RES PUBLICA: A SOUTH AFRICAN PERSPECTIVE

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NTUSI MBODLA
LECTURER
SCHOOL OF LAW
UNIVERSITY OF NATAL
PIETERMARITZBURG

INTRODUCTION

This paper is in four parts. First, I examine the role of the apartheid law in disfiguring the common law notion of *res publica*. Secondly, I look at the perceived conflict between public property and land restitution in terms Restitution of Land Rights Act 22 of 1994, as amended. Thirdly, I look at specific issues such as whether indigenous/rural communities subsistence needs should be recognised and more specifically whether they should have a place within the National Parks. Last, but, by no means the least, will be possible solutions.

It should be noted that this paper will begin as a broad theme on res publica but in the course of the presentation attention will be bestowed upon National Parks i.e. a kind of *res publica*.

THE DISFIGURATION OF THE COMMON LAW NOTION OF RES PUBLICA UNDER APARTHEID LAW

A distinction was made in Roman law between two kinds of public property:- res universitatis - property belonging to a corporate body and *res publica* - thing held by the state for the benefit of the inhabitants. For purposes of this paper attention will be paid to the latter kind of public property.

Public property i.e. res publica has been the subject-matter of litigation in South Africa (see *Hornby v Municipality of Roodepoort* 1918 AD 278; *de Villiers v Pretoria Municipality* 1912 TPD 626). The debate regarding the juridical disposition of this kind of public property has been

focussed largely on the State's competence in respect of the sea-shore and the public's entitlements with regard to perennial rivers (see J.D. van der Vyver '*The Étatisation of Public Property*' in D.P. Visser *essays on the History of Law* 1989, p. 289). Under this heading I consider the application, by South African courts, of the rules of the common law in respect of *res publica* in these two areas i.e. sea shore and perennial rivers.

In South African law a sea-shore is classified as *res publica* (see *Anderson of Murison v Colonial Government* (1891) 8 SC 293). In the latter case the applicants had bought the entire cargo of a ship that had sunk off the coast of Dassen Island. Their attempt to recover cargo that was washed ashore on the island was stifled by Government officials, who denied them access to Crown land above the high-water mark. The court decided that the Government could most certainly regulate access to State-owned land, but the Government could not prevent the free access to and use of the sea-shore by any member of the public, since the sea-shore was *res publica*. De Villiers CJ observed (at 296) in this regard: '... the Government are, in some sense, the custodian of the sea-shore, but they are such only on behalf of the public.'

The insusceptibility of the sea-shore to ownership could be deduced from several judgments of the Supreme Court relating to the border-line of properties along the coast (see for example *Horne & another v Stuben & another* (1902) 19 AC 317; *Pharo v Stephan* 1917 AD 1; *Union Government, Minister of Lands & another v Lovemore* 1930 AD 13). These cases provide clear authority for the proposition that whenever the seaward boundary of property is designated by words such as 'sea-shore', 'ocean' or 'sea-coast' the sea-shore itself would be excluded from such property.

The reasoning of these cases, however, leave unanswered the question as to the ownership, within the confines of the common law, of the sea-shore, the question whether or not private ownership of portions of the sea-shore can in fact be acquired, and the question as to the entitlements of the public in respect of the sea-shore.

Some of these questions were touched upon in (*Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588). The court per Innes CJ held (at 594) that ownership of the sea-shore is vested

in the Crown (currently the State) but this did not mean that the State could deprive the public of its common-law entitlements to use and enjoyment thereof.

Our courts thus declined to follow certain English decisions in which it was held that members of the public did not have a common-law right of bathing in the sea (see *Blundell v Catterall* [1821] 5 B and Ald 268).

The question whether or not the State in South Africa could grant rights in respect of the sea-shore to private persons received attention in several judgments of the Supreme Court. In the case of *Estate De Villiers* Solomon JA found (at 608) it 'difficult to conceive' that the State would deliberately grant to a private person part of the sea-shore which in common law was inalienable. The State's competence to grant rights in respect of the sea-shore to private individuals came squarely before the Appellate Division in *Consolidated Diamond Mines v Administrator, SWA* 1958(4) SA 572(A). This case turned largely on the description of the '*Sperrgebiet* i.e. an area in Proclamation No. 11 of 1920 (S.W.A.), which description was by reference included in the '*Halbscheid*' agreement concluded between the South-West Africa Administration and the appellant. In the proclamation (supra) the western boundary of the *Sperrgebiet* was described as running 'along the Atlantic coastline.' The main question at issue was whether the description of the western boundary of the *Sperrgebiet* within which the appellant held exclusive prospecting and mining rights included the area between high-and low-water marks.

