

**Anthea-Lee September-  
Van Huffel**

Lecturer, University of the  
Free State, South Africa  
ORCID: <https://orcid.org/0000-0003-1179-4144>

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# AN IDEOLOGICAL LAND REFORM POLICY SHIFT OF STATE CUSTODIANSHIP AND 'TRANSFORMING THE RURAL LAND ECONOMY'

## SUMMARY

In customary landholding practices, land is regarded as more than an asset of economic value to be owned. African people's rights in land and other natural resources exceed the idea of mere possession. To African rural landholders, land is not only a material resource for agricultural production, nor is the commercialisation and commoditisation of land the primary driving force for most of the customary landholding communities, even though the land is productively used. This broader conceptualisation of the social function of land beyond the economic aligns with modern property law on the proprietary function of property. However, excessive state limitations imposed on customary land tenure can hinder not only economically valuable property rights, but also other rights to social, cultural, and ontological resources embodied in the spirituality of African communities. Security of tenure for land reform beneficiaries cannot be secondary to commercialisation and commoditisation of the rural land economy in the national interest. Commercialisation and commoditisation are the by-products of recognised, protected, and enforceable property rights and not the "prerequisites" or "qualifiers" for secure land tenure. This article critically discusses the state custodial approach reflected in South African land reform law and policy that places an overemphasis on private property capitalism above the constitutional mandate of security of land tenure. It is argued that, if not carefully formulated, transformative land reform law and policy can be conduits for a state custodianship approach that inadvertently reproduces apartheid-like ideology and preoccupations.

**Keywords:** Secure tenure, state custodianship, National Development Plan 2030, transformative land reform law and policy.



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## 1. INTRODUCTION

The original purpose of redistribution, as introduced by the African National Congress (ANC) in 1997, was to provide the rural poor with land to improve their income and quality of life.<sup>1</sup> For this reason, the White Paper on Land Policy<sup>2</sup> focused specifically on eliminating unequal landownership, addressing historical injustices caused by land dispossessions,<sup>3</sup> and financing market-led redistribution without the state becoming the landowner. The White Paper on Land Policy required well-defined rights, including the recognition of *de facto* rights in a unitary system of land rights, and importantly, a choice of tenure system consistent with the constitutional principles of democracy, equality, and due process.<sup>4</sup> Therefore, the structural transformation of landownership in South Africa was key to the ANC's ideological goals of national development.<sup>5</sup> The ANC's land policies recognised established occupants as the "rightful owners" of communal land.<sup>6</sup> Clearly, the present-day continued retention of ownership rights by the state as custodian in perpetuity is contrary to the initial intent of the country's land policy.

As early as 1994 in the South African democracy, the Reconstruction and Development Programme (RDP) introduced an integrated socio-economic policy framework that was characterised by socialist policy objectives. The RDP sought to address the historical denial of access to land, and to redistribute land to those who were deprived thereof or could not afford it. This was done to ensure security of tenure for the poor and most vulnerable in rural areas. Moreover, the provision of ownership to those previously denied the choice was considered one of the most important means of raising income levels and eradicating poverty.<sup>7</sup> Consequently, increased agricultural production on land was understood as one of the by-products of security of tenure.

In what appears to be a clear ideological shift away from transfer of ownership or comprehensive well-defined land tenure rights, land reform law and policy sets agricultural production for the purpose of commercialisation as a prerequisite or qualifier for secure land tenure in customary landholding

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1 Kloppers & Pienaar 2014:690-693. Department of Land Affairs 1997.

2 Department of Land Affairs 1997.

3 For instance, under the *Black Authorities Act* 68/1951, *Development Trust and Land Act* 18/1936, *Group Areas Act* 41/1950, *Native Land Act* 27/1913, and *Native Trust and Land Act* 18/1936.

4 Pope 2010:336.

5 Greffrath "Land reform, political instability and commercial agriculture in South Africa: An assessment", <https://rebrand.ly/t4kbz14> (accessed on 15 July 2022).

6 Claassens 2014:771.

7 Early ANC socialist land reform policy was premised on social justice. Social justice means redistribution. Land redistribution to previously disadvantaged persons centred on their land ownership as the solution. It was apparent that the common law property system was structured in favour of ownership as the strongest form of tenure. Therefore, the rationale was that improved security of tenure was best achieved by affording previously disadvantaged persons with ownership, which, in turn, would lead to the enjoyment of better socio-economic standing through stronger, more protected property rights that afford greater economic opportunities. See Kloppers & Pienaar 2014:688-691.

settings. While this approach may increase agricultural production for the select few, it is unlikely to secure the land tenure rights of the majority of rural landholders and occupants, due to the exclusionary, conditional basis on which it is founded. The overemphasis on commercial agricultural production as the gold standard privileges and protects an elite that have the resources for commercial agricultural production. By treating commercialisation as a prerequisite or qualifying factor for secure land tenure, the state entrenches existing patterns of landholding. By making land reform tenure conditional, the state is able to retain regulatory control over land that should be restored to those previously dispossessed thereof.

