

Regulation,
Regulators, and
the Crisis of Law
and Government

Private Rights and Public Responsibilities:

Recent developments in
Scots water law

Sarah Hendry

Policy Brief

FLJS

www.fljs.org

The Foundation for Law, Justice and Society

in association with **the Centre for Socio-Legal Studies**
and **Wolfson College, University of Oxford**

The Foundation for Law, Justice and Society

Regulation, Regulators, and the Crisis of Law and Government

This programme examines the regulatory system in the wake of the global financial crisis, assessing its current weaknesses, the role of legislative and judicial bodies, and identifying measures for future reform of both markets and regulatory regimes. It aims to shed light on the recent failures of regulators, often captive of the very industries they are meant to regulate, and examine ways to improve the accountability and effectiveness of the regulatory system.



Executive Summary

- Water law in Scotland was historically based on the riparian system, giving rights over water to those who held rights in adjacent land. The riparian system, with modifications, has been used in many countries but is not appropriate for a modern system of water resource management. Most countries, including Scotland, have moved to a system of licences or permits for the use of the water resource.
- Water law has been the subject of considerable attention in the Scottish Parliament since its re-establishment in 1999, with five Water Acts passed in that time. These include Acts to transpose the EU Water Framework Directive and the EU Floods Directive, to reform the structure and the regulation of the water services supplier, to create a proportionate and integrated system for licensing all uses of water resources, and to give ministers new duties to develop the value of the resource.
- This policy brief will examine these recent reforms and consider whether there has been a shift from private rights to private responsibilities, or perhaps, from private rights to public rights, over water resources in Scotland.
- It will also comment briefly on whether the reforms to water services delivery in Scotland over this period might be of interest and relevance further afield. In Scotland, drinking water and sewerage services are delivered by a single vertically integrated public corporation, Scottish Water. Whilst the system of regulation is broadly similar between Scotland and England, there are no shareholders to consider in the Scottish model. Further, Scotland has already introduced some limited competition in retail services in the business sector. Similar retail competition is part of the current reform package being developed in England.
- The policy brief concludes by suggesting that water has, de facto if not explicitly in the law, moved from the private to the public domain. Holders of land which includes water will still have some special status, but the power to control the resource as a matter of public interest is incontrovertible. There remains a debate about the extent to which control should be exercised as a matter of command, or whether holders of rights in land (with or without water) should be compensated for the environmental services which their holdings provide.

Private Rights and Public Responsibilities:

Recent developments in Scots water law

Introduction: rights in water and rights in land

Recent years have seen many changes to the rights and responsibilities of those with rights to abstract or otherwise use water resources in Scotland. Historically, as a mixed legal system with roots in Roman law, and a plentiful supply of running water, Scotland was at the forefront of developing the 'riparian doctrine', which provided that holders of land adjacent to rivers or lochs would have rights to use the water for primary purposes (that is, broadly, for drinking, washing, cooking, water for animals, but not industrial use or irrigation). Other, 'secondary' uses were only permitted where the water continued downstream undiminished in quantity or quality. This being an impractical goal, except where uses were minimal and supply abundant, although riparianism has been exported to many countries around the world, most of the recipients subsequently required to modify the principle, or indeed to abolish it entirely. In Scotland, early riparianism (without the term being used) was developed in case law as early as the seventeenth century,¹ and at that time the issue was really about determining private rights against other private rights. Where it did survive into modern times, including in Scotland, it tended to be modified to enable secondary uses, at least in the great public rivers, particularly to allow for dams for mills and other manufacturing. These modifications arose through court decisions; in addition, the rules of prescription might apply, to perfect a right that otherwise was not lawful or to prevent challenge to that right, after the passage of a prescribed period of time.

In terms of water pollution, despite the strict riparian doctrine, the very earliest cases allowed for pollution at least of the public rivers — thoughtfully placed by providence, 'to carry man's filth to the sea.'² By the nineteenth century though,

the courts would state that 'properly speaking, no man has a right to pollute.'³ Where there were competing private rights over water quality, remedies had historically lain in the civil courts in actions of nuisance or negligence, and this remains the case today, albeit overlain by new provisions in public statutory law. The latter tend to establish some form of quality standards, enforced where necessary by criminal liability, and insofar as this protects water quality, it makes it less likely that there is a need for civil action.

