



PROPERTY RIGHTS IN WATER AND SOCIAL CONFLICT: AN EXAMPLE FROM ICELAND

Kristín Haraldsdóttir

Specialist, Director of Institute for Natural Resource Law, School of Law, Reykjavik University, Iceland

Social conflict in Iceland over property rights in natural resources has prompted a call for the introduction of a provision into the Constitution of Iceland declaring natural resources ‘the property of the nation’. The paper explores the social conflict concerning property rights in water and, based on recent proposals and recommendations for Constitutional amendments, the possible implications of such a Constitutional provision in light of existing water rights and how it accommodates the considerations raised.

Introduction

Over the past few years, Icelandic water law has been undergoing a review. The review work has revealed a fundamental disagreement over how landowners’ water rights should be defined: as private property or as limited rights of use derived from the nation as the owner? The intensity of the debate is likely rooted in a broader social debate over private property rights in natural resources and the fair distribution of the benefits of utilisation. The social debate has elicited a public call for a constitutional provision declaring all natural resources the common property of the nation. The term ‘property of the nation’ has no sound basis in Icelandic property law and earlier proposals for application of the term in the *Constitution* have been criticized in legal writings due to the ambiguity of the term.¹ This paper examines the concept in light of recent proposals for amendments to the *Constitution* put forward in the Parliament (the *Althing*) as well as recent recommendations of the Constitutional Council.² In essence, the proposals and recommendations are based on the idea that all natural resources that are not private property should be declared ‘property of the nation’.

This paper attempts to identify the main drivers of the social debate over private property rights to water and asks how the question of landowners’ rights to water should be approached under Icelandic law. It also discusses the issues: based on possible interpretations of the concept ‘property of the nation’, what implications does the proposed constitutional provision have in relation to the legal and social considerations raised.

The paper’s discussion is limited to the Icelandic social and legal situation and, thus, does not provide a comparative view, which could be a topic for a separate paper. The paper begins with a brief introduction of the basic principles of Icelandic property law concerning real property, the terminology used in the paper and an outline of the current water law regime. It then addresses the controversial revision of the current law and attempts to explain the legal and social conflict it has raised. Next, the content of landowners’ surface and groundwater rights is explored further and the proposed amendments to the *Constitution* is examined. The paper

¹ See, eg, Davíð Þorláksson, ‘Getur þjóð átt eign’ in Birgir Tjörvi Pétursson (ed), *Þjóðareign: þýðing og áhrif stjórnskrárákvæðis um þjóðareign á auðlindum sjávar* (Ugla, 2007) 15; Sigurður Línal, ‘Um þjóðareign’ in Birgir Tjörvi Pétursson (ed), *Þjóðareign: þýðing og áhrif stjórnskrárákvæðis um þjóðareign á auðlindum sjávar* (Ugla, 2007) 53.

² The Constitutional Council was appointed by the Althing, *Parliamentary resolution on the appointment of a Constitutional Council*, 2010-2011, Doc 930, Subj 549 <<http://www.althingi.is/altext/139/s/930.html>>. Its task was to make recommendations on changes to the Constitution of Iceland. The Council handed in its recommendation for a bill for a revised constitution on 29 June 2011, Stjórnlagaráð [Constitutional Council], *Frumvarp til stjórnskipunarlagá* (29 June 2011) <<http://www.stjornlagarad.is>>.



suggests that use of the terms ‘property’ and ‘ownership’ in relation to landowners’ water rights brings expectations of control that are not warranted if the physical nature of the resource and jurisprudence is considered. However, landowners’ rights of use are extensive and largely preempt all property rights to be held in relation to water. The paper argues that the proposed constitutional provisions could ‘ring-fence’ water rights that are currently held by the State within public lands, but that outside public lands there is not much left for the nation ‘to own’. The balance between public and private interests in water within private land continues to be decided on the basis of the powers of the legislator to lay down general restrictions on private property rights for the purpose of safeguarding public interests within the limits of art 72 of the *Constitution*. However, it is possible that the proposed application of the concept ‘property of the nation’ affects that balance in favour of public interests.

Basic principles of Icelandic property law governing real property

Historically, land and its resources have been subjected to private property rights under Icelandic law. The establishment of private ownership of land can be traced back to the time of settlement in Iceland (AD 870-930) when the first settlers took possession of large areas of land.³ Those areas of land were gradually divided into smaller plots and changed hands by inheritance, purchase, gift etc. The old law books include various provisions on landowners’ rights and relations to other landowners.⁴ They include, inter alia, provisions on water uses known at the time, that is agricultural household use, freshwater fishing and small-scale livestock breeding.⁵ It has been argued that the terminology used in the old law books, including the verb ‘to own’ cannot be interpreted on the basis of current usage.⁶ In fact, the term ‘property right’ or ‘ownership’ does not have a fixed meaning in Icelandic legal terminology. In Nordic legal terminology, including Icelandic, the term ‘private property right’ or ‘ownership’/‘direct ownership’ entails the right of control over a certain asset insofar as there are no restrictions on such right by way of contract or law. The substantive right therefore broadens to the extent that restrictions diminish or disappear. ‘Limited’ or ‘indirect’ proprietary rights, such as the right of use, are derivative rights that are based on the owner’s property right.⁷

Property rights are granted protection under art 72 of the *Constitution* and Art 1 of *Protocol 1* to the *European Convention on Human Rights (ECHR)*.⁸ According to art 72 of the *Constitution* ‘the right of private ownership shall be inviolate; no one should be obliged to surrender his property unless required by public interests. Such measures shall be provided for by law and full compensation shall be paid.’⁹ The concept of ‘property’ under art 72 of the *Constitution* has been given a wide interpretation so as to cover, inter alia, direct and limited/indirect property rights, and tangible and intangible property. It has been argued that the term should be construed to carry the same meaning as the term ‘property’ under art 1 of *Protocol 1* of the *ECHR*.¹⁰ In the context

³ Jakob Benediktsson, ‘Landnám og upphaf allsherjaríkis’ in Sigurður Línal (ed), *Saga Íslands* (Hið íslenska bókmennta-félag, 1974) 1, 155.

⁴ *Grágás* (collection of law considered to be registered on the 13th century), *Járnsíða* (law book in force until 1281) and *Jónsbók* (law book enforced 1281, some parts of which are still in force).