First, the article illustrates the state's conceptualisation of state custodianship as expressed in land policy. Secondly, the article discusses the state's shift from an ideological position that prioritises the transfer and strengthening of property rights, to one of commercial economy, as a prerequisite for security of tenure. It is argued that, at the heart of this ideological shift, is a state custodianship approach that entrenches apartheid-like undertones of perpetual tenancy and private property capitalism. Thirdly, the article critically analyses the role played by a state custodianship approach in the drive to "transform the rural land economy", in lieu of the National Development Plan 2030 (NDP 2030).<sup>8</sup>

## 2. A STATE CUSTODIANSHIP APPROACH TO RURAL LAND HOLDINGS

The state's role in respect of land has been predictable and conventional. As public trustee, it is responsible for preserving, conserving, and protecting the country's natural resources in the environment, including land.<sup>9</sup> The state is the trustee of land in its sovereign capacity, but it has not expressly legislated its trusteeship or custodianship of land as a natural resource or national asset.<sup>10</sup> Recently proposed land reform laws and policies introduce references to "state custodianship of all agricultural land" as part of the state's sovereignty over land as a "national asset"<sup>11</sup> and the "common heritage of all the people of South Africa" in ways that mimic state custodianship in the *Mineral Petroleum Resources Development Act* (hereinafter, the *MPRDA*).<sup>12</sup>

State custodianship of land has not been enacted on the same basis as state custodianship of mineral resources in the *MPRDA*. Nonetheless, it is

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8 National Planning Commission 2012.

9 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 ZAGPHC 132: par. 19.

10 The effect of the statutory incorporation of water as a natural resource in the *National Water Act* 36/1998 and that of mineral and petroleum resources in the *Mineral Petroleum and Resources Development Act* 28/2002 is that these natural resources are now under public trusteeship and state custodianship, respectively. The resources have been removed from the private property regime and are now regulated under a public property regime governed by statute.

11 Department of Rural Development and Land Reform 2011:1.

12 *Mineral Petroleum and Resources Development Act* 28/2002.

argued that the inclusion of the mechanism of “state custodianship” in draft land reform laws,<sup>13</sup> alongside ideological nuances of pre-constitutional custodial land policy, have real implications for land redistribution and security of tenure. However, there is a hesitancy to expressly incorporate state custodianship in land reform statutes that is attributable to the complex nature of land rights, deeply social function of land, and the oppositional party backlash following the failed attempt to include it in proposed constitutional amendments.<sup>14</sup> If viewed comprehensively, the land reform policy points to a custodianship approach to specifically customary landholding structures in ways that do not apply to pre-constitutional landownership.

For example, the Preservation and Development of Agricultural Land Framework Policy (hereinafter, the Agricultural Land Framework Policy) describes the state’s role as “custodian of natural agricultural resources” in South Africa, with the Department of Agriculture, Forestry and Fisheries being primarily responsible for the preservation of agricultural land and its “beneficial use”, and for developing and implementing policies to conserve and protect agricultural land.<sup>15</sup> It further states that agricultural matters relating to the “use of agricultural land” fall in the national sphere of government.<sup>16</sup> The Agricultural Land Framework Policy contains custodial rhetoric in its overarching principles to justify a state custodianship approach to land, similar to that found in the *MPRDA*.<sup>17</sup>

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13 Greffrath “Land reform, political instability and commercial agriculture in South Africa: An assessment”, <https://rebrand.ly/t4kbzl4> (accessed on 12 July 2022). The *Preservation and Development of Agricultural Land Framework Bill* echoes the *MPRDA* by proposing that agricultural land is “the common heritage of all the people of South Africa” and that the Department is the “custodian” thereof for the benefit of all South Africans.

14 Parliamentary Monitoring Group “Report of the second call for written submissions on the revised *Constitution Eighteenth Amendment Bill* (8 September 2021)”, <https://pmg.org.za/taled-committee-report/4706/> (accessed on 21 February 2022). “The concept of state custodianship was objected to on the basis that it must be clearly defined and clarified with clear roles and responsibilities. The amendments must take into account the people’s right to own property. Therefore, full state custodianship of land was rejected as an unworkable solution to the land question in South Africa. The full state custodianship of land was likened to the Ingonyama Trust model which was described as dysfunctional and therefore cannot be replicated throughout the country. In this model, people are subjected to eternal leasing of land thus depriving them of full ownership of land. Further, the recent Ingonyama Trust judgment highlights the dangers inherent in a system of centralised land ownership, where one relies on the state to act in [one’s] best interests. State custodianship may also place an impossible burden on the state as property rights should not be seen in isolation.”

15 Department of Rural Development and Land Reform 2014:26.

16 Department of Rural Development and Land Reform 2014:40.

17 Parliament of the Republic of South Africa 2017:503-507. “In order to advance transformation, the *MPRDA* established that mineral resources are not owned by landowners, ... but are the common heritage of all South Africans, with the state as the custodian.”

Insight into these overarching principles is useful for understanding the way in which the state views its role in relation to land as a national asset. Agricultural land is contextualised as an integral part of the environment. The unsustainable exploitation of natural resources is highlighted as phenomena that are common to all natural resources, but that pose a particular threat to the future productivity of agricultural land. According to the state, the occurrence of exploitation is evidence of a “lack of accountability for land use decisions (by farmers) that affect the availability and viability of agricultural land”.<sup>18</sup> This is compounded by the fact that agricultural land is finite and irreplaceable.<sup>19</sup> These statements create the impression that farmers (landholders) make poor land-use decisions and are unable to properly exercise their property rights, leaving the state (as custodian) with no choice but to intervene to save the resource.<sup>20</sup>

According to the Agricultural Land Framework Policy, it is the responsibility of the state, as “custodian of all agricultural land”, to safeguard it for the benefit of present and future generations. The state must do so, by ensuring the endurance of the land resource and securing its ecologically sustainable development and use, while promoting justifiable economic and social development.<sup>21</sup> However, the core principles of the policy are based on the management of ownership and land-use rights in specifically *common areas*, *state land*, and *protected areas*.<sup>22</sup> The policy strongly protects apartheid landownership (freehold) patterns and critiques the incorrect application of the *Subdivision of Agricultural Land Act 70* of 1970 for endangering food security, by allowing further subdivision of (commercial) agricultural land.<sup>23</sup>

Hence, the environmental stewardship<sup>24</sup> envisaged by the state links any access and use of land directly to agricultural production. It stands to reason that a primary focus on agricultural production, as the predominant feature for

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18 Department of Rural Development and Land Reform 2014:22-23.

