A CRITICAL INVESTIGATION OF STATE CUSTODIANSHIP AND ITS IMPLICATIONS FOR THE SOUTH AFRICAN PROPERTY REGIME

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ANTHEA-LEE SEPTEMBER VAN HUFFEL

PROMOTER: DR JG HORN

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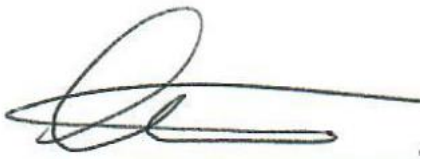
DECLARATION

I, Anthea-lee September-Van Huffel declare that the doctorate in law thesis that I herewith submit at the University of the Free State, is my independent work and that I have not previously submitted it for qualification at another institution of higher education.



30 November 2022

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ACKNOWLEDGEMENTS

THE PRICE

YOU PAY A PRICE FOR GETTING STRONGER,

YOU PAY A PRICE FOR GETTING FASTER,

YOU PAY A PRICE FOR JUMPING HIGHER,

YOU PAY A PRICE FOR STAYING JUST THE SAME.

- HJB

Thank you. To all the wonderful people in my life who supported me through the challenges of writing this thesis. Many sacrifices, big and small, were made along the way to reach the destination. Many "prices" are paid for the benefit and reward of improving oneself, for which I am most grateful. While the thesis project may seem personally consuming and self-motivated, it takes a larger community of friends, family, and colleagues to make it possible. For this reason, I have chosen not to list the names of this entire community which would be a chapter on its own, but to express my absolute gratitude to you all here collectively and personally. Thank you all for contributing to its fruition.

This project took place during the Covid-19 disaster, in which we lost beloved friends and family. I dedicate this work to the loving memory of these angels.

Last, but never least, to God for sending the right people at the right time, for being a provider, and for His faithful timing – to You be all the glory.

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ABSTRACT

The South African public is increasingly being exposed to political debates on state custodianship of all rural or agricultural land, particularly within the context of land reform initiatives. However, what first appeared like a surreptitious shift towards state custodianship of land on the part of some political parties is now boldly stated in the objects of the *Constitution Eighteenth Amendment Bill,* 2021,[1] thereby confirming a potential sociopolitical trend towards state custodianship of land within the land reform context.[2] If applied to land, state custodianship would entail strict regulatory control over the natural resource, with unique features and legal implications,[3] which may pose challenges to the existing property regime and security of land tenure. Therefore, this thesis examines the construct of state custodianship and its application to South Africa's natural resources,[4] its legal implications, and its application to the existing property regime, particularly to transformative land reform.

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[1] Sec. 2. "The purpose of … [the Bill] is to amend section 25 of the Constitution … It also deals with matters related to land as the common heritage of all citizens to be safeguarded for future generations by the state and requiring that conditions should be fostered to enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis." While the inclusion of state custodianship in the property clause did not get the required two-thirds majority in Parliament, its consideration and inclusion in the drafts does point to a degree of support for express state custodianship of land in certain political quarters. This makes it relevant to this study, which aims to demonstrate the nuances of state custodianship as a legal construct separate from public trusteeship, including its unique features and legal implications, whether it should be applied to land, and the different ways of inculcating a custodianship approach as either express or implicit.

[2] Engelbrecht "The ANC's two-state South African state: Its own colonialism and affinity for monopoly capital in the era of the Capitalocene Part 1", http://academia.edu/39392895/The_ANCs_Two_state_South_African_State (accessed on 10 August 2022); News24 "Floyd Shivambu's proposed state custodianship of land farcical and tragic", https://www.news24.com/Columnists/GuestColumn/floyd-shivambus-proposed-state-custodianship-of-land-farcical-and-tragic-20180531 (accessed on 30 March 2022).

[3] Van der Schyff 2013: 227.

[4] Barnes 2009: 10. "The regulation of natural resources poses important questions about the allocation of wealth and power in society. Questions that arise are inter alia: To what ends and in whose interest do we regulate such resources? Who can own these resources and in what form? Moreover, should the use of resources be limited to protect other social values?"

CHAPTER 1

UNPACKING STATE CUSTODIANSHIP OF LAND IN SOUTH AFRICA

1.1 PROBLEM STATEMENT

South Africa has recognised state custodianship of natural resources such as minerals and petroleum through the enactment of statutes in respect of these resources. The transformative objective of statutes such as the *Mineral and Petroleum Resources Development Act* 28 of 2002 (MPRDA) is to redress the socioeconomic inequality of previously disadvantaged persons and communities. The MPRDA bestows custodianship on the state. This means that the state regulates and controls the use of, and access to the rights in, the statutorily defined natural resources, and consequently also controls the exercise of individual and community rights in the natural resources so defined.[5]

The MPRDA repealed the previous *Minerals Act* 50 of 1991 ("*Minerals Act*"), which emphasised and highly regulated privatised rights. This has now been replaced with a system of state custodianship of mineral resources and, accordingly, a system of rights defined and granted by the state. The MPRDA has heralded a distinct policy shift towards broader state control over the granting, exercise and retention of rights over South Africa's mineral and petroleum resources.[6] The effect of this shift is that the state is now able to do explicitly under the MPRDA dispensation what it already did implicitly and indirectly under the *Minerals Act*.[7]

The constitutional imperative to address land reform is found in section 25 of the *Constitution of the Republic of South Africa,* 1996 ("Constitution"). In terms of this section, no one may be deprived of property except in terms of law of general