⁵ See, eg, *Jónsbók, Landsleigubálkur* [Chapter on Landclaim], ss 56 and 24.

⁶ Bjarni Jónsson, ‘Eignarrjettur yfir vatni’ (Nefndarálit meirihluta fossanefndar [Opinion of the majority of the Waterfall Committee], Gutenberg 1919) annex B, 1–13; Aagot Óskarsdóttir, ‘Sögulegt yfirlit yfir íslenska löggjöf um vatnsréttindi’ (Skýrsla Vatnalaganefndar [Report of the Water Law Committee], Ministry of Industry, 2008) 19.

⁷ See, eg, Gaukur Jörundsson, *Eignaréttur* (Bóksala Stúdenda, 1981–1982) 1, 3; Þorgeir Örylgsson, *Kaflar úr eignarétti* (Manuscript, University of Iceland, 1998) vol 1, 11; Thor Falkanger, Aage Thor Falkanger, *Tingsret* (Universitetsforlaget, 6th ed, 2007) 40–42; Knud Illum, *Dansk tingsret* (Juristforbundet, 1976), 30.

⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms* (‘ECHR’), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 1 to the Convention for Protection of Human Rights and Fundamental Freedom*, opened for signature 20 March 1952, CETS No 009 (entered into force 18 May 1954) CETS. The Convention was introduced into Icelandic law by the *Act on the European Convention on Human Rights* No 64/1994.

⁹ Prime Minister’s Office, English translation <www.government.is/constitution/>.

¹⁰ Guðrún Gauksdóttir, ‘Eru aflaheimildir eign í skilningi 72. gr. stjkskr.’ in Pétur Kr Hafstein et al (eds), *Guðrúnarbók. Guðrún Erlendsdóttir sjötug, 3. maí 2006* (Hið íslenska bókmenntafélag, 2006) 249, 273.



of this paper, it is important to note that the term property within the meaning of art 72 of the *Constitution* is primarily concerned with legal status, which provides an individual or legal person with exclusive control over a special asset.¹¹ It means that rights and interests that are granted to the public in general are not ‘property’ within the meaning of the *Constitution*. Concurrently, reference to term ‘property of the nation’ in legislation does not entail any rights protected under art 72 of the *Constitution*.¹²

It is recognised that the legislator may impose general and non-discriminatory restrictions on rights protected under art 72 with a view to safeguarding public interests.¹³ Such restrictions would not be considered expropriation of property under art 72 of the *Constitution*. The questions of where to draw the line between general restrictions imposed by law without compensation, on the one hand, and expropriation, on the other hand, and how far-reaching such restrictions may be, are complex issues that do not lend themselves to general answers.¹⁴ The scope of the restrictions that the legislator can impose within the limits of the *Constitution* depends on a number of factors that must be assessed together.¹⁵ One important factor is the significance of the interests at stake.¹⁶ Long-standing legislative practice and Supreme Court case law support a conclusion to the effect that the legislator has a wide margin of discretion for imposing restrictions on property rights for protecting public interests relating to the environment and management of natural resources.¹⁷ The scope of art 1 of *Protocol 1* of the *ECHR* is wider than of art 72 of the *Constitution* in the sense that it applies to all types of restrictions. Restrictions that are considered general under art 72 of the *Constitution* would normally be assessed under para 2 of art 1 of *Protocol 1* of the *ECHR* and scrutinised under the principle of proportionality.¹⁸ Thus it cannot be excluded that, in individual cases, restrictions that are considered general and outside the ambit of art 72 of the *Constitution* are considered to be in violation of art 1 of *Protocol 1* to the *ECHR*.

Under Icelandic law the term ‘real property’ usually means a defined area of land, along with what naturally pertains to the land: its organic and non-organic components, and buildings and other constructions that are permanently attached to the land.¹⁹ It has been the understanding under Icelandic property law that rights to natural resources attached to land form a part of the property rights of the owner of the real property in question, unless the rights have been lawfully separated from the land.²⁰ As further explained below, the nature and content of landowners’ rights with respect to water has, however, been subject to social and legal debate in the past few years. The *Public Land Act* (Iceland) No 58/1998 (‘*PLA*’) divides land into two ownership categories: private and public land. Pursuant to art 1 of the *PLA*, ‘private land’, is ‘an area of land which is subject to private property rights in the sense that the owner holds all normal ownership control within the limits set by law’. ‘Public lands’, on the other hand, are declared to be owned by the State and defined as ‘land outside private land, where individuals or legal persons may nevertheless possess indirect property rights’. Still, there are certain areas of land, mainly in the north-west of the country, where the borders of public and private land

¹¹ See, eg, Örlygsson, Above n 7, 5

¹² See also Björg Thorarensen, *Stjórnskipunarréttur. Mannréttindi* (Codex, 2008) 476.

¹³ See, eg, *The Public Prosecutor v Björn Guðni Guðjónsson* No 455/2004 (2005) *Supreme Court Report* 1640.

¹⁴ Jörundsson, above n 7, 51-52.

¹⁵ Thorarensen, above n 12, 487-498.

¹⁶ *Ibid*, 497.

¹⁷ See especially *Björgun ehf. v the State* Case No 182/2007, 27 September 2007; Thorarensen, above n 12. For General account of the broad range of public law limitations of property rights based on environmental and natural resource management interests, see, eg, Karl Axelsson, ‘Um skorður umhverfisréttar við nýtingu lands og náttúruauðlinda’ (1996) 46 *Timarit lögræðinga* 81.

¹⁸ Guðrún Gauksdóttir, ‘Friðhelgi Eignarréttar’ in Björg Thorarensen et al (eds), *Mannréttindasáttmáli Evrópu. Meginreglur, framkvæmd og áhrif á íslenskan rétt* (Mannréttindastofnun Háskóla Íslands og Lagadeild Háskólans í Reykjavík, 2005) 503-504.

¹⁹ As stated inter alia in art 2 of *Act on sale of real property* No 40/2002.

²⁰ Jörundsson, above n 7, 32; Örlygsson, above n 7, 59.



are unsettled.²¹ Although the Icelandic State is declared the ‘owner’ of public land, the property rights of the State are generally considered distinctive. The State holds the ownership title as the custodian of the land.²² This special nature of the ownership title of the State is *inter alia* reflected in the fact that any profits that the State may obtain from the land are to be paid into a fund that can only be used for the benefit of public land.