19 Department of Rural Development and Land Reform 2014:15.

20 Atkinson 2009:265-269. “The duty of the white man was ‘to civilise as well as control, to develop as well as protect’. The paternalist approach is characterised by strongly ‘protective’ elements and made explicit reference to the patriarchal idiom of ‘trusteeship’.”

21 Department of Rural Development and Land Reform 2014:40

22 Department of Rural Development and Land Reform 2014:31.

23 PLAAS 2015:5. “Preventing subdivision has no basis – it is discriminatory and based on fallacies about inefficient smallholder farming. There is an inadequate supply of small-scale farmers imposed by a legislative framework and this bill [the *Preservation and Development of Agricultural Land Framework Bill 2014*] will simply cement that.”

24 Department of Rural Development and Land Reform 2014:47-50. “The new framework will spell out the responsibilities of owners, occupiers and users of agricultural land, such as compulsory participation in existing and future programmes, which will include the Agricultural Production Stewardship Programme; and that environmental stewardship must be an integral part of effective agricultural land preservation programmes, plans and policies.”

land access and use, means that the possible subdivision of privately owned commercial farms into smaller farming units for redistribution is inconceivable.<sup>25</sup> Consequently, apartheid landownership structures are entrenched, and the social function of property is devalued.<sup>26</sup>

### 3. COMMERCIALISATION AND COMMODITISATION AS PREREQUISITES FOR SECURE TENURE RIGHTS

The commercialisation and commoditisation of rural land played a key role in the colonial-apartheid eras. Land was viewed as a commodity and a source of economic wealth, especially after the discovery of gold and diamonds. It was in the apartheid state's interest to institutionalise its custodianship of land, in order to control mineral resources.<sup>27</sup> Recent land policy reveals nuances of a similar default to the commoditisation of key assets and the retention of exclusionary barriers accessible only to the wealthy elite.<sup>28</sup> This point is elaborated on below. It is the state's constitutional mandate to carry out effective redistribution and provide secure land rights to previously disadvantaged persons. Tenure reform was intended to restore a minimum of security and permanence, reinforce the land rights of those whose rights were neglected under apartheid, formalise the land rights of those whose land occupation justified it, and establish more suitable land rights for those without secure tenure.<sup>29</sup> The treatment of land held under customary law and land reform tenure as commodities that are only secure and productive if the landholders are engaged in commercial agriculture is contrary to the constitutional mandate.

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25 Van der Walt 2001:286. "By and large, redistribution policies and laws function within the common law conceptual and institutional structures that date back to the days of apartheid, the difference being that the structures of racial discrimination have been removed and that access to land is extended to people and communities previously excluded from it."

26 See Department of Rural Development and Land Reform 2011:2. The conceptualisation of the social function of land beyond simply the economic aligns with modern property law which is that land has more than merely an economic function, but that it fulfils an important social function in that it supports social cohesion and should not be used simply to increase the interests of the rich at the expense of the poor.

27 Ngcukaitobi 2021:21-33.

28 Parliament of the Republic of South Africa 2017:55. "[R]ecent policy appears to have defaulted to the commercial farming model as the only viable and appropriate form of agricultural production ... Instead of focusing on changing the structure of the agrarian and mining economy to include [benefit] those who were marginalised in the past, the emphasis seems to have shifted to retaining the barriers that lock poor people out and preserve key assets for a small elite." Liebrand *et al.* 2012:775; *South African Association for Water User Associations v Minister of Water and Sanitation* (71913/2018) [2020].

29 Van der Walt 2001:287.

The Department of Rural Development and Land Reform's Policy for the Recapitalisation and Development Programme (hereinafter, the Recapitalisation Policy)<sup>30</sup> was formulated as part of the state's review and reformulation of land policy and may be read in tandem with the Green Paper on Land Reform.<sup>31</sup> The Recapitalisation Policy expresses the change in political rhetoric in ANC land policy. It introduces the "participation in the optimal utilisation of land" as related to the land reform objective of addressing historical exclusion and equitable access to land. It further explains the state's interpretation of sec. 25(4) of the *Constitution of the Republic of South Africa* as follows:

Section 25(4) talks to *national interest* and states that "For purposes of this (a) the public interest includes the nations [*sic*] commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources, and (b) property is not limited to land. Implied here is that national interests take precedence and that limitations and exemptions to such limitations of access, will be in furtherance of national interests."<sup>32</sup>

The Recapitalisation Policy focuses on Black emerging farmers and on supporting this group of previously disadvantaged persons to run successful agribusinesses.<sup>33</sup> The overarching strategy for the Recapitalisation Policy is found in the Comprehensive Rural Development Programme (CRDP),<sup>34</sup> which Cabinet adopted in 2009. The CRDP strategy is one of "agrarian transformation" which denotes "a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land". The structural transformation of all rural land held by communities is in the "national interest", according to the state's interpretation of sec. 25(4). Further, according to the Green Paper on Land Reform, the state, as custodian, will manage rural land tenure,<sup>35</sup> which will be predominantly leasehold<sup>36</sup> and, therefore, not landownership.

Evidently, the strong socialist ideology that concentrated on securing tenure for the poor and most vulnerable is no longer the central theme for land reform. For example, the state's right to withdraw redistributed land

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30 Department of Rural Development and Land Reform 2013.