On appeal the question of the extent of the rights of the public to the foreshore was touched upon by the learned Chief Justice, who said that the public have certain simple rights to the foreshore such as to go on to it, to bathe, to fish, to dry nets and draw up boats, and that any substantial interference with those rights would be a wrongful act. The court held that the exact extent of these rights did not need to be determined in the present case because of the fact that by legislation any rights, including ownership, may be granted in the foreshore. Steyn JA, in a dissenting judgment (with which Hall AJA agreed) regarded the Government (at 643) as merely the custodian of the seashore on behalf of the public, and further held that there was a strong

presumption against the grant of full ownership in respect of a *res publica* as well as against he concession of a lesser right.

Having looked at some of the cases it is beyond dispute that the entitlements the public have under *res publica* have been severely curtailed.

Of importance also is that these cases demonstrate that in South African law there is gradual phasing out of the vital distinction between *res universitatis* and *res publica*.

However, it seems to me that South Africa is not alone in regarding *res publica* as State owned resource (see Sibanda & Omwega '*Some reflections on conservation, sustainable development and equitable sharing of benefits from wildlife in Africa: the case of Kenya and Zimbabwe*' 1996 26(4) S Afri. J. Wild L. Res 178).

The minority judgments in *Consolidated Diamond Mines of SWA, Ltd v Administrator, SWA* supra that the Government is 'merely the custodian of the seashore on behalf of the public' seems to be in tune with our rich common law. However, there is a growing move in South Africa that such a custodian relationship or use of trust for the benefit of the public is unsatisfactory for it will fail to create direct link between the producer community and the natural resource management (see Richard Summers '*Legal and Institutional Aspects of Community-based Wildlife Conservation in South Africa, Zimbabwe and Namibia' Acta Juridica* 1999 88 at 208. It should be noted that the moment the control of *res publica* is taken away from the State to the community directly, the property will cease to be *res publica*.

LAND RESTITUTION AND PUBLIC PROPERTY

The present distribution of property rights in South Africa is the product of a history of discriminatory practices which is well known. For large parts of this century the Group Areas Act (Acts 41 of 1950, 77 of 1957 and 36 of 1966) and Native Land Acts (Native Land Act 27 of 1913 and Development Trust and Land Act 18 of 1936) effectively prevented the majority of the

population from acquiring, holding and disposing of immovable property. At the same time the political exclusion of the black population meant that the power and resources of the South African state tended to be used for the benefit of the chosen few.

This situation has given rise to a great deal of controversy about community involvement in protected areas (see Michael Kidd, *Environmental Law: A South African Guide* 1997 at 107). Many people were often displaced in order to establish protected areas and that is becoming a major bone of contention in a period of land claims by previously dispossessed communities.

To be more specific the question is what happens in the case where a particular community/persons were displaced and the area was declared a protected area and now such community claims it back in terms of the Land Restitution Act (supra). The solution is one which will have to be carefully worked out bearing in mind the competing interests: on the one hand the interest of the dispossessed and on the other hand the protection of the resources.

Section 2(1) of the Restitution of Land Rights Act 22 of 1994 provides that:
A person shall be entitled to restitution of a right in land if:

(a) He or she is a person or community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices or a direct descendant of such a person; and

(b) ...

(c) The claim for such restitution is lodged not later than 31 December 1998.

(1A) No person shall be entitled to restitution of a right in land if

(a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or

(b) Any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.

The Minister is enjoined to take into account all relevant factors, in particular planning and environmental considerations and whether the land has been transformed as to make restitution impractical (section 15(6) of the Restitution Act as amended). Furthermore, the purchase or

expropriation of private land can take place only if it is just and equitable, taking into account all relevant factors including the history of the dispossession, the hardship caused, the use to which the property was being put, the history of the acquisition of the land by the owners, the interests of the owner and others affected by the expropriation, and interests of the dispossessed.