[5] MPRDA: sec. 3(1).
[6] Mostert 2013: 78; Badenhorst 2011: 326-341.
[7] Mostert 2013: 78; Badenhorst 1999: 96-109.

application, and no arbitrary deprivation of property is allowed.[8] Furthermore, property may be expropriated only in terms of law of general application for a public purpose or in the public interest and subject to compensation.[9] Section 25(4)(a) extends the ambit of public interest to include the nation's commitment to land reform. Land is a natural resource that should be used in the public interest[10] and to which the Constitution demands equitable access.[11] The Constitution goes on to obligate the state to take reasonable legislative and other measures within its available resources to foster conditions that enable citizens to gain equitable access to land.[12]

Transformative legislation in respect of land operates within the confines of land reform as set out in the Constitution, and therefore, the state's intervention is limited to land reform that is in the public interest.[13]

This thesis explores the question of whether land as a natural resource is susceptible to state custodianship on the same basis as other natural resources such as minerals and petroleum. It also examines whether the application of the legal construct of state custodianship to land would pose challenges to the existing property regime and the efficacy of land reform. In so doing, the distinctive features and legal implications of state custodianship as evident in the MPRDA are compared and contrasted to public trusteeship in the *National Water Act* 36 of 1998 (NWA).

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[8] Constitution: sec. 25(1). "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."; Slade 2017: 346-362.
[9] Constitution: sec. 25(2)(a). "Property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest."
[10] Van der Schyff 2013: 369.
[11] Constitution: sec. 25(4)(a). "(4) For the purposes of this section – (a) the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources."
[12] Constitution: sec. 25(5).
[13] Constitution: sec. 25(4)(a)-(b). "The public interest includes the nations commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources; and property is not limited to land."

1.2 ASSUMPTIONS AND HYPOTHESIS

The hypothesis in this thesis is that transformative land reform laws and policy can be used as a vehicle to introduce state custodianship of land, but that it is only through the enactment of state custodianship as seen under the MPRDA that a property regime change can be implemented. It is suggested that a state custodianship approach is already being implicitly applied to land as a natural resource through land reform policy. Therefore, it is important that the legal implications and challenges of such an ideological approach is well understood.

State custodianship could pose challenges to the existing property rights regime if its co-existence with land tenure rights is unclear. It could also prove challenging if it continues to demonstrate paternalistic apartheid-style notions that may result in the surreptitious institutionalisation of state custodianship in respect of land without necessarily enacting legislation to bring about a property regime change. It is argued that state custodianship of land, whether conducted explicitly or implicitly, would require rigorous judicial oversight to ensure that state actions are supported by public participation, democratic principles, and accountability, and do not exceed the constitutional limitations of fiduciary powers expected of trustees or custodians acting in accordance with a stewardship ethic.

1.3 AREAS OF FOCUS

1.3.1 What is state custodianship, and does South African law recognise it?

Van der Schyff[14] holds that the concept of public trusteeship “or state custodianship” may be described essentially as a stewardship doctrine. It is a legal mechanism ensuring that the rights of the public (or a nation) are protected by vesting natural resources in the state as “trustee”. The state as trustee has the duty, through administrative agencies, to protect, administer, manage, and conserve the resource. The Anglo-American public trust doctrine is but one of the legal manifestations of

[14] Van der Schyff 2016: 237.

"public trusteeship", putting into perspective the potential impact of a stewardship doctrine of public trust on a legal system.[15]

State custodianship shares characteristics with other legal concepts such as stewardship,[16] "public trusteeship"[17] and the fiduciary relationship.[18] The legal accuracy of this statement is examined in more detail later,[19] where the focus will be on determining whether state custodianship as introduced by the MPRDA has characteristic features and legal implications that set it apart from other legal concepts such as public trusteeship under the NWA.

The most explicit statutory representation of public trusteeship and state custodianship of natural resources has been in respect of South Africa's water and mineral and petroleum resources. These resources have received considerable legislative attention since, among others, the enactment of the NWA, the *National Environmental Management Act* 107 of 1998 (NEMA) and the MPRDA. Pre-existing mineral rights legislation was entrenched in the common law private property regime, which meant that access to natural resources required landownership.[20]

Property rights in the private property regime have traditionally been defined in terms of a hierarchy based on binary opposition. Accordingly, property rights are associated with either ownership, which is described as the most comprehensive

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[15] Van der Schyff 2016: 237.
[16] Constitution: preamble, where it is stated that "South Africa belongs to all who live in it" (own emphasis). Constitution: sec. 24(b)(iii) provides for the "use of natural resources while promoting justifiable economic and social development". *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 ZAGPHC 132: par. 19, where it is stated that the Constitution "confers upon the authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment for future generations".
[17] Van der Schyff 2016: 237. See also Sand 2004: 47-71. "Public trusteeship as a legal notion manifests in different guises even within a single legal system. Public trusteeship encapsulates stewardship and influences property regimes differently. The concept of public trusteeship acknowledges that certain natural resources whether in the public or private domain form part of an 'inalienable public trust'."
[18] Leib *et al*. 2013: 705. "Although rooted in private law, the fiduciary principle has been widely employed to provide a descriptive explanation of a normative frame for the relationship between the state and its citizens. A fiduciary relationship emerges in contexts where the fiduciary has discretionary power over the assets or legal interests of the beneficiary."
[19] Chapter 4.
[20] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 CC: par. 1.