The water law regime

The *Water Act No 15/1923* – surface water

The old rules of *Jónsbók* prevailed as the principal rules on property rights to water in Iceland until the early 20th century, when the *Waterfall Act No 55/1907* was passed.²³ In the late 19th century and early 20th century, interest in waterfalls that could be used for hydropower production grew and waterfalls changed hands in speculative business deals.²⁴ In response to this trend, and based on concerns that foreign investors would acquire Iceland’s hydro energy resources, the *Waterfall Act* laid down rules limiting the right to acquire ‘ownership’ of waterfalls to residents of Iceland.²⁵ The Act was modelled on Norwegian law.²⁶ Following many years of preparation, comprehensive rules on surface water were adopted with the enactment of *Water Act No 15/1923*, which replaced the *Waterfall Act*. This Act is still in force and has remained mostly unchanged.

The definition of landowner’s property rights to water was by far the most controversial issue during the preparation of the 1923 *Water Act*. The disagreement was rooted in differing opinions of both a political and legal nature. The preparatory committee for the drafting of the Bill was split into two schools.²⁷ The majority followed what has been named ‘the public rights school’. This group claimed that water should be defined as either common property or State property. It proposed that landowners should have the right to certain uses of water on their land, relating primarily to household, farming and minor industry. The minority followed what has been named the ‘private rights school’, which rejected the notion that landowners’ rights should be limited to certain uses and proposed that landowners should have the full right of ‘possession and use’ of surface water on their land to the extent that there were no limits laid down by law or contract. In the explanatory notes with the legislative Bill, the minority explains that it did not use the word ‘ownership’ in order to avoid the misunderstanding that the disagreement within the committee concerned the question of whether water *as a substance* could be owned.²⁸

From the bills and their attached explanatory notes, it can be deduced that at the centre of the political debate lay the question of whether landowners should be entitled to compensation for use of water for power production that did not interfere with landowners’ reasonable use of water for their household, farming or small scale industry needs. The legal disagreement related

²¹For a further account of the ongoing procedure on the division between ‘public’ and ‘private land’ and a map of the areas that have been decided upon and those that remain undecided upon, see Öbyggðanefnd <<http://www.obyggdanefnd.is>>.

²²Örlygsson, above n 7, 1; Karl Axelsson, Dýrleif Kristjánsson and Hreinn Hrafnkelsson ‘Um jarðrænar auðlindir og framtíðarnýtingu þeirra’ (2007) 4(2) *Timarit lögréttu* 114, 119; Kristín Haraldsdóttir, ‘Introduction to the Legal Environment in Iceland for Utilisation of Geothermal’ (2010) 28 *Journal of Energy & Natural Resources Law* 1, 21.

²³Jonsson, above n 6, 13.

²⁴Sveinn Ólafsson ‘Sala orkuvatna og greining þeirra um landið’ (Nefndarálit meirihluta fossanefndar [Opinion of the majority of the Waterfall Committee], Gutenberg, 1919) annex B, 47.

²⁵See the legislative Bill, published in the *Parliamentary Gazette*, vol A, 1901, 128.

²⁶At this time the 1887 Act of 1 July on utilisation of waterfalls was in force in Norway. The Act stated that landowners ‘own’ the waters on their land. In the course of preparation of that Act and in later preparation for amending the 1887 Act, the definition of ownership of waterfalls was discussed and debated in Norway. The issue of the debate was whether landowners’ rights should be defined as ownership or use rights. See, Thor Falkanger, ‘Norsk vassdrags og energirett - en introduksjon og et kort historisk tilbakeblikk’ in Thor Falkanger and Kjell Haagenen (eds), *Vassdrags – og energirett*, (Universitetsforlaget, 2002) 33-36.

²⁷Fossanefnd [Waterfall Committee], álit meirihluta [Opinion of the majority], Gutenberg, 1919, XV.

²⁸Ibid 30.

to a different understanding of how the rules of the old law books should be read and the impact of the use of the notion ‘ownership’ in the *Waterfall Act* on the legal status of landowners.

In short, the law passed by the *Althing* took a somewhat muddy middle route. Article 2 of the 1923 *Water Act* states that ‘all land is accompanied by the right of possession and utilisation of water, rivers and lakes, on the land in the manner permitted under the Act’ [author’s trans]. Landowners’ rights to small non-flowing waters, such as ponds are, on the other hand, defined in negative terms, cf art 9. The Act lists the user rights of landowners, pursuant to art 2, and prioritises the competing uses of landowners and other users of the same water. Abstraction of water for household and farming takes precedence over other utilisation of water. Next in the line comes abstraction for industry operated on the land, then irrigation and, after irrigation, power production.²⁹ The Act also defines public rights to water. It states that anyone can take water for household and farming purposes provided the abstraction is not to the detriment of the landowner. Also, anyone can use water for swimming and transport in accordance with the law.³⁰ Furthermore, the Act limits landowners’ use rights by imposing license requirements for various water developments.³¹

It has been the general view of scholars throughout the 20th century that since the Act lists all uses of any significance, including power production, the view of the minority of the water law committee prevailed.³² It has been argued that surface water rights, like minerals and other ground resources, are part of the property rights of landowners and protected as such under art 72 of the *Constitution*.³³ In more recent literature, these views have been criticised on the principal grounds that water is not subject to direct ownership of landowners, and landowners’ rights are subjected to far reaching limitations for protecting public interests.³⁴ However, there seems to be a general consensus by legal scholars that by the enactment of the 1923 *Water Act* it was established beyond doubt that landowners hold certain use rights, including the right to utilisation of the energy of the rivers flowing through their properties and that those rights enjoy protection under art 72 of the *Constitution*.³⁵

The Act on the Survey and Utilisation of Ground Resources

The *Water Act* No 15/1923 only covers surface water. Groundwater use was of limited relevance at the time when the Act was adopted. Today, nearly a century later, groundwater serves approximately 95 per cent of household consumption and geothermal resources serve most of the needs for hot water and heating.³⁶ It was not until 1998 that comprehensive legislation governing groundwater rights was adopted. At that time the prevailing view in legal literature was that groundwater formed a part of land ownership and that landowners had the exclusive right to the use of groundwater beneath their land within the limits set by law or the rights of third parties.³⁷ In the *Act on the Survey and Utilisation of Ground Resource* No 57/1998 (*GRA*), it was laid down that *ownership* of ground resources (including groundwater) is attached to private land.³⁸ In the explanatory notes to the Bill it is stated that declaring ground resources the private property of landowners is in line with accepted law in Iceland.³⁹ The use of the word *ownership* has been

²⁹ Articles 15, 17, 18, 36 and 49.