31 Department of Rural Development and Land Reform 2011.

32 Department of Rural Development and Land Reform 2013:6-7 (own emphasis).

33 Department of Rural Development and Land Reform 2013:10. "It is the intention of the policy that black emerging farmers are deliberately ushered into the agricultural value-chain as quickly as is possible, through this state intervention. This is a strategic farmer support policy by the developmental state."

34 Department of Rural Development and Land Reform 2009.

35 Pienaar 2014:655; Department of Rural Development and Land Reform 2011: clause 6.5.2; Erlank 2014:0628.

36 Erlank 2014:0617, 0625; Pope 2010:334. The White Paper on Land Policy boldly stated that a fundamental principle of tenure reform was that there should be a unitary system of land rights.

from previously disadvantaged persons (at will), if not productively used,<sup>37</sup> demonstrates its interventionist approach as the custodian of land in the national interest. Land reform statutes that provide land beneficiaries and occupants with perpetual tenancy only formalise apartheid custodianship limitations on Black landownership. None of the recent land policies seem to reflect the initial intent, namely the *temporary* holding of land for the *certain* restitution or redistribution back to claimants or beneficiaries previously dispossessed.<sup>38</sup> What is observed instead is the state's regulatory retention of substantive entitlements as 'custodian' of communal land.

Such an overly custodial approach implies an ongoing involvement in the property rights of customary landholders and creates the impression that land reform beneficiaries are somehow incapable of responsible decision-making, ownership title, or ownership-like entitlements. It simply continues the colonial-apartheid belief that the most appropriate form of property rights for indigenous people is long-term tenancy.<sup>39</sup> Therefore, the state, as their guardian, feels compelled to retain ownership, in order to regulate their access to, and use of land, on their behalf, in perpetuity. Further, some citizens are entitled and able to retain ownership, yet others are not thereby creating a dual-property system based on production.

It is not surprising then that the regulation of land access, use, and ownership in South Africa was a key issue in the Land Reform Policy Discussion Document of 2012.<sup>40</sup> According to this document, the state's land reform policy objectives included enhancing "regulation systems" that promote "optimal land utilization", ensuring that property rights are supported by an

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37 Kloppers & Pienaar 2014; Van der Walt 2001:287. "Tenure reform is the category of land reform where one would have expected the most imaginative, ground-breaking changes, since it involves the legal transformation of the apartheid legal system of weak, insecure and generally unsuitable black land rights into more secure or more suitable rights ... One of the greatest problems caused by apartheid land law is that black land rights both in urban and rural areas, were cast in legal forms that rendered them permanently insecure, weak, and open to manipulation that characterized the forced removals and evictions of the apartheid era. In a sense, black land rights under apartheid land law were caught up in a politically inspired and racially defined feudal system, which meant that black land holders and occupiers could never be sure that their overlords (either white state officials or black tribal officials) would not retract or amend the precarious privilege under which the land was held."

38 Kloppers & Pienaar 2014:687. "Section 12 of the [Abolition of Racially Based Land Measures] Act [108 of 1991] contained transitional measures regarding the phasing out of the South African Development Trust. Since the Trust owned the majority of 'native' land, transitional measures had to be put in place to facilitate the transfer of the land out of the Trust to other state departments or institutions established to take transfer of the land."

39 Department of Rural Development and Land Reform 2011. See also Hall & Kepe 2017:4, whose case studies found a "stark contrast between proclaimed policy aims and realities on the ground". They state that "[a]lthough government policy emphasises the need for tenure security and aims to achieve this through the provision of long-term leases, we found that beneficiaries did not have leases in any of our case study projects."

40 Department of Rural Development and Land Reform 2012:2.



effective “governance system”, and the proper configuration of the “multi-form land tenure system into a single and coherent four-tier system”, while “improving the existing customary and statutory tenures to become drivers of economic development”.<sup>41</sup> Judging by these objectives, current state land policy anticipates a long-lasting state regulation of rural land within a single statutory governance system. However, such an approach of perpetual and indefinite custodianship ignores the reality that land taken during apartheid was transferred to the democratic state to redress the past injustice of large-scale dispossessions.<sup>42</sup> As such, any reconfiguration of landholding structures requires *both* consultation with, and the consent of the land rights holders.<sup>43</sup>

In addition, the kind of state custodianship model described in the Land Reform Policy Discussion Document was previously applied only in the former homelands during apartheid,<sup>44</sup> which was also justified as being in the “national interest”.<sup>45</sup> It now appears that the same custodial model is to be extended

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41 Department of Rural Development and Land Reform 2012:6. See also Pope 2010:335. “If a separate register is envisaged, then the political implications of entrenching land rights that are officially different should be carefully considered for fear of creating new perceptions of inferiority.”

42 Kepe 2012:395. “For many people, the official end of apartheid would have been meaningless to those who suffered land dispossession if there was no process of restoring land rights. The Restitution of Land Rights Act of 1994 became the first law passed by the post-apartheid government.” Bundy 1990:3-13.

43 Weinberg 2015:18. “Much of this land is held in trust by the state on behalf of specific groups of people who were prohibited by law from owning it outright because of their race ... There are a variety of such trust arrangements, some providing rights equivalent to ownership for groups who had purchased the land historically, others acknowledging long-term historical occupation of the land, and others providing lesser occupation rights ... The new policies try to convert such rights to conditional leasehold or ‘institutional use rights’.”

44 Kloppers & Pienaar 2014:682-684. “The *Native Trust and Land Act* made provision for the establishment of the South African Native Trust, a state agency to administer trust land ... The Act abolished individual land ownership by black people and introduced trust tenure through the creation of the South African Development Trust ... Vested in the Trust was land reserved for the occupation of natives ...” The researchers go on to explain that the 1950 and 1966 versions of the *Group Areas Act* were used to forcibly remove Black, Coloured, and Indian people from designated White areas. The function was to control ownership of immovable property, by prohibiting ownership and restricting the occupation and use of land and premises on racial grounds. Mass evictions and displacements followed, as did the introduction of a permit system, and policing of access to controlled White areas.