property right one can have, or a limited real right in someone else's property. The distinctive common law completeness of ownership became the absolute – the most valuable and important right in property.[21] The systemic superiority of ownership title benefited the predominantly white landowners and effectively excluded the non-white landless majority from access to secure land tenure and the benefits of natural resources.[22] Ownership title retained a superior position in the land rights hierarchies, which attached all rights to the land, and all rights in the natural resources associated with the land accrued to the landowner.[23] Even the constitutional development of property law allowing ownership to be limited in the public interest proved incapable of adequately countering the systemic aftermath of apartheid's exclusionary land laws. The status quo continued to perpetuate the exclusion of the majority, even though the state had the authority to enact statutes to effect the necessary changes in respect of shared public interests in natural resources.[24]

The pivotal change came in *Agri SA v Minister for Minerals and Energy* ("*Agri SA*"),[25] which affirmed the state's custodianship of South Africa's minerals and petroleum resources through the MPRDA on the basis that all minerals and petroleum resources are the "common heritage" of the country.[26] *Agri SA* sent a clear message that the equitable redistribution of benefits flowing from natural resources is an important mandate of the state. In his interpretation of section 25 of the Constitution, Mogoeng CJ cautioned against an overemphasis on private property rights at the expense of the state's social responsibilities and stressed that the state had an equally important duty to ensure that all South Africans partake of the benefits flowing from mineral and petroleum resources.[27]

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[21] Van der Walt 2012: 114; Van der Walt & Dhliwayo 2017: 34-52.
[22] *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 CC: par. 1.
[23] Van der Walt 2001: 258-311.
[24] Constitution: sec. 24; Merrill 1998: 730-755.
[25] 2013 4 SA 1 CC.
[26] *Agri SA*: par. 25; MPRDA: sec. 2(b), 3.
[27] *Agri SA*: par. 60-62. See also Capps & Mnwana 2015: 610. "The … MPRDA is the critical legislation here. Its goals have been to simultaneously accelerate competitive accumulation in the

In determining what state custodianship of land could mean for South Africa, the *Agri SA* judgment will serve as a focal point of reflection in this thesis. It unequivocally confirmed that state custodianship implies removing rights in natural resources such as minerals and petroleum from the private property regime and vesting such rights in the state[28] on behalf of the nation.[29] As such, *Agri SA* affirmed the transition of mineral and petroleum resources out of the private property rights regime into a public rights regime controlled by the state, and identified this principle as "state custodianship".

1.3.2 Does state custodianship manifest in apartheid land laws and constitutional land reform laws and policies?

The Constitutional Court in *Agri SA* referred to the gross inequality in land distribution, and the progressive pursuit of transformation in South Africa's land laws and policies. However, it carefully limited itself to commenting only on the MPRDA provisions that expressly provide for state custodianship of mineral and petroleum resources.[30] The Constitutional Court failed to elaborate on state custodianship in other transformative statutes, and on potentially applying this principle to other natural resources such as land. This lacuna is examined more closely in this thesis through a critical analysis of the manifestations of state custodianship in legislation and policy. The underlying principles of apartheid land laws and constitutional land reform legislation, bills and policies are closely examined in relation to the concept of

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national mining industry and transform its racial composition, alongside other social objectives. This has entailed: eliminating the barriers to investment posed by private mineral rights, through their effective nationalisation; proscribing black shareholding levels, as a condition of the new mine licensing system; and encouraging those tribal authorities that were receiving mining royalties to convert them into direct equity stakes in local mining operations, in the names of Black Economic Empowerment (BEE) and 'community participation'." This, according to Capps & Mnwana, has resulted in "chiefly accumulation".

[28] *Agri SA*: par. 68.

[29] MPRDA: preamble; Marais 2015.

[30] *Agri SA*: par. 66. The MPRDA in effect put an end to the (i) ability to sterilise or not to exploit minerals; (ii) previously unfettered entitlement to sell, lease or cede the mineral right at any time; and (iii) mineral rights or unused old-order rights for which prospecting, or mining rights could not be acquired.

state custodianship.[31] The critical analysis seeks to establish whether features of state custodianship are inadvertently already being applied to land within the land reform context. Considering that much of the primary land reform legislation was incorporated into the constitutional dispensation after the end of apartheid,[32] the analysis deliberately includes apartheid-era land laws and policies to determine whether a predisposed paternalistic tendency identified in past land laws continues to prevail in constitutional land reform laws under the guise of state custodianship.

1.3.3 Are 'radical' transformative statutes and policies a vehicle for state custodianship of land?

Despite numerous pieces of legislation aimed at achieving security of tenure, legally secure tenure remains inaccessible to many black South Africans. This has resulted in a renewed call for radical transformation of South Africa's property rights system. For a large segment of the country's population, the call for radical transformation of the landholding system translates into state expropriation without compensation.[33] Indeed, for many South Africans, redistribution of land has become the measure of transformation.[34]

Transformation is regarded as the use of political power to radically change social and political structures and to set society and polity on a new course towards unprecedented goals.[35] This means that transformation includes progressive fundamental political changes to a society in response to an unacceptable past, which often takes the form of central planning, social engineering and political

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[31] Chapter 6.
[32] Lahiff 2014: 13.
[33] Cousins 2016: 13.
[34] Duvenhage & Jankielsohn 2017: 1; Constitution: sec. 25(5). See also Albertyn 2018: 467. "The principle of redistribution relates to equality in an economic sense and is concerned with whether people's overall resources are more equally distributed, so that they have 'roughly similar' prospects for pursuing their lives in ways that matter to them and for interacting with each other as peers. It addresses the effects of policies, laws and conduct on economic inequalities, and interrogates a more equal distribution of resources and benefits, not only as a threshold but also as a ceiling." Baker *et al*. 2009: 33.
[35] Duvenhage & Jankielsohn 2017: 1.