The St Lucia dispute is a case in point: Lake St Lucia and its surrounds on the east coast of northern Natal, have long been a topic of controversy. The region around the Lake is characterised by two major features. It includes some of the least developed districts in South Africa, and is home to people who are often extremely poor. The need for development and upliftment is keenly felt. On the other hand, it is blessed by attractive wild scenery, and there is a spectacular diversity of plant and animal life.

In a period of less than half a century, major decisions affecting the land use of the areas surrounding the Lake have been made. Those which bear relevance to the Eastern Shores of the Lake include:

- In the 1950's, commercial forestry was commenced on the Eastern Shores and State Forest land was proclaimed and demarcated. Currently, 5 244 ha within the 12 874 ha of the Eastern Shores state forest has been afforested with slash pine (*Pinus elliottii*) by the Department of Water Affairs and Forestry.
- As a result of the commercial forestry operations, many local people were evicted from the Eastern Shores area and resettled elsewhere.
- The plans for afforestation and or the construction of a dam on the Hluhluwe River provoked a public outcry in the 1960s. In 1966, the Kriel Commission of Enquiry recommended to Parliament an increase in the size of the conservation area at the time, that the Eastern Shores be included, that the area be managed by a single body, that existing commercial afforestation be phased out and that no new plantations be established in the Eastern Shores area, but these recommendations were not implemented.
- Prospecting leases in the area have been granted to various bodies and companies since 1972. Appeals by, and meetings with, conservation bodies resulted in the exclusion of some sensitive areas.

- The Kingsa prospecting lease on the Eastern Shores of Lake St Lucia was granted in 1972 and the Kingsa Extension and Tojan leases in 1976 (the mineral rights for theses areas currently reside with the RSA Government).
- On 2nd October 1986, the St Lucia system, which includes the Eastern Shores area with its extensive afforestation and existing prospecting leases, was designated a wetland of international importance in terms of the Ramsar Convention.
- Conservation areas have been proclaimed in the area since the previous century. The St Lucia Game Reserve (comprising Lake St Lucia and a half-mile strip around it) was established in 1897. Since then, numerous conservation areas have been proclamated around the Lake. The latest announcement came in early 1990, when the Minister of Environment Affairs announced proposals for a Greater St Lucia Wetland Park. The management of the Eastern Shores State Forest was transferred to the Natal Provincial Administration (NPA) in August 1992.

In 15 June 1989, Richards Bay Minerals applied for mining rights in respect of prospecting leases on the Eastern Shores. This triggered the latest struggle.
Environmentalists went on to produce what became the largest single environmental petition in the country against the Richards Bay Minerals Company, which sought to mine titanium at the expense of the area's beauty and eco-system. However, for the thousands of black people living on the periphery of St Lucia, the battle has just begun for inclusion in the development of an area from which they had often been kicked out in the past. Of interest, however, is the memorandum of understanding entered into by and between the St Lucia residents and the KwaZulu-Natal Nature Conservation Board (dated 08 October 1999).

Some of the salient clauses of this memorandum of understanding are clauses 4 and 12. Clause 4 provides as follows: 'Management of heritage site. The parties recognise that the Heritage Site shall be managed for the benefit of both the Board and the Claimant.

It is agreed by the parties that the management of the Heritage Site shall be in accordance with the norms and standards set by the Board at any time and that due recognition is given by the parties to the status of the Heritage Site's presence within a World Heritage Site. Inappropriate

and/or ad hoc developments cannot be sanctioned but suggestions concerning recognition of the heritage value and presence of the Claimant will be thoroughly respected and given due consideration through mutual discussion and negotiation.'

Clause 4 is important, not just in itself, but for what it signifies. It signifies that for the first time since the inception of our democracy, the thousands of black people living on the periphery of St Lucia now stand to benefit from the Heritage Site. For instance it has been recognised that if local communities can be given a stake in wildlife they will have incentives to develop and conserve the resource, resulting in improved resource conservation and reduced enforcement costs (see Tom Le Quesue 'Common Property Theory and Wildlife Resource use - Community Based Wildlife Resource Management Programmes in Africa (http://www.saep/org/subject/natcon/natleq/html). However the question remains, is that what the people want? Or what we think the people want? Perhaps the answer lies with the article published in The Citizen dated 12 March 1998, 'New row looms over St Lucia plans' by Gumisai Matume. This reads as follows: 'St Lucia is white noted a petition circulated by one of the groups fighting for multiracial management of the resort'.