45 Kloppers & Pienaar 2014:683. “In order to achieve the objectives of the [Native Trust and Land] Act, section 13 empowered the trustees of the Trust [the state] to expropriate land owned by natives outside a scheduled area ... for any ... reason which would promote public welfare or be in the public interest.”

to all rural land made available through restitution and redistribution.<sup>46</sup> In essence, land is treated more as a commodity than a resource that has different meaning<sup>47</sup> and functions, for different communities, in different regions. This approach requires the optimal productive and commercial use of land, provides restrictive landholding constructs, with limited land rights, and is highly administrative and dependent on state custodianship.<sup>48</sup> This is a far cry from the initial approach in the White Paper on Land Reform,<sup>49</sup> which promised access to land as a “basic human need” and proposed private ownership as the solution.<sup>50</sup>

The ANC’s earlier socialist ideology was based on its National Democratic Revolution and was articulated as “a process of struggle that seeks to transfer power to the people and transform society into a non-racial, non-sexist, united, democratic one and changes the manner in which wealth is shared, in order to benefit all the people”.<sup>51</sup> This is not to say that the earlier land policy did not recognise land as a national asset and resource for economic activity. However, the aim was never the commercialisation and commoditisation of all agricultural land, but the preservation of human dignity for all. The economic wealth was concentrated on funding social programmes and the attainment of human dignity for all South Africans.<sup>52</sup>

The state describes its new approach to land reform as “autonomy-fostering service delivery”, insisting that land reform should not be understood as “just another social transfer where benefitting citizens receive government largesse”, but a vehicle “clearing the way for previously marginalised individuals

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46 Parliament of the Republic of South Africa 2017:54. “The State Land Lease and Disposal policy, and the CPA [Communal Property Association] Amendment Bill default to the model for state trusteeship put in place by the Development Trust and Land Act of 1936 as the most appropriate form of land rights for beneficiaries of land reform. This model previously applied only in the former homelands, but now appears to have been extended to all land made available through restitution and redistribution.”

47 Kepe 2012:407. See also Hall & Kepe 2017:8. “[L]and reform in the past 20 years has gone from prioritising secure tenure as a basis for poor black South Africans to make their own land-use decisions to a highly prescriptive managerial [state custodianship] approach which contributes to the privileging of sustaining commercial land use over providing secure tenure and preference for wealthy beneficiaries or agribusinesses. This ... has altered the foundational logic of redistribution.”

48 Pope 2010:337.

49 RSA 1991.

50 Pienaar 2011:33. “The point of departure of the 1991 White Paper was that access to land was a basic human need and that a system of free enterprise and private ownership was appropriate to fulfil this need.”

51 Greffrath “Land reform, political instability and commercial agriculture in South Africa: An assessment”, <https://rebrand.ly/t4kbzl4> (accessed on 12 July 2022).

52 Greffrath “Land reform, political instability and commercial agriculture in South Africa: An assessment” <https://rebrand.ly/t4kbzl4> (accessed on 12 July 2022); African National Congress “Tasks of the NDR and the mobilisation of the motive forces”, <https://www.anc1912.org.za/1st-ngc-tasks-of-the-ndr-and-the-mobilisation-of-the-motive-forces/> (accessed on 10 July 2022).

to be full economic and social participants in the South African Project”.<sup>53</sup> Hall and Kepe suggest that, contrary to its role as trustee or custodian, the state is playing a more interventionist role by purchasing land itself. Yet the state, as public trustee or custodian of all South Africa’s natural resources, is not meant to be a competitor or beneficiary in land reform. The capitalist logic of land reform has gone from market participation (to acquire land) to expectations of commercial production (to use the land) in ways that militate against secure land access for the poor.<sup>54</sup> However, instead of challenging the supremacy of private property structures, the state is becoming a significant player in the land market.

It is apparent that recent land reform laws and policies indicate that the state’s approach to achieving land redistribution and security of tenure has become “functionally and discursively” disconnected from the sociopolitical context of dispossession it was intended to redress.<sup>55</sup> Both public and private sector participation is essential for the state to undo the systemic effects of the apartheid exclusionary property structure.

This is particularly so for the transformation of the rural landscape, as the bulk of agrarian land remains privately or state-owned.<sup>56</sup> Some academics hold the view that South Africa is far from coordinating or even coercing private capital to commit to a concerted programme of industrial expansion and diversification because the interests of private capital have predominated over development goals and that fostering a purely exclusive relationship between business and the state may lead to cronyism between political and business elites.<sup>57</sup>

#### 4. TRANSFORMING THE RURAL LAND ECONOMY

The state, through the Department of Agriculture, Land Reform and Rural Development (DALRRD) must interpret secs. 25(5) and 25(6) of the *Constitution of the Republic of South Africa* in a manner that will best achieve

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53 Department of Rural Development and Land Reform 2012:3.

54 Hall & Kepe 2017:8.

55 Pope 2010:339-340, citing Okoth-Ogendo 2008, states that land fallacies in respect of indigenous social and governance structures, mostly stemming from the colonial and apartheid era, served the apartheid regime’s construct for the separation of black and white landownership and land use. “[T]he persistent tenure insecurity of indigenous law is not inherent to that system but, rather, is an inevitable and insidious consequence of the ‘dislocation of the indigenous systems from their social and institutional context that defines and sustains them’.”

