South African law of fresh water fishes

Ian Cox

There is a great deal of confusion in the South African angling community regarding the law relating to fishes. Questions such as "do I need a licence" or "what are my rights when a river or dam demarcates the boundary" frequently crop up on social media.

The short answer to these questions is that the rules differ depending on where you are, how you fish, what you are catching and whether the rules are enforced. The current rules, such as they are in urgent need of reform but the nature of that reform is a vexed one especially given government's tendency to use these environmental and fisheries laws to take control of resources that are presently privately owned.

The origins of our law of fishes

The origins of South African fish law are found in Roman law and in particular the law relating to things. This is the law that regulates our rights in property. These rights in turn depend on the nature of the thing and whether it is capable of ownership. Thus, the Romans distinguished between things that were capable of being owned and things which could never be owned.

Things that could never be owned, or so-called public property, included the air, running water, the sea, and consequently the shores of the sea. This concept of public property extended to river banks of navigable rivers. Thus, the Institutes of Justinian stated that the public use of river banks is part of the law of nations just as the river itself and that the right of fishing in ports and rivers is common to all men.

The fact that the right to fish was common to all people under Roman law does not make fish public property. Fish are regarded as wild animals in Roman law. Wild animals could be owned under Roman law, but only for so long as they fell under human control. One acquired control of a wild animal either by killing it and taking possession of its carcass or by capture. In the latter case, one's ownership of the wild animal remained only for so long as it remained subject to your control. Ownership was lost if the animal escaped.

South African common law is based on Roman Dutch law reinterpreted through the lens of the Constitution. Roman Dutch law is an amalgam of Dutch customary law and Roman law that was developed by Dutch jurists in the 17th and 18th centuries. It was replaced by the Napoleonic Civil Code in Holland in 1809 but lived on in the former Dutch colonies including South Africa.

This amalgamation of Dutch customary law and Roman law resulted in marine and fresh water fisheries being treated differently. This is because the Roman law public right to fish rivers clashed with Dutch customary law which held that the right to fish in rivers was part of the "regalia of the realm". Thus, while the right to fish in the sea and from the sea shore was treated as a public right to be enjoyed by all, the right to fish in rivers was owned by the state and could be managed in without regard to the public in the sole prerogative the state Again this did not make fish state property. Wild fish remained unowned. The state owned the exclusive right to hunt wild fish.

Early South African law of fishes

South African fisheries law dates back to the arrival of Jan van Riebeek who in 1652 issued a placaten making it unlawful to catch fish without a permit. This applied to both freshwater and marine fish. Fishing in waters falling under the Dutch East India Company remained tightly and sometimes corruptly controlled until 1795 when the British first took control of Cape of Good Hope and promptly set aside all the fishing laws previously imposed by the Dutch.

Ancient English fisheries law differed from the Dutch common law in that both sea and freshwater fisheries originally fell under the regalia of the State. However, the king's right to exploit the fishery eroded over time. First the introduction of Roman Law in the 12th century made the right to fish the sea and seashore a public right. Later the reforms that started with Magna Carta transferred the right to fish freshwaters to the land owner. That remains the position to this day. The UK government levies a rod licence as a conservation tax rather than as the grant of a right to fish inland waters.

This English law approach to fisheries management has influenced the development of South African common law related to fishes ever since. Thus, today our marine fisheries are managed on the basis that everyone has a right to the marine fishery, subject only to government's obligation to regulate that right to ensure sustainable and equitable use. Likewise, the right to our freshwater fishery reposes in the landowner again subject only to government's obligation to regulate that right to ensure sustainable and equitable use. Fish themselves remain unowned for so long as they roam free in the wild.

It should come as no surprise, therefore, that pre-1994 South African fresh water fisheries laws all make it an offense to fish on property without the landowner's consent. Likewise, it follows that government regulates these rights of use using environmental laws rather than laws that control the fishery or the right to fish.