Reforms in the nineteenth century

By the nineteenth century, as the doctrine was refined, water rights were described in the courts as 'more than a right of use ... as nearly amounts to property';⁴ but rights in water were never quite the same as rights in land, as the Roman principles of *ius communes* applied, at least to surface water in public rivers. But the location of water rights as a species of property rights had great significance after the Act of Union, whereby, as a question of private law, a separate jurisdiction was retained. There has never been a UK water law.

The nineteenth century refinements frequently addressed conflicts over rights to divert and dam the flow, which were particularly prevalent in an industrializing world. Where they concerned public rivers, defined in Scotland in accordance with the civilian tradition and more broadly than in England as being all navigable waters, they had an element of public interest. Public rights in public rivers were recognized, but they were limited — fishing, for example — although a public right in coastal waters did not so apply in the great rivers. Also in the nineteenth century, and continuing through the twentieth, often through private Acts, we saw the transfer, variously to public corporations, boards, and municipalities, of private water rights for public supply.

In the interests of the wider public though, in the nineteenth century, Parliament began to introduce modern environmental law. Usually, this was on a British or UK-wide basis, but water, like public health, maintained its separate Scottish identity in these statutes, due to the historic locus of each in private law. Even so, the essence of the new rules was similar. Causing pollution of watercourses, regardless of ownership or rights to abstract, was both an offence and a civil wrong. So the trend historically has been to modify private rights, in the public interest. It could therefore be argued that these nineteenth-century reforms shifted the position of private owners of water rights to increase their responsibilities. Whereas in the past these had been mainly in terms of not engaging in wrongful acts that would cause loss or harm to their neighbours, they now had increased responsibilities to maintain or protect the water environment in their care, for the benefit of the wider public, and subject to control by public authorities.

The modern law — the new Scottish Parliament

The most appropriate place to start an analysis of the modern law is in 1999, with the (re)establishment of the Scottish Parliament.⁵ One of the consequences of maintaining a separate system of private law was that by the second half of the twentieth century, the pressure of time at Westminster meant the neglect of many areas needing reform. Use was made of Miscellaneous Provisions (Scotland) Acts; alternatively Scottish provisions were tacked onto the end of English Bills. Water was just one area crying out for attention from the new devolved Parliament, but it is one to which much attention has been paid.

In the intervening fourteen years, the Parliament has conducted several inquiries, and passed no less than five pieces of primary legislation relating to water. The remainder of this policy brief will briefly analyse these, primarily in terms of their impact on private rights.

The Water Industry (Scotland) Act 2002 — Scottish Water

The Water Industry (Scotland) Act 2002⁶ established a single Scottish-wide public corporation, Scottish

Water, in place of three regional authorities, for the delivery of public water and sewerage services. Although not wholly relevant to this brief, Scottish Water has been something of a success story. A system of economic regulation very similar to that in England, under the Water Industry Commission for Scotland rather than the water regulator Ofwat, along with the merger of the regional authorities, allowed significant efficiency savings whilst avoiding divestiture and the transfer of resources to shareholders. However, PFI schemes were used to modernize waste water provision to meet EU requirements.

The Water Environment and Water Services (Scotland) Act 2003

The Water Environment and Water Services (Scotland) Act 2003 (WEWS)⁷ succeeded the EU Water Framework Directive (WFD).⁸ This provided an opportunity not only to reform Scots water resources law but also to demonstrate a different, and much more proactive, approach to European environmental law. The WFD was replaced by April 2003, though the deadline was not until December; it was transposed by primary law not by regulations; and it went beyond the requirements of the Directive in a number of ways. This might be criticized as 'gold-plating'; or in the circumstances, it might indicate a job well done. In particular, it included wetlands (but not peatlands) in the definition of 'water environment'; it maintained the historic three-nautical-mile limit out to sea used for pollution control and applied it to all WFD activities, rather than the one nautical mile required by the Directive; and it also enabled the reform of Scots water pollution law, which although compliant with existing EU law was badly in need of revision. We might describe the opportunity presented for water law reform in 1999 as a happy confluence.