56 Weinberg 2013:36. “As the nominal owner and trustee of most communal land, the state has a fiduciary duty to act in the best interests (and not on behalf) of rural people. To do so it must relinquish its decision-making and landownership power to rural people.” Parliament of the Republic of South Africa “The National Development Plan unpacked”, <https://rebrand.ly/9u3iz2i> (accessed on 25 July 2022). The NDP sets out ambitious goals for poverty reduction, economic growth, economic transformation, and job creation, and the private sector has a major role to play in achieving these objectives.

57 Fine 2010:175; Liebenberg 2012:1-29.

the constitutional objectives contained in those prescripts, namely to take reasonable legislative and other measures to foster conditions to enable citizens to gain access to land on an equitable basis,<sup>68</sup> and to provide legally secure tenure to those with legally insecure tenure as a result of past apartheid laws or practices.<sup>59</sup>

To realise the vision of its *Constitution*, South Africa needs transformation<sup>60</sup> to pave the way for inclusive economic growth and development. Economic growth without transformation only increases the divide and inequitable patterns of wealth.<sup>61</sup> Achieving both transformation and inclusive economic growth requires a deliberate effort to empower previously excluded segments of society through devices such as the protection of socio-economic rights and other freedoms aimed at attaining social justice. It also requires society to address the glaring forms of status subordination based on systemic patterns of social and economic disadvantage.<sup>62</sup> This is bound to create points of conflict within state departments that largely retain the power over policy and expenditure.<sup>63</sup> However, the alternative would be to default to ideologies of exaggerated custodianship that, in practice, benefits only a select privileged few.<sup>64</sup>

In response, in 2011, South Africa released its National Development Plan 2030 (NDP 2030),<sup>65</sup> positioning the document as a blueprint for tackling South Africa's economic inequalities, and it was adopted by Cabinet in 2012.<sup>66</sup> The NDP 2030 offers a long-term strategic plan that identifies the role of different sectors and provides a national guideline or vision that requires the participation and cooperation of civil society as a whole to succeed and

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58 *Constitution of the Republic of South Africa*:sec. 25(5); Kloppers & Pienaar 2014:677-678.

59 *Constitution of the Republic of South Africa*:sec. 25(6); Kloppers & Pienaar 2014:677-678.

60 Klare 1998:150. "[A] long-term project of constitutional enactment, interpretation, and enforcement committed (... in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction."

61 National Treasury 2017:1.

62 Kibet & Fombad 2017:353. See also Phooko & Radebe 2016:307; Fraser & Honneth 2003:7-70.

63 Kibet & Fombad 2017:353; Pillay 2002:255-277.

64 Adams 2013:91-97; Hwedi 2001:19-31.

65 National Planning Commission 2012.

66 National Science and Technology Forum "The National Development Plan", <http://www.nstf.org.za/wp-content/uploads/2018/02/All-The-NDP.pdf> (accessed on 30 July 2022).

reap the benefits.<sup>67</sup> The overall aim of the NDP 2030 is that each sector must ensure that all South Africans attain a decent standard of living by eliminating poverty and reducing inequality.

Each sector must have clear overarching goals to reach this general aim, consensus on key obstacles, and a basis for decision-making on how best to use their limited resources to achieve the aim.<sup>68</sup> The NDP 2030 recognises the role of leadership and accountability, stating that “[p]olitical leadership is critical for effective implementation”.<sup>69</sup> South Africa is in the implementation stage of the NDP 2030, a process of breaking down the plan into key outputs and activities to be implemented by individual departments. For DALRRD, this means “transforming the rural land economy”.

#### 4.1 Creating an integrated and inclusive rural economy

In terms of land, the NDP 2030 provides “an integrated and inclusive rural economy” as the vision. The NDP continues the state custodial narrative with references to “South Africa, our country, is our land” and the “preservation of land for future generations”.<sup>70</sup> State custodianship is a legal mechanism intended to be used to minimise the unwanted systemic effects of inequality and to promote the national interest.<sup>71</sup> The vision for rural land is one with “better integration of the country’s rural areas, to be achieved through successful land reform, infrastructure development, job creation and poverty alleviation”.<sup>72</sup> Central to this vision is the “expansion of irrigated agriculture” as the driving force behind the transformation of the rural land economy.<sup>73</sup> The NDP 2030 proposes a very clear approach to rural land development that centres on agribusiness. While it refers to a “differentiated rural development strategy”, it very clearly prioritises commercial agribusiness.<sup>74</sup>

The rationale is that, through the optimal utilisation of rural land for agribusiness, local communities will benefit from the localised generation of capital, which can be used for quality basic services such as education,

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67 Parliament of the Republic of South Africa “The National Development Plan unpacked”, <https://rebrand.ly/9u3iz2i> (accessed on 25 July 2022). “High-level leadership meetings will be held regularly between government and business, government and labour, and government and civil society. These will provide a route for focused dialogue to discuss the contribution of each sector to the implementation of the NDP, identify blockages and develop a common understanding of how obstacles will be overcome. These high-level meetings will be underpinned by more focused stakeholder engagements ... to find solutions to specific challenges and construct frameworks that enable stakeholders to hold each other accountable.”

68 Parliament of the Republic of South Africa “The National Development Plan unpacked”, <https://rebrand.ly/9u3iz2i> (accessed on 25 July 2022).

69 Parliament of the Republic of South Africa “The National Development Plan unpacked”, <https://rebrand.ly/9u3iz2i> (accessed on 25 July 2022).