You would be mistaken, however, in thinking that the situation on the ground is that simple. Fresh water fisheries were once a provincial competency that was addressed in terms of the environmental laws of the province or so called independent homelands. The Constitution, perhaps unwisely, differentiates between fisheries management, which is an exclusively national legislative competency, and environmental management which is shared between the national and provincial governments. The resultant confusion is magnified in that no distinction is made between the wild fishery and fish farming. This has hugely detrimental implications for aquaculture.

Fortunately, the complexities of that debate are beyond the scope of this article. I also ignore the additional complexities that are created when provincial governments have replaced the pre-1994 conservation laws with their own enactments often in contravention of the Constitution and national environmental laws. However, I won't get into that debate. I will assume, as our law does, that these laws are lawful until their legality is successfully challenged in court.

The existing situation is complex enough with different rules applying in different provinces and even within provinces given the different rules that applied to the old "independent homelands".

In simple terms:

It is an offence to fish on any land in South Africa without the permission of the landowner.

It is an offence to fish for any fresh water fish anywhere in South Africa without a licence outside the former Ciskei and KwaZulu-Natal without a licence, unless:

In the Western Cape, Eastern Cape, Free State, Gauteng, North West, Limpopo and Mpumalanga: you are the landowner or a relative or an employee of the landowner.

In the Northern Cape: the waters being fished are surrounded by the land of a single landowner.

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A licence is only required in the former Ciskei in respect of trout. A licence is only required within what was the former KwaZulu in respect of bass and trout. A licence is required for all fish species elsewhere in KwaZulu-Natal other than those parts of the Ingwavuma and Ubombo districts that are not protected areas. However, neither KZN nor the Eastern Cape governments enforce these laws.

A fishing licence and the permission of the landowner may not be enough to legally entitle one to fish. Some freshwater angling species, notably the largemouth yellowfish, are listed as threatened or protected species under the national TOPS Regulations. Fishing falls within the definition of a restricted activity in terms of the National Biodiversity Management Act, 2004 which means that one must obtain a permit from the Minister of Environmental Affairs before one can target largemouth yellowfish. Furthermore, some provinces have controversially adopted their own lists of threatened or protected species. While the legality of these enactments is open to considerable doubt, further permits may be required in terms of these provincial enactments as well even in respect of the same fish.

That said, those targeting largemouth in the Northern Cape, may rest easy. The Northern Cape Nature Conservation Act does not require a permit if a listed fish species is caught and immediately released. The same is not true of the Western Cape.

You should be thoroughly confused by now. But it gets worse. Just try and obtain the necessary permits and licences. That is a bewildering subject in and of itself.

Which takes me back to the poor angler fishing the Vaal river where it separates the old Transvaal from the Free State. Many of the properties on the Transvaal side stop at the river bank, whereas those on the Free State side stop in the middle of the river as is normally the case. The little bit of the old Transvaal that lies between the river bank and middle of the river technically belongs to the state. The adjacent land owner cannot give you permission to fish on that land. And if your fly drifts onto the Free State side of the river you commit an offence. Hence the prevalence of angry shotgun toting Free Sate farmers on their side of the river.

This is a law in urgent need of reform. However, the opposite is in fact happening. National and Provincial environmental and fisheries authorities are presently engaged in an orgy of law making, much of it unlawful, all of which is designed to make the legal situation even more complex than it already is.

It is very likely that these measures will increasing erode the preferred rights landowners enjoy to the resource. Indeed, it is one of the stated goals set out in governments fresh water fisheries policy. A rethink of this old English rule is easy to justify, given the skewed racial distribution of privately-owned land in this country.

However, state ownership of the resource is just as easily criticised. State control of the marine fisheries resource has seen that plunder of that resource in an unbridled exercise of cadre enrichment and rent seeking that has been going on for over 100 years. State control of the freshwater resource is unlikely to result in a different outcome.

It is not surprising that most anglers ignore the law. The law such as it is as incomprehensible as it is unworkable. Worse still, it is not going to get better. This does not bode well for the management of South Africa's freshwater fishery or the value chains which this fishery supports.