manipulation.[36] Some scholars believe that Parliament's approval of state expropriation without compensation is an example of radical transformative action by the state.[37] As of this date, the expropriation without compensation legislation that is intended to give effect to the transformation that section 25 was designed to facilitate[38] has been approved by the National Assembly but must still run its course through the National Council of Provinces. The interventionist role and powers attributed to the state in the facilitation of transformative legislation is fundamental: States use legislation and policy to effect change to legal systems and, in so doing, alter social and political structures. 'Radical' land reform is understood as legislation and policies that allow for the abrupt fundamental modification of landownership patterns and use through the redistribution of land from one group to another, employing methods that may pose an extrinsic threat to an existing order.[39] With reference to the MPRDA and its introduction of the legal phenomenon of state custodianship, Froneman J stated:

> I acknowledge that there is no precedent for this approach. That is because this Court is faced for the first time with legislation that seeks to effect an institutional change to the legal regime that applies to the exploitation of this country's mineral and petroleum resources. Large-scale transformational legislation of this nature presents challenges of a special kind. There is no binding precedent of this Court that precludes a new and fresh approach to the issue.[40]

Therefore, the creation and introduction of the legal notion of state custodianship in the MPRDA may be seen as an example of a radical legislative measure aimed at transformation. However, radical land reform laws and policies are often intertwined with broader state agendas or national interests, including the establishment of

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[36] Duvenhage & Jankielsohn 2017: 2.
[37] Cousins 2017: 1.
[38] *Agri SA*: par. 63.
[39] Duvenhage & Jankielsohn 2017: 7. See also Claassens 2014a: 23. "Redistribution is never only about quantifiable indicators: it requires tackling vested interests and confronting power, which requires close attention to structural patterns of poverty and exclusion and a commitment to reintegrate people living in the former Bantustans as equal citizens, on terms that acknowledge and redress their exclusion in the past."
[40] *Agri SA*: par. 91; Van der Schyff 2016: 254.

legitimate new regimes.[41] Yet the radical transformation of a country's landholding system is not an uncommon occurrence in other international jurisdictions: Namibia, Botswana, Zimbabwe, the People's Republic of China and Russia are all examples of countries that have undergone radical transformation of their landholding systems through land laws and policies that transformed their property structures.[42] The focus of this thesis will be on investigating the use of transformative statutes and policies by the state as "custodian" of land to realise more equitable land holding patterns.

1.3.4 Why should land be treated differently, and not be subject to state custodianship?

To ascertain whether land, like certain other natural resources, should be subject to state custodianship requires an understanding of the severance of natural resources from the common law ownership of land, and the position of land in the private property regime. The tension between the protection of the private property ideology of individuality and exclusivity of property ownership on the one hand, and the constitutional demand for transformation of the landholding system in section 25 of the Constitution on the other, necessitated the severance of certain natural resources from the private property regime to achieve the constitutional objectives.[43]

Despite the recognition of the principle of severance in South African common law, however, land – unlike water, minerals, and petroleum – remains solidly embedded in the private property regime.[44] The Constitution resulted in the refinement of the common law understanding of property ownership into a more abstract concept of

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[41] Kepe 2012: 392.
[42] Qiao & Upham 2015: 2495; Pils 2016: 437-444; Richardson 2005: 1-35.
[43] Van der Schyff 2016: 17 – 19; Milton 1996: 657-699; Radin 1982: 957-1015; Schnably 1993: 347-407; Van der Walt 2002: 254-289.
[44] See detailed discussion in chapter 2.

ownership that is greater than the sum of its parts.[45] In terms of this abstract concept, ownership not only includes the relationship between owner and property, but also refers to the relationship between the owner, other persons and the property.[46] This development allows for justifiable limitations to be placed on ownership in the interest of the public, including state interference to varying degrees.[47] For example, the state may interfere through deprivations or expropriations for justifiable reasons, such as land reform in the public interest.[48] Therefore, state custodianship in itself is a form of deprivation of property rights.[49]

The transition to a constitutional dispensation and the enactment of the Bill of Rights means that objective law must take into account the needs of the greater public so as to advance transformation.[50] Under the constitutional dispensation, ownership is fundamentally and inherently limited by both constitutional and legislative provisions to achieve social equality.[51] Yet it continues to enjoy the institutionalised protection afforded to it by the common law private property regime,[52] thereby maintaining the system of privilege established during the colonial and apartheid eras. In this respect, state custodianship diminishes an individual's relationship with the legal object to allow the state to regulate the resource for the transformative constitutional purpose of equitable access and to preserve the resource for future generations.[53]

Rights in mineral resources can no longer be exercised independently of the state, as custodian. Rights in land, on the other hand, remain constitutionally protected in