70 National Planning Commission 2012:21.

71 Singer 1996:142-144, 208.

72 National Planning Commission 2012:218.

73 National Planning Commission 2012:218.

74 National Planning Commission 2012:219.

healthcare, and public transport, and will enable people to develop the capabilities to seek economic opportunities.<sup>75</sup> The NDP 2030 suggests that this will contribute to the cross-sectoral aim of ensuring that all South Africans attain a decent standard of living by eliminating poverty and reducing inequality. In furtherance of the vision, the DALRRD has initiated the enactment of land reform laws and policies that target rural landholding for such economic development.

The NDP 2030 is intended to be ground-breaking for South Africa's agricultural economy, by actively transforming the rural landholding landscape to be more inclusive and to offer more opportunities for rural communities to participate fully in the economic, social, and political life of the country. Therefore, against the background of the NDP 2030, increased state intervention in rural land tenure can be expected which is justified by the state custodial approach found in land reform policy.

In addition, the NDP states that the priority for land reform will be the transfer of agricultural land to Black beneficiaries, without distorting land markets or business confidence in the agribusiness sector.<sup>76</sup> Evidently, market forces and confidence in agribusiness are determinants for the transfer of ownership rights to land reform beneficiaries.

It is clear from the NDP 2030 that community participation will largely depend on the state and its land policy. It foresees high-level meetings between government, business, labour, and civil society that will be underpinned by more "focused stakeholder" engagements. Solutions to challenges will be constructed during these "focused stakeholder" engagements.<sup>77</sup> Given the increasingly regulatory and interventionist custodial model of rural land governance, it is imperative that customary communities take an active role in all discussions that involve their land tenure rights.<sup>78</sup> Land has more than simply an economic function; it fulfils an important social function and results in social cohesion that is a direct function of access to land.<sup>79</sup> This is the only way for communities to be certain that land use decisions address their economic and social realities.

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75 National Planning Commission 2012:219.

76 National Planning Commission 2012:227; Weinberg 2015:19.

77 Parliament of the Republic of South Africa "The National Development Plan unpacked", <https://rebrand.ly/9u3iz2i> (accessed on 25 July 2022).

78 National Planning Commission 2012:219, which states that South Africa needs to use "underused" land in communal areas and land-reform projects for commercial production and give priority to successful irrigation farmers in communal areas.

79 Department of Rural Development and Land Reform 2011:2.

The NDP 2030 very clearly represents a shift from earlier state grant-based policies.<sup>80</sup> For this reason, the voices of land reform beneficiaries need to be strengthened, particularly during the implementation of changes to land tenure law and policy, as the plan is designed to bring about change over a period of nearly two decades.<sup>81</sup> The state will regulate all agricultural land as custodian<sup>82</sup> of the national (economic) development plan. According to the state, property, including natural resources, is a transforming institution that is central to market economies<sup>83</sup> and this locates it within the regulatory ambit of the state.

It is proposed that, if the state through its land-reform laws and policies is attempting to break away from the institutionalised effects of the private property paradigm<sup>84</sup> by moving to an alternative “statutory use rights” paradigm, it should rather focus on strengthening statutory use rights to be equally competitive with other tenure forms, specifically private ownership. Instead, weaker customary tenure forms must operate alongside and in competition with private ownership. The statutory use rights of rural landholders remain comparatively undefined and open to interpretation, while private landownership is left unaltered and unchallenged. It is, therefore, a concern that the NDP 2030 creates a dual land rights system that is, in

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80 National Planning Commission 2012:221. “Traditionally, agriculture was a livelihood asset for the rural poor when other sources of income fell away. This role was always underdeveloped because of apartheid, but it is diminishing further due to increases in social grants ...”. Moseneke 2012:101; Kibet & Fombad 2017:359. See also Parliament of the Republic of South Africa “The National Development Plan unpacked” <https://rebrand.ly/9u3iz2i> (accessed on 25 July 2022). “The Plan [National Planning Commission 2030] supports government’s intention to gradually shift [funding] resources towards investment that grows the economy, broadens opportunities, and enhances capabilities. As a result, other parts of the budget will need to grow more slowly.”

81 Parliament of the Republic of South Africa “The National Development Plan unpacked”, <https://rebrand.ly/9u3iz2i> (accessed on 25 July 2022).

82 Department of Rural Development and Land Reform 2013:54. “The purpose of establishing a Land Management Commission (LMC) is to strengthen the National Administrative System. The LMC shall coordinate land administration at national and local levels and ensure the participation of a variety of state, private sector, traditional authorities and civil society actors in land management. The goal is to create a single system for land management for the country through an autonomous LMC which is accountable to the Ministry of the Department of Rural Development and Land Reform (DRDLR).”

83 Micklitz 2016:243.

84 Mostert & Lei 2010:383. “Property law has always been one of the ‘strongholds of civilian jurisprudence’. This implies a particular understanding of the relation between ownership and other rights in respect of property. In very broad strokes, this understanding supports an economic system based on capitalist ideology. Rights to property are usually divided into real rights, on the one hand, and personal rights or statutory grants, on the other. Real rights comprise two broad categories in traditional private law theory in South Africa, namely ownership and limited real rights.”

effect, not inclusive.<sup>85</sup> Rural landholders without ownership rights are left with a long-term promise that their newly created (statutory) use rights will be amalgamated into the private rights system.<sup>86</sup>

The interim status quo is the persistence of weaker tenure rights under custodial care which is justified as an inconvenient yet temporary measure to allow time to sift out the commercially productive farmers from the unproductive ones. The former is entitled to security of tenure and the latter not. In doing so, security of tenure becomes entirely performance based. This approach to tenure rights is premised almost entirely on market forces and creates a long-term dual land rights system that can spawn further inequality, with certain persons entitled to legally secure tenure and state support, while others simply are not, as they may never perform well enough to be eligible for security of tenure. Such an insular approach fails to recognise that tenure rights are often interdependent and interconnected with other basic human rights.<sup>87</sup>