³⁰ Article 11, cf art 115.

³¹ See, eg, art 69 and art 133.

³² Jörundsson, above n 7, 43; Þorgeir Örlygsson, ‘Um eignarhald á landi og náttúruauðlindum’, in Katrín Jónasdóttir et al (eds), *Afmælisrit. Gaukur Jörundsson sextugur 24 September 1994* (Bókauðgáfa Orators, 1994) 585.

³³ See, eg, *ibid* 585-586.

³⁴ Aagot Óskarsdóttir, ‘Hver á vatnið?’ (2008) 61 *Úlfljóttur* 87, 91-98.

³⁵ *Ibid* 106–107; Örlygsson, above n 32, 585.

³⁶ Freysteinn Sigurðsson, ‘Vatn og vatnafar á Íslandi. Viðfangsefni vatnalaga’ in Róbert Spano (ed) *Rannsóknir í félagsvísindum* (Félagsvísindastofnun Háskóla Íslands, 2005) vol VI, 184.

³⁷ Örlygsson, above n 32, 584.

³⁸ Article 3 [Ministry of Industry, Energy and Tourism (Iceland) trans, English translation of *Act on the Survey and Utilisation of Ground Resources* <<http://eng.idnadarraduneyti.is/laws-and-regulations>>].

³⁹ *Parliamentary Gazette*, vol A, 1997-1998, 910.



criticized in recent literature based on the view that it changed the legal status from indirect ownership (limited to possession and use⁴⁰) to direct ownership of groundwater.⁴¹

The *GRA* does not lay down any limits with respect to how deep into the ground landowners' rights reach. The question of whether such limits should be established had been the subject of debate for decades.⁴² In legal literature, the general view has been that landowners' rights extend as far as may be considered reasonable from the perspective of the interests of the landowner. Landowners hold the right to utilise ground resources like other property in the manner, and to the extent, that such properties are ordinarily used (rule of ordinary use).⁴³ It can be deduced from recent Supreme Court judgments that this rule still prevails after the enactment of the *GRA*.⁴⁴ The judgments can also be read to the effect that ground resources that have no economic value, in the sense that their utilisation 'could never yield profit' are not to be regarded as 'natural resources' covered by art 3 of the *GRA* and thus not subject to the property rights of landowners.⁴⁵ In real terms, the rule of ordinary use only seems to set the limit of landowners' rights based on what is technically and economically feasible at any given time.

The proposed reforms to current water law – the legal and social conflict

The reforms

In 2001, work began to reform the 1923 *Water Act*. A Bill for a new water act was first presented to the *Althing* in December 2004,⁴⁶ and again, slightly altered, in November 2005.⁴⁷ It was enacted in 2006 as *Water Act No 20/2006*, but with the reservation that its entry into force was delayed and a committee appointed with the task of reviewing it (the Water Law Committee). The parliamentary debate on the 2006 *Water Act* revealed a strong attachment to the settlement reached when the *Water Act No 15/1923* was adopted and the belief that water, being essential to all life, should not be private property.⁴⁸

The stated aim of the 2006 *Water Act* is, inter alia, to lay down clear rules on the ownership of water.⁴⁹ In that spirit, it takes a holistic approach to water rights and covers all running or static water on the surface of the earth and underground.⁵⁰ The controversial provision on landowners' rights to water states that 'any real estate, including public land, includes ownership of water on or under property or flowing through the property'.⁵¹ Essentially, the wording and the approach in defining landowners' water rights is the same as that of the *GRA*: they are expressed by the use of the term 'ownership' and defined in negative terms and not by providing a positive list of use rights. The explanatory notes to the legislative Bill explains that the proposed amendments to the definition of landowners' property rights relate primarily to form and not to substance.⁵²

⁴⁰ This terminology appeared in earlier Icelandic laws governing ground resources, see, eg, *Act on Ownership and Useright to Geothermal No 98/1940*.

⁴¹ Valgerður Sólves, 'Um eignarhald á jarðhita' (2009) 59 *Timarit lögfræðinga* 414.

⁴² For an account of the debate, see, eg, *ibid*.

⁴³ Ólafur Lárusson, *Eignaréttur I* (Hlaðbúð, 1950) 46; Ólafur Jóhannesson, 'Um eignar- og umráðarétt jarðhita' (1957) 6 *Timarit lögfræðinga* 143; Örlygsson, above n 7, 85; Axelsson, Dýrleifsdóttir and Hrafnkelsson, above n 22, 116.

⁴⁴ *The Icelandic State v Ragnar Sigurðsson* and counterclaim No 644/2006, 21 February 2008; *The Icelandic State v Sigurður Baldursson* and counterclaim, No 645, 21 February 2008; Similar views have been expressed by Óskarsdóttir, above n 6, 49 and Sólves, above n 41, 444.

⁴⁵ See also, Aagot Óskarsdóttir, 'Minnisblað um vatnsréttindi og eignarétt að auðlindum' (Skýrsla Vatnalag nefndar [Report of the Waterlaw Committee] Ministry of Industry, Energy and Tourism, 2008) 210.

⁴⁶ *Parliamentary Gazette*, vol A, 2004-2005, Doc 546.

⁴⁷ *Parliamentary Gazette*, vol A, 2005-2006, Doc 281.

⁴⁸ See, eg, Parliamentary Committee on Industry, 'Report of the minority', *Parliamentary Gazette*, 2005-2006, vol A, 3383.

⁴⁹ Paragraph 2 of art 1.

⁵⁰ Article 2.