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[45] Van der Walt 1990: 26-48.
[46] Van der Walt 1990: 26-48; Gretton 2007: 802-851.
[47] Van der Walt 2000: 226-243; Iles 2004: 68-92.
[48] *Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd* 1993 1 SA 853 C; *Diepsloot Residents' and Landowners' Association v Administrator Transvaal* 1994 3 SA 336 A; Van der Walt 2017: 34- 35.
[49] *Agri SA*: par. 68. "The MPRDA is the legal instrument through which Sebenza was deprived of its coal rights. This therefore is a compulsory deprivation. The custodianship of this and other mineral and petroleum resources is, in terms of the MPRDA, vested in the state on behalf of the people of South Africa."
[50] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 CC.
[51] Van der Walt & Viljoen 2015: 1036.
[52] Royston 2002: 176-177. "Part of the ANC's initial housing policy was to introduce and develop a variety of tenure forms that would provide access to housing and grant secure tenure, but individual ownership has been the main form of tenure delivered in urban areas."
[53] MPRDA: preamble.

the private property rights regime through section 25 of the Constitution, or the so-called 'property clause'. This is entrenched even further by the stipulations on the formal registration of title in the *Deeds Registries Act* 47 of 1937, which provides that only real rights in land, such as ownership, are registerable and transferrable.[54] It is this combination of both physical possession of land and the formal protection of ownership rights that has afforded predominantly white landowners legally protected security of tenure over vast tracts of agricultural land during the colonial and apartheid eras – a pattern of disproportionate landownership that continues to this day.[55] Given the public outcry for radical transformative measures, it is not surprising that the notion of state custodianship of land increasingly crops up in the political discourse and government policy on land reform.[56]

However, state custodianship of statutorily identified natural resources as seen in the MPRDA may have inadvertently paved the way for the adoption of state custodianship of *land* in the context of land reform laws and policies. Land, after all, is one of the nation's most significant natural resources and forms part of the state's objective to transform the rural land economy, as captured in the National Development Plan (NDP) 2030.[57] To understand the intensity and scale of a country's resource management interventions, one should consider the nature of the state. A developmental state is a category of state that by definition intervenes in the affairs of society, and particularly in the economy.[58] Through its NDP 2030, South Africa has chosen a democratic developmental state model to reach its transformative and developmental goals.[59]

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[54] *Deeds Registries Act* 47/1937: sec. 16.
[55] Walker & Dubb "The distribution of land in South Africa: An overview", http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/4455/fc_1_distribution_land_south_africa_overview_2013.pdf?sequence=1&isAllowed=y (accessed on 9 September 2022); Presidential Advisory Panel on Land Reform and Agriculture 2019: 5.
[56] Department of Agriculture, Forestry and Fisheries 2013: 12; Mostert 2015a: 11-30.
[57] NPC 2012: 196-213.
[58] Koehler & Chopra 2014: 26.
[59] Van der Waldt 2015: 38-39. "The peculiarity of the government's interventionism in a developmental state particularly concerns the large scope and level of intervention in the economy. It also applies to state ownership and the state's control of the industry. This can also entail privatisation and the

In the process of reviewing the amendments to the property clause of the Constitution to allow for expropriation without compensation, it was the political party, The Economic Freedom Fighters, ("EFF") who first proposed that section 25 of the Constitution should be amended to expressly include state custodianship in subsection (3). The last revision of the *Constitution Eighteenth Amendment Bill,* 2021 ("*Eighteenth Amendment Bill*"), substituted subsection 5 of the property clause, requiring that conditions be fostered to "enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis".[60] The text retained the reference to state custodianship despite written public objections to the proposed wording.[61] Therefore, this can be interpreted that the state exhibits an increasing trend in its land reform programme to interpret its role as "custodian of all land" on the basis of land being a "national asset",[62] and an intent to do so through statutory state regulation by including references to land that is akin to state custodianship in the MPRDA.

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nationalisation of industry, including mines. … [N]ationalisation simply means replacing a private owner with a state one, with little real improvement for society at large. … [B]ureaucratic (governmental) control does not mean that governmental structures suddenly have provided the cure for societal and environmental problems."

[60] *Eighteenth Amendment Bill*: par. 3.1.4

[61] PMG "Report of the second call for written submissions on the revised *Constitution Eighteenth Amendment Bill* (8 September 2021)", https://pmg.org.za/tabled-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 your best interests. State custodianship may also place an impossible burden on the state as property rights should not be seen in isolation."

[62] Mostert 2014b: 762.

1.3.5 Does state custodianship compel a property regime change?

The radical transformation of so-called mineral rights ownership was long expected.[63] The legislative intervention came in the form of the MPRDA, with Mogoeng CJ reassuring the public that the introduction of state custodianship does not mean that the state has acquired ownership rights to the mineral and petroleum resources.[64] Regardless, the severance of rights in natural resources and the vesting of rights in the state under state custodianship has caused considerable confusion as to the legal implications of state custodianship. Van der Schyff, for instance, argues that merely replacing the mineral law dispensation as it existed under private property law with a state custodianship paradigm is not sufficient,[65] as this only gives rise to other unanswered questions.

This thesis seeks to clarify the characteristic features of state custodianship and its legal implications to better understand its consequences for the property rights regime. This includes the extent of state powers and, consequently, political influence over natural resources, and the existence of beneficiary land rights alongside or subject to state custodianship of land and other natural resources.

Evidently, the enactment of the principle of state custodianship in the MPRDA resulted in a legislative change from a private property regime to a statutory public property regime. This change brought an end to mineral and petroleum resources being held in the private property regime.[66] Ever since, the statutorily identified resources have been regulated in a public property regime, and all use and access rights to such resources are allocated according to the criteria and processes prescribed in the MPRDA.[67] Therefore, the introduction of state custodianship by way of statute has resulted in a property regime change for the transformative constitutional objectives set out in the statute.