The NDP 2030 holds that the “focus should be on cooperating with traditional leaders to secure tenured *irrigable* land supported by fully defined property rights. This will allow for development and give prospective financiers and investors the security of tenure they require”.<sup>88</sup> The NDP 2030 frames the role of the state as “lay[ing] the foundation and framework upon which private economic activities can flourish”.<sup>89</sup> Objectively this is admirable but, in practice, it supports the creation of a dual land rights system whereby commercial irrigation is elevated above any other farming method and set apart for fully defined property rights. It is further notable that the cooperation is between traditional leaders and the state, and not the rural landholding community.<sup>90</sup>

Land reform law and policy remain firmly entrenched in the private property hierarchy of land rights and aim to foster an agricultural environment that almost exclusively supports commercial ‘private economic activities’. It is contended that this is a situation of default from the state’s failure to hand over ownership where appropriate and to create equally competitive property rights in consultation with land reform beneficiaries.

The state has historically viewed the transformation of ownership patterns through the socialist lens of redressing past injustice (retrospective) rather than viewing land reform as an economic opportunity (prospective) for

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85 Cousins & Hall 2011:18.

86 National Planning Commission 2012:226-227.

87 On the interdependent nature of basic human rights, see Liebenberg & Goldblatt 2007:335-361; Allsobrook 2019:408-418.

88 National Planning Commission 2012:222.

89 Werner 2015:77.

90 Wicomb 2014:132-133. A definitive shift in political ideology was made plain through the enactment of the *Traditional Leadership and Governance Framework Act 41/2003 (TLGFA)* and, subsequently, the *Traditional and Khoi-San Leadership Act 3/2019 (TKLA)*. These laws have made the existence of customs entirely dependent on traditional leadership and have codified traditional leadership powers through statute rather than the authority of the defined community in accordance with living customary law.



capitalist economic transformation. However, the NDP 2030 and recent land reform laws and policies have abandoned this historical practice in pursuance of concentrated state interventions that seek to transform the rural land economy without dismantling structural inequalities in the private property rights system.

According to Van der Walt, the solution may be land reform policies that promote and develop a stronger “use rights” orientation, moving away from the ownership orientation that has traditionally informed our private property system. However, this argument presupposes that a system based in ownership inherently involves a hierarchy of stronger and weaker rights, where ownership is the paradigmatic right in terms of which other rights are created and evaluated. Whereas a system based on recognised and protected use rights will produce a range of land rights that are intrinsically incapable of being classified as either weaker or stronger. A stronger focus on strengthening a use rights system will weaken or restrict the scope of ownership rights, and thereby provide real possibilities for the redistribution of wealth and power.<sup>91</sup>

## 5. CONCLUSION

The custodial approach is riddled with questionable ideological expressions that are used to justify private capitalist agendas that are not easily reconcilable with the constitutional mandate of security of tenure and redistribution. There can be no doubt of the existence of an ideological shift away from the initial pro-poor land reform agenda to one of institutional economic capitalism in the national interest. Land reform laws and policies indicate a disconnect or failure to engage with the tenure realities of rural landholding communities and to focus on remedying the structural inequalities in property dynamics.

While the *Constitution of the Republic of South Africa* may mandate redistribution and security of tenure, its conceptual interpretation is influenced by the political ideology of the day and a state custodianship approach to land, as a national asset, can have outcomes that run counter to the primary objectives of land reform, if not carefully monitored. This influence is a concern and can result in the abuse of custodianship for political and entrenched private economic interests.<sup>92</sup> Recent developments in land reform law and policy have drifted away from the initial pro-poor stance, lack a

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91 Van der Walt 1999:267.

92 Russell 2013:6-7. “Earliest manifestation of using the political state for narrower private interests: The Arms Deal, cadre deployment, ANC elites and business community offers, centralization of power, connections to organized interests culminating in state capture. The transformation of land ownership in South Africa is no longer focused on redress of a past injustice, but on economic opportunity.” See also Greffrath “Land reform, political instability and commercial agriculture in South Africa: An assessment”, <https://rebrand.ly/t4kbz14> (accessed on 12 July 2022). “An incremental decay of the institutional capabilities of the South African Developmental state: corruption, cadre deployment and demographic representation, have eroded the capacity, effectiveness and efficiency of the public sector, reluctance from existing landowners, institutional dysfunction – government may opt for wholesale dispossessions.” See also Fombad 2007:36-38.

vision of inclusive agrarian reform, carry signs of elite capture, and contain significant gaps in terms of security of tenure.<sup>93</sup> A similar custodial approach was used during apartheid to rationalise the enactment of interventionist land laws and policies<sup>94</sup> that enabled frequent statutory interventions in African landholding in the national interest. Apartheid land laws and policies were goal oriented and justificatory, explaining the injustices that arose as “temporary” measures to reach the goal.<sup>95</sup> If not carefully formulated, transformative land reform law and policy can be conduits for a state custodianship approach that inadvertently reproduces apartheid ideology and preoccupations, that appear objectively admirable, but ultimately derail land reform objectives, and infringe on basic human rights.

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93 Parliament of the Republic of South Africa 2017:37.

94 Carey Miller & Pope 2000:27. “A perception that black land tenure was often an economic failure was one of the factors in the introduction of trust tenure and an ‘interventionist approach on the part of the state’. Surveys of land use, official and independent, pointed in the direction of a failure by blacks ‘to make maximum use’ of the potential of land holdings was an indictment against the white government rather than against the manipulated blacks. But, as in earlier times, ‘economic justification and political motivation’ travelled in the same compartment.”

95 Van der Walt 2001:269

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