



# Reform of Scottish Private Water Rights

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## Introduction

Water is a vital resource; essential for all forms of life. Due to a growing population, continuing industrial growth and ongoing environmental degradation, water will be an ever more contested resource, with some predicting it to become the oil of the 21st century.<sup>1</sup> The law of private water rights is the area of property law which determines what landowners can do with the water running through their land. This is an important part of the legal framework regulating water. In light of pressing global challenges, there is real urgency to addressing the question of how to reform the law of private water rights.

## Private Water Rights in Scotland

The law of private water rights in Scotland became settled in the 18th and 19th centuries.<sup>2</sup> Scots law never allowed owners unlimited rights to consume, divert or affect the flow of water running through their lands. However, the exact legal nature of the limitations took centuries to establish. Due to the use of water-powered mills - the use of which peaked between 1730 and 1830 - in a variety of different processes from grinding grain to coal mining, a robust system of water rights was necessary and the lack of a system resulted in many

disputes in the courts as mill owners were fighting with each other over the use of the water.

With the beginning of the Industrial Revolution demands on water supply began to grow and become more complex. New large-scale industries were developed, some of which like brewing and distilling, consumed significant quantities of water.

There were also the social consequences of the Industrial Revolution. Increasing urbanisation led to a demand for a centralised water supply but wholesome water was often difficult to procure. Lack of clean water was identified as a chief cause of various cholera and typhus epidemics which ravaged the British population.

In the cases of this time, the use of water for domestic purposes and industrial purposes often clashed such as when water was used for cooling steam engines which resulted in water shortages. Or where use of water for a distillery, brewery or dye-works resulted in the pollution of rivers used for drinking, cooking and washing. The judges recognised this and gave judgments against industry to preserve water for domestic purposes.<sup>3</sup>

The resulting water rights system, which was outlined in the case of *Morris v Bicket*<sup>4</sup> of 1864 and is still in force today, is incredibly restrictive.

A downstream owner has a right to have the water transmitted to her “undiminished in quantity, unpolluted in quality, and unaffected in force and natural direction and current, except in so far as the primary uses of it may legitimately operate

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<sup>1</sup> H Ingram, J M Whiteley and P R Perry, “The Importance of Equity and the Limits of Efficiency in Water Resources” in J M Whiteley, H Ingram and R W Perry (eds), *Water, Place & Equity* (2008) p1.

<sup>2</sup> See J Robbie, *Private Water Rights* (2015).

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<sup>3</sup> See blog J Robbie, [“Social Justice and the Historical Development of Water Rights”](#)

<sup>4</sup> (1864) 2 M 1082.

upon it within the lands of the upper heritor.”<sup>5</sup>

Therefore, landowners are allowed to take water for drinking, washing and cooking but no other inference with the natural flow is allowed. Each landowner along a river has a real right in upstream (and downstream) lands will entitles her to object to an operation which materially interferes with the flow of the river.

### **Practical Implications**

The practical implications of the law are that if there are successive owners along a river, any operation which will materially affect the natural flow of the river requires consent of the other owners. Therefore, if an owner wants to set up a hydro-scheme, for example, she will need to obtain the consent of numerous downstream owners and maybe some upstream owners. This is in addition to any public law consents which are required such as a Controlled Activities Regulations Licence issued by the Scottish Environmental Protection Agency.

Crucially, however, these rules only apply if there are other owners along the river in question. If a river is wholly contained within one person’s land, there are no private water rights restrictions on the operation.

### **Problems with the Current Law**

As a result of the history of private water rights in Scotland there are a number of problems with the current law.

- ▶ Due to the previous lack of research in the area of private water rights, the law is not widely known or understood.
- ▶ The law is inaccessible due to being contained in a patch-work of 18th and 19th century case law.
- ▶ The law is out-of-date with modern concerns having been established in the period of the Industrial Revolution.

- ▶ The law can lead to arbitrary results depending on the number of landowners along a river.

### **Reform of Private Water Rights**

In 2014, the Land Reform Review Group identified private water rights as an area requiring reform.<sup>6</sup> Substantive questions that need to be addressed in order to comprehensively review this area of law are:

- ▶ To what extent should water be subject to private ownership?
- ▶ Who should own the land under water?
- ▶ How should the flow of water change the ownership of land under water?
- ▶ What should the rights and obligations of landowners be in relation to water?

For the purpose of reforming Scots law, much can be learned from other jurisdictions around the world, such as Louisiana, Norway or South Africa, which have recently reformed their water law or are currently doing so. Further, due to the multifaceted nature of the interests and issues involved in water regulation, broad engagement with stakeholders from policy, industry and scientific backgrounds is necessary to determine which social, economic and environmental factors should feed into the reform process.<sup>7</sup>

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<sup>6</sup> Land Reform Review Group, *The Land of Scotland and the Common Good* (2014) paras 30.1-30.13, available here: <http://www.gov.scot/Publications/2014/05/2852/downloads#res-1>

<sup>7</sup> Find out more about the “Reform of Private Water Rights” project here: <http://www.gla.ac.uk/schools/law/staff/jillrobbie/privatewaterrights/>

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<sup>5</sup> (1864) 2 M 1082 at 1092.