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[63] Van der Schyff 2016: 179.
[64] *Agri SA*: par. 68.
[65] Van der Schyff 2016: 253.
[66] See detailed discussion in chapter 2.
[67] Van der Schyff 2016: 173 - 177.

1.4 METHODOLOGY, WITH DESCRIPTIVE STUDY OUTLINE

Chapter 1: Unpacking state custodianship of land in South Africa. This chapter contains the motivation and rationale, hypothesis and methodology of the research. It sets out the primary research questions surrounding state custodianship and its implications for South African land reform. It also provides the historical background to the incorporation of the notion of state custodianship and spells out the hypothesis on which the rest of the chapters are based. A qualitative research methodology, primarily desktop research, is used.

Chapter 2: The role of the state in relation to natural resources. Using critical analysis, the chapter explores relevant literature, common law, statutes, and case law on the historical role of the state with regard to natural resources, particularly water, minerals, and land. An empirical study method is then used to consider the interpretation and use of law for the state's regulation of access to and use of natural resources. Common law principles and concepts such as *cuius est solum, eius est usque ad coelum et ad inferos*; *dominus fluminis*, severance and *res publicae* are explored against the backdrop of South Africa's colonial-apartheid history and the interventions in natural resource law during these governing eras.

Chapter 3: The state as trustee or custodian of natural resources. This chapter contains a qualitative methodological discussion of public trusteeship, stewardship ethic, and the importance of infusing human rights and constitutionalism into the exercise of state fiduciary rights and duties. Critical to this discussion is the origins and foundational principles of the public trust doctrine, and its incorporation and development in other international jurisdictions, including the development of a uniquely South African public trusteeship notion. In providing a global perspective on stewardship trends elsewhere, the emphasis is on the democratisation of resource rights, which entails public participation and accountability in resource management.

Chapter 4: Public trusteeship versus state custodianship. Here, the focus shifts to a critical analysis of the similarities and differences between the NWA's public trusteeship and the MPRDA's state custodianship. These two property-regime-

changing constructs are examined as imposed (statutory) regulatory systems applicable to certain natural resources. The chapter highlights their respective characteristic features and legal implications through an ad hoc comparison.

Chapter 5: Transformative statutes and state custodianship. A qualitative methodology is used to discuss both state custodianship and public trusteeship as vehicles to transform the existing inequalities in the property system. The chapter considers and analyses public trusteeship and state custodianship as separate mechanisms deployed to achieve the constitutional mandates of the state, as trustee or custodian, including the transformative restructuring of landholding. The idea of state custodianship of land is introduced based on the critical analysis in chapter 4, laying the foundation for a substantive discussion of recent land reform laws and policies in chapter 6.

Chapter 6: State custodianship in the interest of land reform. This chapter presents a qualitative discussion of South Africa's property system in view of mounting theoretical arguments that challenge the relevance of private property and its (in)ability to meet public interest demands such as the equitable redistribution of land and security of tenure. In this chapter the impact of the Constitution on the idea of property and how it has resulted in its reconceptualisation to include not only a wider range of recognised interests in property, but the public regulation of different forms of land tenure for the public interest of land reform is discussed; and how this wider (inclusive) constitutional reconceptualisation of property challenges the relevance of the traditional ideas associated with the more narrow (exclusive) common law understanding of private property. A qualitative method is therefore used to explore the nature and origins of oppositional dialogues and is used to examine apartheid ideology as a potential precursor to a state custodianship approach in recent land reform law and policy. To this end, recent land reform laws and policies as well as key ideologies are explored. Among others, this discussion considers transformative constitutionalism[68] and the transformation of the rural economy against the

[68] See detailed discussion in chapters 5, 6 and more specifically paras. 6.5 and6.6.

background of South Africa's NDP 2030 and the goal of becoming a developmental state.[69] In addition, the chapter discusses the political change in policy direction with regard to the objectives of land reform, from an overt socialist ideology to an increasingly custodial and capitalist one that emphasises land as a commercial commodity for production.[70] Central to chapter 6 is the consideration of the legal implications of a state custodianship approach to land as a natural resource, as seen under the MPRDA.

Chapter 7: Conclusions and recommendations. Summarising the key findings, conclusions and recommendations flowing from the research, this final chapter reflects on the democratic developmental role of the state, and how this conceptual understanding affects the state's regulation of natural resources.

[69] Edigheji 2007:1. See also Duvenhage 2009:12. "South Africa has committed itself to building a developmental state. The aim is to facilitate economic development by mobilising the resources of society and directing these towards realising the goals set out in the National Development Plan: Vision 2030, as well as the State of the Nation Address (SONA 2013). The African National Congress (ANC) as the ruling party in Government, has expressed the desire to transform South Africa into a 'developmental state' with the 'people's contract' as a prominent feature of this transformation process."

[70] Andrews 2018: 50-53.

CHAPTER 2

THE ROLE OF THE STATE IN RELATION TO NATURAL RESOURCES

2.1 INTRODUCTION

This chapter focuses on the state's role in relation to South Africa's natural resources such as water, minerals, and land, being a part of the environment.[71] More specifically, it examines the historical common law concepts that have been used to describe and legally interpret the state's role in relation to South Africa's natural resources. Common law principles and concepts such as *cuius est solum, eius est usque ad coelum et ad inferos*, *dominus fluminis*, severance and *res publicae* are explored against the backdrop of South Africa's colonial-apartheid history, as are the legal interventions regarding natural resource law taken during these governing eras.