⁵¹ Article 4 [Ministry of Industry, Energy and Tourism (Iceland) trans, English translation of the *Water Act* <<http://eng.idnadarraduneyti.is/laws-and-regulations>>

⁵² *Parliamentary Gazette*, vol A. 2005-2006, Doc 281,



The main question, and the centre of legal the debate on the 2006 *Water Act*, is whether this can be held to be true as the law stands.

The Water Law Committee returned its report in 2008.⁵³ In the Committee's view the disagreement on the definition of landowners' water rights concerned both legal and political issues. The dispute in law concerned divergent understandings of the content of landowners' water rights under existing law and jurisprudence. The political arena was split into two opposing groups: those who argued that private property rights were best suited to secure efficient and environmentally sound utilisation, and those who emphasised the special nature of water and public interests attached to water.⁵⁴ The Committee did not put forward any concrete proposals for amendments to the 2006 *Water Act*, but expressed the view that the Act needed to better reflect the balance struck under the 1923 *Water Act* between public and private interests so as to ensure that the powers of the legislator to impose general restrictions on landowners' rights based on public interests would not be limited. In the view of the Committee, the approach of the 2006 *Water Act* called for more rigorous rules on public rights to water.⁵⁵

Following the report of the Committee, work on a new Bill commenced and, in early March 2011, a new Bill was put forward in the *Althing*.⁵⁶ In essence, it proposes that the 2006 *Water Act* should be abolished and that current rules on landowners' rights laid down in the 1923 *Water Act* should remain in force.⁵⁷ Accordingly, the divergence between the definition of landowners' rights to surface water and groundwater is maintained. Considering that primarily groundwater is used for consumption in Iceland, it is questionable that this legislative amendment alone will satisfy those who claim that water, being essential to all life, should not be in private ownership. The social and legal conflict raised by the 2006 *Water Act* will now be further explained.

Underlying issues – the social conflict

In the course of preparations for the 2006 *Water Act* the nearly century-old debate on public versus private rights to water resurfaced, albeit in a different social context. In the sphere of the past century, Iceland gained full independence and developed from a poor agricultural society to an industrialised urban society with a strong internationalised economy. Concurrently, land uses are much different and management needs more complex, raising issues of conflicts between different uses and how to best ensure sustainable development. In this respect, large scale energy projects for serving power-intensive industry has, in recent years, proven to be particularly controversial. In very simplified terms, the conflict is based on differing views on how to balance the interests related to nature conservation and industrial development.

As already noted, historically, water uses in Iceland were basically restricted to surface water and predominantly for household needs and livestock farming.⁵⁸ In the early 20th century, industrialisation opened up new utilisation possibilities, most importantly those related to energy. The 1923 *Water Act* can be seen as a reaction to this diversification. Unlike today, at this point in time there was a general consensus on the need to develop Iceland's energy resources for furthering industrial development, but differing views on how to best ensure national economic interests: through private property rights and private development, or public ownership and State involvement? Throughout the first half of the 20th century, private entrepreneurs had high hopes and dreams of raising capital from foreign investors and developing hydropower energy on a large scale.⁵⁹ These anticipations never materialised. In effect, until recently, large scale de-

⁵³ Ministry of Industry, Energy and Tourism, Skýrsla Vatnalaganefndar [Report of the Water Law Committee] (2008) <http://www.idnadarraduneyti.is/media/frettir/Skyrsla_Vatnalaganefndar.pdf>.

⁵⁴ Ibid 15.

⁵⁵ Ibid 165-166.

⁵⁶ Bill of law for amendments to Water Act No 15/1923, as later amended, Doc 949, Subj 561 <<http://www.althingi.is/altext/139/s/0949.html>>.

⁵⁷ In August 2011, the Bill was still under parliamentary procedure.

⁵⁸ Jakob Björnsson in Sigurjón Rist (ed), *Vatns er þörf*, (Menningarsjóður, 1990) 5.

⁵⁹ Jonsson, above n 6, 47.



velopment of energy in Iceland, both hydropower and geothermal, was in the hands of public utilities, based on a system of exclusive rights for supply and a duty to provide public services.⁶⁰ Similarly, water supply is a public service, carried out by the municipalities or utilities owned by them.⁶¹ Over the course of the years, in relation to energy development and groundwater extraction, public utilities acquired important water rights through agreements with landowners or via expropriation.⁶² It could be argued that this public façade of water uses has created a gap between how the general public perceives water – that is, as public domain – and the content of the law.

In 2003, the electricity market opened up for competition in both the production and sale of electricity.⁶³ The liberalisation carried ideas of privatisation of public energy utilities and, in 2007, large shares in one of the major energy utilities⁶⁴ were sold to a private company. It is safe to say that those ideas met with much scepticism by the general public and further privatisation of public energy utilities was halted. Security of energy supply, access to clean water, environmental considerations and regional development are all interests that were cited in justification of legislative amendments enacted in 2008 with the aim to ‘ring-fence’ water and geothermal rights owned by the State and public entities.⁶⁵ As a result, the State, municipalities and public entities were prohibited from directly or indirectly transferring their water rights and geothermal rights to private parties.⁶⁶ When, in 2009 and 2010, a foreign company acquired a major share in the one energy company that had been privatised, strong reservations regarding Iceland’s sovereign rights to its resources were raised. In fact, it is safe to say that the foreign acquisition caused political turbulence and a public outcry. It was followed by a call for measures to be taken to regain public ownership of the utility.⁶⁷ An administrative committee was set up to review the legality of the sale under Icelandic law governing foreign investment.⁶⁸ With certain reservations, it concluded that the law had not been violated.⁶⁹ The fact that the company did not have any permanent rights to geothermal energy but leased the right to use from the respective municipalities (65-year lease with a right to enter into negotiation for an extension) seemed to have limited sway in the public debate. The protests raised are difficult to comprehend without a full grasp of all the facts. In essence, and for the purpose of this paper, it suffices to note that the debate, both on the privatisation of public energy utilities and on foreign investment in such utilities, reveals that the social conflict on private ownership of water and geothermal resources centres today, as in the beginning of the 20th Century, to a large extent on public versus private *control* over the resources and appropriate means to ensure that the *economic benefit* accrues to the nation. However, as reflected in the 2008 legislative amendments, the need to ensure public control is today based on a set of a more complex and

⁶⁰ Over the course of the past decades electricity production has grown extensively, not least the past 10 years. In the year 2005, total electricity production was 8.7 TWh, see National Energy Authority and Ministries of Industry and Commerce, *Energy in Iceland* (2006) 8-9. In 2009 it had grown to 16.8 TWh. Most of the electricity produced is consumed by the aluminium industry (74%), see National Energy Authority, *Energy Statistics in Iceland 2010* (2010) <www.nea.is>.