That revision took place as part of an integrated and holistic package. Scotland was in many ways at a standing start for the implementation of the WFD. It had no history of mandatory catchment planning and no comprehensive abstraction controls. Abstractions for public supply, for large-scale hydro power, and for (minimal) irrigation were controlled. But riparian landowners were still able to abstract under the common law, from surface water and

groundwater. Indeed, for the latter, the rights of use were even closer to a property right, though the precise analysis has been subject to debate.⁹ A decision was taken to bring in a comprehensive authorization process for all uses of the water environment: abstractions, discharges, impoundments, and river works.

The Controlled Activities Regulations — a modern licensing regime

To achieve proportionality and manage regulatory effort, a tiered system was introduced, with General Binding Rules (GBRs) for the smallest scale and least hazardous activities, registrations for the middle tier where there was a risk of cumulative effect, and full licences for activities of the greatest scale and potential risk. This was achieved by the Water Environment (Controlled Activities) (Scotland) Regulations, currently 2011 (CAR).¹⁰ Thenceforth, riparians who had previously abstracted essentially as of right, even for secondary purposes, often where the long negative prescription had operated to bar any challenge from their downstream neighbours, were now subject to some control. Landowners abstracting groundwater from beneath their own land were similarly placed.

One interesting question that was raised prior to these reforms was whether any of these proprietors would seek to challenge the new rules, particularly under Article 1 Protocol 1 of the European Convention on Human Rights. No such challenge was made, even by groundwater users. One assumes that proprietors, and their advisors, considered that the reforms were proportionate and within the state's margin of appreciation, especially given the long lead-in time and extensive consultation, as well as the tiered regime. There seems little doubt that state regulation of the water environment would be an appropriate focus for such exemptions. Undoubtedly therefore the CAR has made significant inroads into private rights in water.

The Water Services (Scotland) Act 2005

The 2005 Act¹¹ also concerned the water industry, giving the Water Industry Commission for Scotland (WICS) powers to set charges rather than merely to advise ministers, as well as bringing in some

competition for retail services to business customers. This reform has been a success, and although not directly relevant here may be worth mentioning as being of some wider interest in England, given the current proposals to liberate that market along similar lines, if more widely applicable.¹² It has been helped by a gradualist approach — applying only to business customers, and only to retail services, with a prohibition on any other party placing water into, or removing waste water through, the public network. It has also been helped by a very open and transparent approach to access pricing, whereby new entrants to the market, and their potential customers, know the price that would be charged by Scottish Water Business Stream for the same service. This allows very clear understanding of the added value that new entrants can provide. The WICS considers that although not many customers have made the switch, the competitive pressure has also been effective in constraining the prices charged by Business Stream (a fully ring-fenced subsidiary).

The Flood Risk Management (Scotland) Act 2009

Following both a parliamentary inquiry and a government consultation, the Flood Risk Management (Scotland) Act 2009¹³ implemented the EU Floods Directive,¹⁴ and again took the opportunity to make certain other reforms to the existing domestic law. One or two of these provisions might be of interest in an analysis of a reform of private rights. Under Section 20, the Scottish Environment Protection Agency (SEPA) must identify 'natural features and characteristics' relevant to flood control. These might include, for example, wetlands and flood plains that could be used for so-called 'natural flood management' upstream. A question then arises as to what compensation farmers or other land managers might seek for such sacrificial land. Hilly uplands, or wetlands, may be of less value to the farmer and of more value to flood management schemes; generally, the quality of the land and the alternate productive uses would be relevant to such a calculation. Some payments may be available, for example, through the Scottish Rural Development Programme; there is also currently a river restoration scheme funded by the Scottish government and administered by SEPA, specifically targeted at WFD improvements in morphology.¹⁵

Also under the Floods Act is a requirement for SEPA to identify artificial structures that play a role in flood defence. This in itself is mainly aimed at flood defence schemes and is not obviously targeted at private landowners or riparian rights-holders. However, we bear in mind that the CAR now controls comprehensively all impoundments and river works. Potentially tying into this identification process that SEPA is undertaking, and into the CAR provisions, are new rules that are soon to be brought in to address historic structures that may be affecting the morphology of a watercourse. In Scotland, as in many European countries, changes to morphology (the physical structure of a river, for example by straightening it) is a principal reason why a waterbody may not reach 'good' ecological quality under the WFD. These historic structures might be owned by organizations including roads authorities or Network Rail, but possibly also by private riparians. The intended new powers will allow SEPA to order either repair or removal of such structures at the owner's expense, regardless of whether the current owner is responsible for their erection. So again, we encounter a reform making clear inroads into private rights — in this instance, without compensation. We will return to questions of compensation at the end of this brief.