This is a telling demonstration that people want to participate in the management and decision-making. Unfortunately clause 4 is silent on that question. It is submitted that the St Lucia question is far from being resolved as people are not part of the decision making. There is a precedent from which the South Africans in St Lucia can tap in. The WINDFALL (Wild Industries Develop For All) programme in Zimbabwe, the goal of which was an attempt to give communities incentives to preserve wildlife, is instructive in illuminating the importance of the community participation in decision making. One of the main problems for the failure of this programme was the lack of significant local participation in decision making. Without local participation, communities failed to develop the necessary custodial responsibility towards wildlife. It is exactly this type of problem which leads common property theory to focus on the importance of local institutions which can allow communities to participate in the decision making and benefits of common property (see also Tom Le Quesue supra at 7).

SHOULD INDIGENOUS/RURAL COMMUNITIES HAVE A PLACE WITHIN THE PARKS FOR THEIR SUBSISTENCE NEEDS?

The colonial approach to conservation in Africa over the past century, centred around the notion that the exclusion of rural people from protected areas would lead to the ultimate protection of wildlife and its habitats. This was essentially a protectionist approach which entailed the creation of wildlife sanctuaries predominantly in the form of national parks and game reserves to the exclusion of local communities (see Richard Summers loc cit at 188). So it is not always correct to say that in the past there have been conflicts between man and nature' (at p 3 of "*People and Parks Parks and People*" Proceedings of a Conference held at Koinonia Conference Centre Botha's Hill 22, 23 May 1995).

The colonial approach shares the same boat with the United States wilderness model of a national park. Its central premise is the exclusion of human occupation (resident peoples) from within its boundaries. There is a plethora of legal literature to the effect that this wilderness model undermines indigenous rights and role in environmental management (see S. Stevens, '*Inhabited National parks: Indigenous Peoples in Protected Landscapes'* (1986) (IUCN) East Kimberly Working Paper No. 10).

Another important point to be noted in dealing with this issue of 'wilderness' is that the survival of the rural communities is intimately connected with those of wildlife. A strict adherence to the definitional requirements of a national park has laid the seeds of conflict for millions of 'resident peoples' particularly in those developing countries which have large rural and often migratory populations. In recent times there is increasing recognition by the governments of many countries that there is a place for indigenous peoples within national parks, particularly where zones have been established to protect a cultural heritage (see Stevens supra at 23).

There is a growing acceptance that new conservation policy needs to be formulated that takes into account the greater socio economic context. This is demonstrated by the following statement of law: 'For any legal dispensation to be effective and enduring, it should be socially and economically relevant. South Africa is a developing country and its wildlife law must respond

appropriately to its development needs and the apparent dilemma of conserving natural resources while at the same time recognising the subsistence needs of indigenous people.

It is essential that the last remnants of our wildlife and its habitat be legally protected, but the laws must be so formulated and applied as to permit of controlled taking on a sustained-yield basis, particularly in those areas where the traditional way of life is dependent upon access to flora and fauna for food, fuel, medicine and building materials. Local people should be permitted controlled access to the natural resources within such areas, or defined buffer zones, consistent with their traditional harvesting practices. Irrespective of theoretical or philosophical commitments, the reality is that South African wildlife law must be human-oriented, otherwise it will not be effective...' There should be provision, as a matter of law and not of administrative policy, for local participation in the protection of wildlife and natural areas, the determination of reserve boundaries and preparation of management plans, and in the economic benefits derived from these resources' (see J. Du P Bothma & P.B. Glavovic '*Wild Animals*' in R.F. Fuggle & M.A. Rabie (eds) *Environmental Management in South Africa* (1996) 251. Botham & Glavovic supra are not alone in this battle. There has been a departure from the orthodox view of national park recently even in the United States and Canada where a variety of subsistence uses by indigenous peoples has been recognised and allowed to continue within the boundaries of national parks (see *R.v. Sundown* 170 D.L.R. 4th 385; *R v Van der Peet* 137 D.L.R. 4th 289).