⁶¹ Similarly, water supply is a public service, carried out by the municipalities or utilities owned by them, cf the *Act on Public Water Utilities* No 32/2004, in particular arts 1 and 4.

⁶² For an account of this, see Prime Minister’s Office, ‘Skýrsla nefndar um fyrirkomulag varðandi leigu á vatns- og jarðhitaréttindum í eigu íslenska ríkisins’ [Report of a Committee on lease of water rights and geothermal rights held by the State] (2010), 45–90 <<http://www.forsaetisraduneyti.is/frettir/nr/4172>>.

⁶³ *Electricity Act* No 65/2003.

⁶⁴ See the explanatory notes to the bill of law passed by the *Althing* as *Act on Electricity* No 65/2003, *Parliamentary Gazette* vol A, 2002-2003, 2895.

⁶⁵ *Act on the Amendment of Several Acts Governing Energy and Natural Resources* No 58/2008 and the explanatory notes to the Bill of law, *Parliamentary Gazette*, vol A, 2007–2008, 3839.

⁶⁶ Articles 1, 6 and 11.

⁶⁷ The fact that nearly 50 000 people (out of approximately 318 000 inhabitants in Iceland) signed a public call for a referendum on the sale illustrates the intensity of the debate, <<http://www.orkuauindir.is/>>.

⁶⁸ *Act on Investment by Non-Residents in Business Enterprises* No 34/1991.

⁶⁹ Nefnd um orku og auðlindamál [Committee on Energy and Natural Resources Affairs] ‘Um kaup Magma Energy Sweden AB á eignarhlutum í HS Orku hf.’ [Report on the acquisition of Magma Energy Sweden AB of shares in HS Orka.] 2010, 83-88 <<http://www.forsaetisraduneyti.is/frettir/nr/4378>>. In order to understand the intensity of today’s debate it is important to keep in mind that water is the primary energy source in Iceland. The total amount of electricity produced in Iceland is based on either hydro (73%) or geothermal (27%) and warm groundwater is used for 90% of all space heating, see Björnsson, above n 58.

diversified public interests that relate inter alia to: increased awareness of the intrinsic value of nature and the need to prioritise between different uses of water and land (for example tourism versus industry) and the value of Iceland's water resources in light of the global quest for secure supply of energy and clean drinking water.

As pointed out by the Water Law Committee, the conflict on public versus private rights to water should also be seen as part of a broader debate on public rights to natural resources in general, most importantly living marine resources.⁷⁰ The establishment of a *general* system of permanent Individual Transferable Quotas ('ITQs') in the fishery management regime in the 1990's has raised fundamental constitutional questions of equitable access to the resources⁷¹ and a political debate on the fair distribution of benefits as well as the effect of the ITQs system on regional development. The nature and content of the rights established through the allocation of permanent ITQs and their protection under art 72 of the *Constitution* has, in the past decades, been the subject of constant debate in legal literature. Most legal writers are of the view that the ITQs enjoy protection under art 72 of the *Constitution* as occupational right only and the legislator has powers to change the ITQ system without compensating the right holders.⁷² However, the view has also been expressed that ITQs enjoy protection under art 72 of the *Constitution* as private property.⁷³

Admittedly, there are certain similarities between the conflict over the ITQ system and the conflict on property rights to water. Both relate to private property rights in fugacious natural resources of fundamental national interest and the core issue of debate is on how to ensure that the benefits of exploitation of the resources accrue to the nation. However, there are dissimilarities. First, the social conflict with respect to water is very much related to strong opposition against privatisation of public energy utilities, whereas it is not a matter of concern that the fishery sector is operated fully by private entities. Second, the question of access to water is mainly related to concerns about security of supply, whereas the question of access to the fisheries resource is on equal right to exploit the resource. Third, as further explained below, the legal debate on private property rights in water is mainly related to the question of whether landowners' water rights should be defined in terms of indirect or direct property rights, whereas, as mentioned above, the legal debate on the property status of ITQs is on whether they should enjoy protection under art 72 of the *Constitution* only as occupational rights. In light of the last point in particular, it is pertinent to ask whether there is any correlation between the social conflict on property rights in water and the claim for a provision in the *Constitution* declaring natural resources not in private ownership as 'property of the nation'. Before addressing the notion, it is appropriate to further explore the content of landowners' property rights to water.

The content of landowners' property rights to water – the legal conflict

It has been argued that applying the term 'ownership' in relation to water instead of the right of 'possession and use' changes the form of ownership from indirect (use rights) to direct ownership (which implies that water as a 'substance' is subjected to ownership) and that direct ownership, carries stronger rights of exclusion than use rights.⁷⁴ The changed wording, it is contended, could

⁷⁰ Ministry of Industry, Energy and Tourism, above n 53, 15.

⁷¹ *Valdimar Jóhannesson v The Icelandic State*, No 145/1998, *Supreme Court Report* (1998) 4076 and *Public Prosecutor v Björn Kristjánsson* No 12/2000, *Supreme Court Report* (2000) 1534. See also, views of the UN Human Rights Committee, *Views*, Communication No 1306/2004, 91st sess, UN Doc CCPR/C/91/D/1306/2004 (14 December 2007) ('*Haraldsson v Iceland*').

⁷² Þorgeir Örylgsson, 'Hver á kvótann' (2008) 48 *Timarit lögfræðinga* 59; Skúli Magnússon, 'Um stjórnskipulega vernd aflaheimilda' (1997) 50 *Úlfljóttur* 587.

⁷³ Gauksdóttir, above n 10.