The Water Resources (Scotland) Act 2013

The most recent Water Act in Scotland is partly linked to the Scottish government's 'Hydro Nation' agenda;¹⁶ some aspects may be of relevance to, or affect, private rights. Part 1 of the Act contains a new duty on ministers to 'develop the value' of Scotland's water resources. 'Value' was defined in the Bill as 'economic and other value'. Several of us who gave evidence at the Parliamentary Committee, including the Centre for Water Law, Policy and Science; the James Hutton Institute; and the UK Environmental Law Association, suggested various amendments, including enshrining an 'ecosystem approach' in Scots water law, or even recognizing the intrinsic value of water *in situ*. The Parliament did not accept these suggestions, but it did make explicit that 'value' included environmental and social considerations, as well as economic. However, the government's underlying position is clear; it seeks to maximize the returns on the water environment, including several provisions to extend and clarify the ability of Scottish

Water to use its assets more productively, especially around renewable energy generation.

Another provision, which had not been consulted on before the Bill was published, brings in a new regime for authorizing large abstractions (currently set at 10 megalitres, without any particular justification for that figure) by the ministers themselves. This will not be instead of the current regulation of abstractions under CAR, but in addition, which does not seem wholly consistent with reducing burdens under a 'better regulation' agenda. It is not wholly clear why the ministers require this new power. When the early proposals for the Bill were consulted on as part of the Hydro Nation initiative, it was suggested that ministers were keen to facilitate bulk transfers of water outside of Scotland — at a time when there was a threat of drought across much of England — but this suggestion was widely criticized. By the time the Bill was published (containing these provisions that had not been in the consultation) there was some reference in its policy memorandum to the desirability of ministers being able to prevent just such transfers. For the purposes of this brief, the salient point is that this is another level of control imposed on those in a position to apply for consent to abstract large volumes of water; usually, riparian landowners.

A third relevant provision in this Act concerns Scottish Water's powers to enter into land management agreements for the purpose of maintaining upstream water quality. Catchment protection is increasingly recognized as a cost-effective preventive technique, linking into water safety planning as recommended by the World Health Organization. There is much evidence of good practice emerging, in England and further afield.¹⁷ Indeed, the authority to carry out such work is in itself a reason to support a vertically integrated water services provider which would have responsibilities at every stage of the resource chain. Scottish Water is a corporate body, and of course already has the power to enter into agreements of all kinds. This new Act clarifies these powers, but also makes a new provision for compulsory rights of entry onto private land which may encompass a waterbody that subsequently forms part of public supply, in order to test, take

samples, and so forth. These provisions again impact on the private rights of riparians and were the subject of some negative comment, especially from groups representing the interests of landowners.

Land (and water) management agreements: payments for ecosystem services

Scottish Water has recently developed a pilot scheme to incentivize land managers to commit themselves to certain best practice initiatives. Currently, under the CAR, Scotland has decided to make certain elements of agricultural good practice mandatory, enacting several GBRs relating to diffuse pollution. This works along with requirements for Good Agricultural Environmental Compliance under the EU's Common Agricultural Policy. Leaving aside the specific requirements of the Nitrates Directive, Scotland is not the only jurisdiction to have enacted binding rules on diffuse pollution, but it is rare. More often, policymakers — and farmers — prefer to rely on a combination of good practice guidance and incentives. However, the approach does have certain advantages, though it is necessary to commit to a degree of regulatory effort to establish the rules in the minds of those bound by them. Some high-profile enforcement action may be helpful in this regard, to encourage widespread compliance. In the context of land management agreements with water services providers, it is essential to ensure that incentives are not available for compliance with the minimum rules, and Scottish Water are expected to cooperate fully with SEPA in this regard. A pilot scheme is already underway, which facilitates relatively small payments (of a maximum £20,000 per holding within state aid rules) for a specified set of improvements, although, thus far, this scheme is only available to farms in identified problem catchments.¹⁸