This examination is necessary to delineate the circumstances that have given rise to the development of public trusteeship in respect of water in the NWA[72] and the introduction of state custodianship in respect of minerals and petroleum in the MPRDA. Both these statutory interventions by the state aim to achieve the constitutional objective of equitable access for all to benefit from the respective resources. Therefore, to contextualise state interventions and the use of the law to give effect to or limit property rights, the historical background to state interventions and the common law in this regard must be examined.

2.1.1 State interventions to limit property rights

[71] NEMA: sec. 1. 'Environment' is defined as "the surroundings within which humans exist and that are made up of – (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being". Constitution: sec. 25(4)(a)-(b). "… (a) the public interest includes the nation's commitment to land reform, and to reforms to bring equitable access to all South Africa's natural resources; and (b) property is not limited to land".

[72] Constitution: sec. 9(2), 24, 27.

Through its laws and policies in relation to the environment and its natural resources, the state needs to ensure the ecologically sustainable development and use of South Africa's natural resources, while promoting justifiable economic and social development.[73] The view that owners may not use their property in ways that prejudice the community, and that other peoples' interests regarding land must be considered, corresponds with the acknowledged stance that property has a "public or civic or proprietary" aspect to it that transcends individual economic interests, and that ownership should inherently be limited for the benefit of society at large.[74]

Property is intimately bound up in questions of public interest or, put differently, the socioeconomic security and well-being of all South African citizens. Therefore, it can be said that the public interest is served through the developmental role of the state. A developmental state actively guides economic development and the use of the country's resources to meet the needs of the people.[75] It uses all available resources (i.e. natural, state, human and financial) to address social challenges and facilitate economic growth.[76] As such, the idea of property carries with it certain responsibilities towards the public that, on occasion, trump private interests. In contemporary property systems, this public function of property is frequently usurped by the state. Property holdings and particularly ownership of land and other natural resources have historically been subject to multiple public duties imposed by law. Clearly, therefore, there are important limitations to the scope of private property,[77] particularly where such limitations are demanded by the public interest.

Land fulfils not only an economic function, but also an important social one. Social cohesion, just like development, is a direct function of access to land.[78] Invariably, political and economic considerations influence property arrangements and the state's decision-making regarding access to and use of resources that affect the

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[73] Constitution: sec. 24(b)(iii).
[74] Van der Schyff 2013: 372.
[75] Van Dijk & Croucamp 2007:665; Adams *et al.* 1999; Rosa 2017.
[76] Van der Waldt 2015: 38.
[77] Barnes 2009: 67.
[78] Department of Rural Development and Land Reform 2011a: 2.

socioeconomic fabric of the country. An overview of South Africa's water, mineral and land law history illustrates the far-reaching impact of the legal-political context on the distribution of economic wealth in the country.[79] The renewed interest in the public function of property and the judicial recognition that a state stewardship authority has been established regarding land as part of the environment seem to be parallel developments in South African property law,[80] alongside the constitutional recognition that private ownership cannot be understood in absolute terms.[81] Van der Schyff's so-called state "stewardship authority"[82] in respect of land and its development alongside natural resources implies that the state serves as "trustee" with certain fiduciary duties towards the environment and its natural resources.

In South Africa, the relationship between the state and natural resources has developed and become increasingly regulated through the enactment of laws and policies. The introduction of public trusteeship in the NWA, which is unique to the South African context, and of the novel notion of state custodianship in the MPRDA suggests that the state's regulatory role in relation to South Africa's natural resources is developing.[83] This evolving role is later examined with reference to the flexible and indeterminate nature of state custodianship, as well as the idea of the developmental state and the drive to achieve economic transformation.

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[79] Mostert & Lei 2010: 384. See in general Hirsch 1979.
[80] Van der Schyff 2013: 372.
[81] Van der Walt & Dhliwayo 2017: 34-52.
[82] Barnes 2009: 160. See also Lucy & Mitchell 1996: 566-584. "The hallmark of stewardship is landholding subject to responsibilities of careful use, rather than the exclusive rights to exclude, control and alienate that are characteristic of private property. The steward is in essence a duty bearer, rather than a right-holder."
[83] Alonso-Fradejas 2021: 6. "The relationship between the state and natural resources as slowly developing over time is in no small part as a result of conservationism and environmental law."

2.1.2 State interventions for the benefit of all South Africans

The preamble to the MPRDA acknowledges that the country's mineral and petroleum resources "belong to the nation", which is also the fundamental basis for the state's public trusteeship in the NWA.[84] The concept of state custodianship has been introduced in the MPRDA on much the same basis.[85] The MPRDA describes the state as being vested with custodial authority over the natural resource for the benefit of the people of South Africa.[86] However, state custodianship differs from public trusteeship in that there is no binding precedent for the notion of state custodianship prior to *Agri SA* or the MPRDA.[87] While the common law concepts of *res publicae*,[88] public trust,[89] stewardship[90] and fiduciary[91] have historically been used in some shape or form to capture the state's role and function as public trustee of the nation's natural resources and property, state custodianship has no historical roots in the South African legal system.[92] Therefore, it is imperative to determine whether the intention of Parliament and the legislature is for state custodianship to