⁷⁴ Óskarsdóttir, above n 45, 208-209.



alter the way in which the content of landowners' rights is construed and possibly strengthen landowners' rights to surface water.⁷⁵

In this paper, the argument is that generally it is correct that direct ownership entails stronger ownership control than use rights. That is, however, not absolute as it depends on the subject of 'ownership'. The relationship between an owner and his or her property, that is, the possibility to control and use property, is dependent on the characteristics of the property.⁷⁶ Thus, it should be examined whether the physical nature of the subject of 'ownership' excludes any other control than that related to use. Running water (surface water and underground water), just like wild animals and fish, is a fugacious resource in the sense that it flows constantly. This means that for reasons of certain physical characteristics of a resource an 'owner' would lack control over the resource as such in terms of exclusivity.⁷⁷ Therefore, landowners' relations to running water are inherently limited to use, and landowners' relations vis-a-vis other parties (that is the right to exclude, transfer, assign etc) relate to water uses and not the substance as such. Based on the physical characteristics of the resource, a landowner can only exclude others' uses if they interfere with his/hers legitimate interests related to his/hers use rights.⁷⁸ Also, it may be inferred from a recent Supreme Court judgment that landowners' rights to natural resources pursuant to the *GRA* (including groundwater, static or flowing) relate to the economic uses of a resource and not the resource as such.⁷⁹ Based on the above, it is argued that the substantive right of landowners in water are the same irrespective of whether the law applies the terminology 'ownership', for example the *GRA*, or 'possession and use'; for example the 1923 *Water Act*.

Therefore, the principal question is how the law defines landowners' use rights. In that regard, there is a difference between the 1923 *Water Act* and the *GRA*. The 1923 *Water Act* includes, as already explained, a positive list of use rights. This means that use rights which are not listed do not belong to landowners. They are public. As explained above, it is generally recognised that the 1923 *Water Act* lists all uses of economic relevance today, including the generation of energy. The *GRA*, on the other hand, applies a negative definition of landowners' rights, which grants them the right to any use of economic value, unless the law or rights of third parties dictate otherwise. The difference in law between landowners' rights under the two Acts of law is therefore primarily of relevance with regard to new uses not listed in the 1923 *Water Act* that could become economically feasible in the future.

That being said, it is necessary to stress that the content of landowners' rights cannot be properly defined without an in-depth analysis of the many and far-reaching rules of public law that restrict landowners' water rights on the grounds of public interests. In this context it should be recalled that the scope of the restrictions that the legislator can impose within the limits of the *Constitution* is dependent upon a number of factors that must be assessed together; and one important factor is the significance of the interests at stake.⁸⁰ With respect to water, it could be argued that the legislator has a broad discretionary scope for imposing restrictions on landowners' water rights in order to, inter alia, ensure a sufficient supply of clean water for sustaining life and the environment. The limits are, as previously mentioned, difficult to define in absolute terms.

Over the course of the last century, public law limitations on private property rights to natural resources have developed synchronously with societal changes. Industrialisation has entailed

⁷⁵ Óskarsdóttir, above n 34, 111-112.

⁷⁶ Lárusson, above n 43.

⁷⁷ Antony Scott, *The evolution of resource property rights* (Oxford University Press, 2008) 55-56.

⁷⁸ For similar views on landowner's rights to ground resources, see Þorgeir Örlygsson, 'Um eignarhald á landi og náttúruauðlindum', in Katrín Jónasdóttir et al (eds), *Afmælisrit. Gaukur Jörundsson sextugur 24. september 1994* (Bókaútgáfa Orators, 1994) 559. Compare also with Norwegian law, see Falkanger, above n 26, 33; Daniel Rogstad, 'Eiendomsrett til vassdrag og grunnvann', in Falkanger, above n 26; Kjell Haagensen (ed), *Vassdrags – og energirett* (Universitetsforlaget, 2002) 148-149.

⁷⁹ See above n 44.

⁸⁰ Thorarensen, above n 12.

more intense land use and exploitation of natural resources and called for public law rules for management of land use and development of natural resources and protection of the environment. This is far from being limited to Iceland.⁸¹ While new uses and the increased economic value of natural resources have brought landowners increased and more valuable rights, an extensive set of public law rules, including license requirements and restrictions on transfers of rights, have concurrently limited landowners' property rights based on public interests.

Based on the above, it can be argued that the term 'ownership' brings certain expectations, both in general language and legal terminology, and has diffused the social conflict on property rights in water. The content of landowners' rights should be analysed on the basis of the physical characteristics of the resources and the public interests vested in it.⁸² The balance between public and private rights to water under the current legal regime is, to a large extent, decided by public law and the limits set by art 72 of the *Constitution*.⁸³ In light of that, it is tempting to approach the concept of 'property of the nation' – as applied in recent proposals and recommendations for constitutional amendments – with a view to shed at least a faint light on how such a constitutional provision meets the social and legal debate on property rights to water.

The concept 'property of the nation' and proposals for its constitutional status

As mentioned earlier, the term 'property of the nation' does not have a sound basis in Icelandic property law. The concept appears in various Acts without a clear reference to its content.⁸⁴ Notably, it is referred to in the *Fisheries Management Act*, where exploitable marine resources are referred to as the 'common property of the nation.'⁸⁵ The notion was introduced into the *Fisheries Management Act* with the aim of emphasising that ITQs should not create irrevocable property rights.⁸⁶ The fishery management regime has been under constant review in the past decades in an attempt to reconcile differing interests and views. In this quest, a committee of experts and political representatives was elected by the *Althing* in 1998 to address natural resources that are, or could become, common property of the Icelandic nation (the Natural Resources Committee). In its report in the year 2000 the Committee put forward a proposal for a constitutional provision declaring any natural resources not in private ownership to be the 'common property of the Icelandic nation'.⁸⁷ Subsequently, several Bills have been put forward in the *Althing* based on similar principles and ideas, most recently by the Prime Minister in spring

⁸¹ For a brief account of different measures to protect public interests in natural resources in several European countries (Denmark in particular), see Anita Rønne, 'Public and Private Rights to Natural Resources and Differences in their Protection' in Aileen McHarg, Barry Barton and Adrian Bradbrook (eds), *Property and Law in Energy and Natural Resources* (Oxford University Press, 2010) 60-79.

⁸² The latter has also been emphasised by Óskarsdóttir, above n 34.