This, like compensation for sacrificial land for flood management, or other payments to achieve good ecological water quality, is essentially a payment for ecosystem services (PES) scheme. PES schemes are a new name for an old idea, whereby owners of natural resources (including land, water, and things on or under land or water) should receive compensation if their property rights in those resources are infringed or reduced by the state. Market mechanisms such as water trading are

another mechanism to place economic values on resource use and indeed non-use. Prior incarnations of PES might include internalizing the environmental externalities, or accounting for all the lifecycle costs of a product, including its water and carbon inputs.

Conclusions and policy implications

In Scotland, as in many other countries, recent years have seen significant changes to water law. These have included introducing river basin planning for integrated water resource management, introducing a tiered and proportionate licensing regime for all uses of the water resource, and reforming the delivery of water services whilst maintaining these in the public sector. Although water in Scotland is usually in abundant supply, and flooding is the most common extreme event, nonetheless periodic water scarcity does occur and this can be exacerbated by very small supply zones in rural areas.

Historically, Scotland's water was managed through a rights system based on land ownership, which is no longer appropriate to modern conceptions of environmental resources. In the recent past, lack of parliamentary time for Scottish affairs meant that some aspects of Scots law, whilst preserved under the Act of Union, had been neglected in legislative terms.

Much-needed reform happened soon after the introduction of the Scottish Parliament, and there has been considerable enthusiasm for this area of policy, both the management of water resources and the delivery of water services. This policy focus will continue through the Scottish government's development of its Hydro Nation agenda and new duties around developing the value of the resource.

There is no doubt that the historical trend has been to reduce and limit the extent of private rights in water, both in terms of discharges and water quality, but especially around abstractions and river works. A new licensing regime was not challenged by riparian rights holders, suggesting that the rules were considered broadly acceptable in an age in which resource use is legitimately licensed by states. There has been a shift from private rights to public responsibilities on the part of those privileged to be riparians, and insofar as riparians have any special

position in relation to the water on their land, it is suggested that such a position stems now from those land rights.

It may also be predicted that there will be an important debate in the immediate future around the extent to which control should be command-based, or alternatively the extent to which landowners (with or without water rights) should be compensated for the environmental services which their land may provide. We may anticipate increased value being placed on the natural environment, and specifically water, driven in part by the EU Water Framework Directive but also by wider agendas around natural resource management and biodiversity. As these valuations, and the methods behind them, become more accepted and embedded, there will perhaps be more clarity around what are reasonable levels of payment for specific uses or non-uses; modification of the agricultural support regimes in the EU will also contribute to this. However, this may not resolve underlying philosophical differences around the inherent value of the natural environment, nor necessarily the appropriate balance between the rights of the landholder (to freedom of use or compensation) and their responsibilities (to protect and manage the land resource in the public interest). Arguments over water that were, to an extent, won and lost in the nineteenth century are now current over land, but made more explicit and perhaps less easy to resolve as a result.

An alternative, or complementary, assessment might also see the shift in terms of a move from private rights to public rights. In many countries, especially those with a civilian law tradition, either the constitution, or a water code, or both, will explicitly place water in the public domain — France and Spain are obvious examples. In the US, there is a recognition of the doctrine of public trust applying to surface waters, and this concept was made explicit in the South African National Water Act, widely considered to be an excellent example of a reformed water law. Public trust also finds its way into case law in India, where the Supreme Court has used the doctrine, for example, to decide that a private landowner could not divert a river to benefit a building project.¹⁹

In the UK, although neither the 2003 Water Act nor the 2013 Act went so far as to declare explicitly that water was in the public domain, or in public trust, or any of the other formulations used in Water Acts or codes around the world, nonetheless I would posit that such was the effect, particularly so with respect to the 2003 Act. We recognize that there is a public interest, and that the public have interests, in the resource that is water, and we allow its future management in that context. It is anticipated that control of this resource, in the public interest, will be non-controversial in principle, although there will always be a debate around how that control should be exercised.