It should be noted, however, that the above cases turned on the limited measure of sovereignty accorded to aboriginal communities in terms of US and Canadian constitutional law. They are therefore distinguishable from the South African situation, where communities subject to indigenous law do not enjoy similar autonomy (see Iain Currie '*Indigenous Law*' *in Chaskalson et al. Constitutional Law of South Africa,* Revision Service 2, 1998 at 36-27).

POSSIBLE SOLUTIONS

There is a growing acceptance that rural communities or indigenous peoples should share in the benefits arising from the use of parks (see Richard Summers supra at 205; proceedings of a

community workshop held at Sodwana Bay 15, 16, 17 May 1995 at p3). The question that seems unsettled is how to share the benefits. Basically there are two views: on the one hand there is the view contained in the Convention on biological Diversity (came into force in December 1993) that says that there should be a fair and equitable sharing of benefits arising from the use of resources. South Africa is a party to this convention (see Richard Summers supra at 205); on the other hand is the view that benefits should be shared proportionately (see proceedings of a community workshop held at Sodwana Bay supra at p3). As a party to the convention South Africa is therefore obliged to develop national strategies which will give effect to this objective.

Surprisingly, the debate on the question of sharing of benefits from the resources is silent on the question of future generation having a share in the resources. The inclusion of future generation would be in line with the provisions of section 24 of the Constitution of the Republic of South Africa Act 108 of 1996 in particular section 24(b) 'to have the environment protected for the benefit of present and future generations....' . The St Lucia Memorandum of Understanding seems to have touched on this aspect for clause 12 provides for payment of levies to the Trust, whose duty is to administer the levies for the existing and future generations.

There is also a growing move that parks as *res publicae* should no longer be held in trust for (it is said) this is unsatisfactory as it does not create a direct link between the producer community and the natural resource management (see Richard Summers supra at 208). Another view that lends credence to the above is that one cannot develop land without ownership (see proceedings of a community workshop held at Sodwana Bay supra at 9).

I would like to part company with Richard Summers supra on the question that ownership of parks should be transferred to the rural communities. It is conceded that people feel alienated but, it is submitted, not because they do not own the land but because they are not part of the decision making on how to manage the natural resources. There seems to be a misunderstanding of the saying that a "park is ours" or "our park". This simply means that there is community involvement in management of the parks not physical transfer of ownership. Such an interpretation is not only in tune with the whole notion of *res publica* (property held for the benefit of the public) but also ensures community participation.

On the second view that one cannot develop property without ownership, I submit that it is without merits for one can develop property if he/she stands to gain even without ownership.

On the question of land claims it is submitted that the issue should not be approached legalistically. It should be resolved sensibly with the cooperation of the affected communities (see proceedings of a community workshop held at Sodwana Bay supra at p3). Another point that should be emphasized is the trust and good communication between the communities and the park management/State (see P.C. West & S.R. Brechin (eds) *Resident Peoples and National Parks* (1991) 61).

Last but by no means the least, is the question whether indigenous/resident peoples should be accorded a place within the parks.

The answer to that question depends upon whether one adheres to the orthodox definition of a national park or not. As indicated above there has been a departure from such a definitional requirement in the United States and Canada where a variety of subsistence uses by indigenous peoples has been recognised and allowed to continue within the boundaries of national parks.

In the United States this has been formalised by statute, for eg. under the Alaska Native Interests Land Conservation Act, although in both countries the government retains almost total discretion over land use within park boundaries (see M.I. Jeffrey '*National Parks and Protected areas - approaching the next millennium' Acta Juridica* 1999 178 footnote 70). However, it should be noted, as has been done above, that the situations in the United States and Canada turn on the limited measure of sovereignty accorded to aboriginal communities in terms of US and Canadian constitutional law (see Iain Currie supra at 36-27).

There is a shadow of doubt as to whether in South Africa we still have 'pure indigenous peoples' whose survival is intimately connected with wildlife. It is submitted that if they are still in existence we should recognise their systems and where appropriate build on them. And also we should recognise their subsistence needs. Local people should be permitted controlled access to

natural resources within the park consistent with their traditional harvesting practices (see Bothma & Glavovic supra at 258; clause 3 of the St Lucia Memorandum of Understanding at 3).

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