⁸³ In this regard it is interesting to note that Rønne states, citing Hans Christian Bugge, 'Legal Issues in Land Use and Nature Protection—an Introduction' in H T Anker and E M Basse (eds) *Land Use and Nature Protection* (DJØf Pub, 2000) 21, and H C Bugge and C Voigt (eds), *Sustainable Development in International and National Law* (Europa Law Publishing, 2008), that '[i]t may be argued that along with the more widely-recognized concept of sustainable development, the precautionary principle, and the principle of intergenerational equity, (...) the balance point is moving away from the traditional strong legal protection of private property interests in favour of common environmental interests. Rønne, above n 81, 79. With the reservation that the content of property law in the Nordic states is not unified, Axelsson states that under Norwegian, Danish and Swedish constitutional law the legislator is provided with greater discretion in imposing limitations on private property rights without compensation than is the legislator under Icelandic constitutional law. Axelsson expresses the view that caution is justified in changing the traditional way of approaching property rights under Icelandic law, Rønne above n 17, 102-104.

⁸⁴ Þorláksson, above n 1, 42-46.

⁸⁵ First sentence of art 1 of Act No 116/2006 [Ministry of Fisheries and Agriculture (Iceland) trans, English translation of Act on Fisheries Management <<http://eng.sjavarutvegsraduneyti.is/laws/nr/9335>>]

⁸⁶ The last sentence of art 1 of the *Act on Fisheries Management* reads: 'The allocation of harvest rights provided by this Act neither endows individual parties with the right of ownership nor irrevocable control over harvest rights'. See *ibid*.

⁸⁷ Auðlindanefnd [Natural Resources Committee] *Álitsgerð með fylgisskjölum* [Report], (2000), 27. For an account of earlier proposals of similar content see Skúli Magnússon, 'Úttekt á lögfræðilegum álitafnum stjórnarskrárákvæðis um auðlindir' in Stjórnlaganefnd [Constitutional Committee] *Skýrsla stjórnlaganefndar 2011* [Report of the Constitutional Committee] (2011), 243-248.



2009.⁸⁸ So far none of the proposals have received the support needed in the *Althing*. Recently, the Constitutional Council appointed by *Althing* put forward its recommendations for a revised *Constitution*, including a provision declaring all natural resources not in private ownership as the joint and perpetual property of the nation.⁸⁹

It could be argued, based on recent proposals and recommendations that there are two principal schools on what should be the substantive content of a constitutional provision on natural resources. First, that such a provision should entail a declaration reinforcing the powers and duty of the State to manage natural resources on the basis of national interests (excluding any reference to the concept of ‘property of the nation’).⁹⁰ It has also been argued that the concept ‘property of the nation’ could be construed to this effect.⁹¹ Second, that in addition it creates a form of a distinct institution of ‘property’ that could be described as an antithesis of private property. It would mean that natural resources are either subject to private ownership or ‘ownership’ of the nation. If applied, this interpretation resembles in many respects the division between private and public land under the *PLA*. The institution ‘State property’ within Public Land and ‘property of the nation’ would also have common characteristics. Both would confer the ‘ownership’ control to the State and impose certain obligations on the State to exercise its control for the benefit of the nation. Interpreted to this effect, ‘property of the nation’ would replace all forms of property right to natural resources (most notably *commons* and *public property*) with the important exception of private property and indirect property rights, such as use rights pursuant to the 1923 *Water Act*. The paper argues that this meaning can be read into above-mentioned proposals presented in the *Althing* and with certain reservations also into the recommendations of the Constitutional Council.⁹²

If the first school is applied and ‘property of the nation’ is only meant to reinforce State powers to manage natural resources, the concept could apply to all resources equally, that is both within public and private land, and irrespective of existing property rights held by private and public parties. The second school, on the other hand, is based on a distinction between natural resources subject to private property rights and those that are not. Obviously water resources within public lands would be considered ‘property of the nation’. As for water resources within private land, the question of whether water is subject to direct ownership would continue to be debated. Even if it were accepted that water as a substance is not private property and could thus be considered ‘property of the nation’, the substantive effect of that would be limited. Presumably existing property rights to water (use rights) would be unaffected, at least as long as there is no clear provision on nationalisation of those rights. Moreover, water rights acquired by public entities on a private law basis would not be considered ‘property of the nation’ and legislative amendments allowing privatisation of such public entities not be excluded. Based on the above, it is argued that the only clear effect of a constitutional provision declaring natural resources that are not private property ‘property of the nation’ is that water resources within public land would be ‘ring fenced’ in the sense that the legislator’s power to alter their legal status would be limited. In addition, it could be argued, both versions entail a constitutional reinforcement of public interests attached to natural resources that could affect the balance test of art 72 of the *Constitution* on public versus private interests in favour of public interests.

⁸⁸ *Parliamentary Gazette*, vol A, 2008-2009, 3366.

⁸⁹ Article 34 of ‘*Recommendations for a Bill for a Revised Constitution*’, Stjórnlagaráð [Constitutional Council], frumvarp til stjórnarskipunarlaga (29 June 2011) English translation of the first paragraph of the provision reads: ‘Iceland’s natural resources that are not private property shall be the joint and perpetual property of the nation. No one can acquire the natural resources, or rights connected thereto, as property or for permanent use and they may not be sold or pledged.’ <www.stjornlagarad.is>.

⁹⁰ See a proposal for amendments to a legislative bill for amendments to the Constitution put forward by parliamentarians of the Independent Party in Iceland (Sjálfstæðisflokkurinn), *Parliamentary Gazette*, vol A, 2008-2009, 4481.

⁹¹ Magnússon, above n 86, 226-227.

⁹² See above n 2. The recommendations of the Constitutional Council are not entirely clear on how it treats existing indirect property rights.

Final comment

The concepts of 'property' and 'ownership' carry certain expectations of control that are not equally pertinent to all 'things'. The concepts are difficult to define with regard to natural resources, and water in particular – due to its physical nature and the strong public interests vested in it. The application of the term 'ownership' in relation to water has diffused social conflict on property rights to water and inspired claims for a constitutional provision declaring natural resources the 'property of the nation'. Such a provision could prove useful to 'ring fence' public rights to water within public lands. Thereby, it could to a certain extent, accommodate considerations on the need to ensure public control over water and ensure that benefits accrue to the nation. Conversely, insofar there is conflict on the content and scope of private property rights to water within private land, such a provision does not seem to offer much clarification or unity.

Keywords: Icelandic law, water law, private versus public, property rights, Icelandic Constitution art 72