Notes

- 1 *Bannatyne v Cranston* (1624) M. Dict 12769; and see the recognition of the early emergence of the doctrine in Scotland, though not by name, in *Colquhoun's Trustees v Orr Ewing* (1877) 4R HL 116, at 127.
- 2 *Mayor of Berwick v The Laird of Haining* (1661) M. Dict 12772.
- 3 *Rigby & Beardmore v Downie* (1872) 10M 568, at 573.
- 4 *Ferguson v Shirreff* (1844) 6D 1363, at 1367.
- 5 Scotland Act 1998 c.46.
- 6 Water Industry (Scotland) Act 2002 asp.3.
- 7 Water Environment and Water Services (Scotland) Act 2003 asp.3.
- 8 Directive 2000/60/EC Establishing a Framework for Community Action in the Field of Water Policy.
- 9 Whitty, N. (2000) 'Water Law Regimes'. In: K. Reid and R. Zimmerman (eds) *A History of Private Law in Scotland*, Vol. I. Oxford: Oxford University Press.
- 10 Water Environment (Controlled Activities) (Scotland) Regulations, SSI 2011/209.
- 11 Water Services (Scotland) Act 2005 asp.3.
- 12 HM Govt 2012 Draft Water Bill 2012 Cmnd 8375.
- 13 Flood Risk Management (Scotland) Act 2009 asp.6.
- 14 Directive 2007/60/EC of the European Parliament and of the Council on the Assessment and Management of Flood Risks.
- 15 Scottish Government (2008) *Implementing the Water Environment and Water Services (Scotland) Act 2003: Restoration of the Water Environment: A Consultation*. Available at <http://www.scotland.gov.uk/Publications/2008/12/18145403/6>; see also http://www.sepa.org.uk/water/water_environment_fund.aspx
- 16 Scottish Government (2010) *Building a Hydro Nation*. Available at <http://www.scotland.gov.uk/Publications/2010/12/14111932/0>; Scottish Government (2012) *Scotland the Hydro Nation: Prospectus and Proposal for Legislation*. Available at <http://www.scotland.gov.uk/Publications/2012/02/9536>
- 17 For example, in the New York Catskills, a combination of compulsory purchase and financial incentives, backed by elements of compulsion, saved the city the expense of a new treatment works. See http://www.nyc.gov/html/dep/html/watershed_protection/index.shtml. Closer to home, see also Wessex Water, <http://www.wessexwater.co.uk/environment/threecol.aspx?id=7199&linkidentifier=id&itemid=7199> and South West Water <http://www.southwestwater.co.uk/index.cfm?articleid=8329>
- 18 Scottish Water Sustainable Land Management Incentive Scheme, see <http://www.scottishwater.co.uk/protectdwsources>
- 19 *M. C. Mehta v Kamal Nath and Others* 1 SCC 388 (1997).



The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

Sarah Hendry is an academic lawyer specializing in water and environmental law. She works at the University of Dundee in the IHP-HELP Centre for Water Law, Policy and Science, a Category 2 Centre under the auspices of UNESCO. Sarah is Scottish Editor for the *Journal of Water Law* and the *Journal of Environmental Law and Management*, and co-convenor of the UK Environmental Law Association Scots Law water topic group.

Her interest in Scots, EU, and comparative water law extends across both water resources and water services, and she sits on the Scottish Customer Forum, a new body to better represent consumers in price setting for water services. She teaches comparative national water law and the regulation of water services and is programmes director for the centre's taught Masters programmes, with a particular interest in making law accessible to non-lawyers. She is a co-investigator on two EU FP7 projects, GENESIS and LAGOONS.

For further information please visit our website at www.fljs.org or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD

T · +44 (0)1865 284433

F · +44 (0)1865 284434

E · info@fljs.org

W · www.fljs.org

The logo for the Foundation for Law, Justice and Society (FLJS) features the letters 'FLJS' in a large, light-colored, sans-serif font. A small '+' sign is positioned between the 'J' and 'S'.

www.fljs.org