

## **Why the obsession with custodianship in land reform?**

The Ad Hoc Committee tasked with amending section 25 of the Constitution has published a revised Bill for public comments. Whilst the revised Bill did not include proposals to nationalise all land through the principle of state custodianship, which was widely discussed a few months ago, it still contained a watered-down version that brings an entirely new set of challenges. Some background is needed.

When the Committee was originally due to present its proposals to the National Assembly at the end of May, an extension was sought to allow political parties to consult and attempt to reach an agreement on the contested proposals. Perhaps the most controversial proposal made by a political party represented in the Committee was to place all land in South Africa under the Custodianship of the state.

The terminology is important as water, mineral resources and biodiversity in South Africa is already the common heritage of all South Africans, with the state acting as the custodian. In a landmark ruling by the Constitutional Court in 2013, it was held that minerals in South Africa do not belong to the state (and were hence not expropriated or nationalised in the classical sense) because the state cannot use it for its own benefit. It merely manages mineral resources on behalf of the people to ensure equitable access. This ruling did not escape the attention of land activists. Hence, the proposal was made to place all land in the Custodianship of the state, a form of 'soft' nationalisation that would require the state to manage land to ensure equitable access.

Land is fundamentally different from minerals or water because it is not a consumable resource and has always been the subject of private ownership. Perhaps for these reasons, the majority of the members in the Ad Hoc committee rejected the proposal. However, the Bill endorsed by the majority of the Committee still contains a proposal mixing state custodianship with the land redistribution programme.

Section 25 (5) of the Constitution places an obligation of the state, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis. In plain language, it means the state must facilitate land redistribution. The latest version of the Bill seeks to amend this by requiring the state to foster conditions that enable state custodianship of 'certain land' for citizens to gain access to land on an equitable basis. If one reads through the jargon, it means that land redistribution must take place through the state, gaining ownership over more land in South Africa.

To a large extent, this is what is already taking place in South Africa. The state purchases property from the open market and then allocates it to a beneficiary in the form of a lease agreement. Unfortunately, this form of land redistribution has proven to be very inefficient and resulted in numerous unintended consequences. Several research studies and advisory committees have pinpointed the state's reluctance to transfer ownership to new-age farmers as the root cause of several problems, including the struggles to access to finance and redistributed farms falling out of production. With these shortcomings plain for anyone to see, why would a proposal be made to entrench state ownership as the only way to effect redistribution?

This is not a question to which this writer has an answer. Perhaps it is a political compromise? Perhaps it is rooted in an idealist vision where the developmental state would be in a better

position than the market to ensure that land is distributed evenly and used productively by all? Unfortunately, this ideology, however noble, is far removed from reality. At worst, a centralised system where the state has complete control can lend itself to nepotism or favouritism. At best, the state will always be a bureaucratic animal that is far removed from the day-to-day decisions that a land reform beneficiary needs to make to run a successful business. Instead of moulding the custodianship concept into something that the majority may find palatable, the policy direction should focus on real empowerment that allows the beneficiary more than mere access. Real empowerment involves devolving the decision-making ability to the lowest possible level. If land reform is to result in meaningful empowerment, then it must come with authority to make meaningful decisions. Introducing the word 'custodianship' is likely to do more harm than good and a far better alternative would be to leave the legal provisions be and focus on rigorous implementation.