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[84] NWA: sec. 3(1). "As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate."
[85] Viljoen 2016: 20.
[86] MPRDA: preamble. It confirms that South Africa's mineral and petroleum resources "belong to the nation" and that the state is the "custodian" thereof.
[87] *Agri SA*: par. 101. Froneman J, for the majority, states: "[T]there is no binding precedent of this Court in relation to the kind of institutional change of the legal dispensation which is at stake under the MPRDA. *Harksen* dealt with a provision of the Insolvency Act and *Reflect-All* with regulatory provisions that did not seek to change the institutional legal system in any way. Neither case dealt with the nature of change brought about by vesting the natural resources of the country in the state as custodian of those resources for the benefit of the people of South Africa."
[88] The common law concept of *res publicae* is discussed in detail under par. 2.2.4.2.
[89] Tewari 2009: 702-703. "[T]he development of water rights in South Africa is largely hinged upon Roman-Dutch law in which rivers were seen as resources which belonged to the nation as a whole and were available for common use by all citizens, but which were controlled by the state in the public interest … The concept of public trust goes back to Roman times … The idea of trusteeship was finally incorporated into the South African law after the democratic transition in the country. These principles were closely in line with African customary law which saw water as a common good used in the interests of the community."
[90] Stewardship is explored in detail under par. 3.2.
[91] Leib *et al*. 2013: 705. "Although rooted in private law, the fiduciary principle has also been widely employed to provide a descriptive explanation of – and normative frame for – the relationship between the state and its citizens … A fiduciary relationship emerges in contexts where one person (the fiduciary) has discretionary power over the assets or legal interests of another (the beneficiary)."
[92] *Agri SA*: par. 105.

be synonymous with public trusteeship, or for the two concepts to be similar, but also substantively distinct in certain respects.[93]

Public trusteeship in the NWA and state custodianship in the MPRDA have respectively been codified into South African law.[94] Statutory public trusteeship is a central mechanism deployed in the NWA to ensure that the country's water resources are managed for the benefit of all South Africans and in the public interest, giving effect to the constitutional mandate of the state as public trustee.[95] Likewise, the MPRDA gives effect to section 24 of the Constitution, which requires the state to ensure that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner, while promoting "justifiable social and economic development".[96] Given the country's history of colonialism and apartheid, both statutory mechanisms reaffirm that reform measures must be implemented to bring about "equitable access to all South Africa's natural resources".[97]

Importantly, state custodianship as a legal concept is born entirely out of a constitutional democracy, which means that any state action that stems from it must be based on the democratic values of human dignity, equality and freedom as enshrined in the Bill of Rights.[98] State custodianship, therefore, is intended as a product of a constitutional culture, and constitutional imperatives in the Bill of Rights demand a proactive approach by the state.[99] The state must respect, protect,

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[93] Van der Schyff 2010: 124. "The legal concept of public trusteeship in the NWA cannot be said to be the same as *res publicae* or even the same as the public trust doctrine in foreign laws."
[94] Van der Schyff 1998: 44.
[95] NWA: sec. 3(1), 3(2).
[96] MPRDA: sec. 2(h).
[97] MPRDA: preamble; Constitution: sec 25(4)(a); Marumo 2014: 31.
[98] Constitution: sec. 7(1); Van der Walt 2006: 1-47.
[99] Van der Schyff 2016:13. See also Kibet & Fombad 2017: 342. "Broadly speaking, constitutionalism encompasses a number of elements such as the protection of fundamental rights and freedoms; the concept of separation of powers; independence of the judiciary; review of laws for constitutionality; and regulation of amendments to the constitution … [H]owever, … these elements do not automatically guarantee constitutionalism." Fombad 2007: 10-14. See in general Liebenberg 2010.

promote and fulfil the rights in the Bill of Rights,[100] while also providing the parameters and framework within which economic transformation is to take place.[101]

For state custodianship to be a tool for socioeconomic transformation, its purpose, content, and legal consequences must be transformative, but also consistent with constitutional values. However, just as transformative constitutionalism[102] informs the statutory purpose, content and legal consequences of state custodianship,[103] the common law concepts[104] are informed by their colonial and apartheid legal-political contexts.[105] The prevailing paradigms and underlying principles of South Africa's common law heritage at the time cannot be overlooked, as these informed the purpose for which the common law concepts were initially constructed. Therefore, legal-political contexts determine the type of property regime and property constructs applied in land governance. It follows, then, that when the modern-day state amends its regulatory framework, it too redefines the existing property regimes, subjecting them to ever more complex systems of control.[106] The change in South Africa's

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[100] Constitution: sec. 7(2).
[101] Constitution: sec. 36(1); Van der Schyff 2016:13; Kibet & Fombad 2017: 342-343; Okoth-Ogendo 1993: 65. According to Okoth-Ogendo, constitutionalism also entails a culture or commitment by political elite to respect and abide by constitutional limits, since it is possible to have "constitutions without constitutionalism".
[102] Pieterse 2005: 155-158, 166. "[T]ransformative constitutionalism provides historical justification for transformation, while at the same time representing one of the primary means through which such transformation is to take place."
[103] Constitution: sec. 1(a)-(c), where it is stated that the Republic of South Africa is one, sovereign, democratic state founded on values of human dignity, equality, advancement of human rights and freedoms, and the supremacy of the constitution and the rule of law. Van der Schyff 2016:14.
[104] MPRDA: sec. 4(2). This section implies that the common law principles still apply, unless they are inconsistent with the provisions of the MPRDA. Van der Schyff 2016:33. "These sources indicate the importance of a proper understanding of the legal-political context that is further elevated because of the continued albeit contextualised application of the common law in the current mineral and petroleum regime."
[105] "Legal-political context" here means the interpretation given to legal concepts at a specific time, which is informed by the predominant political ideology and policy approach of the specific era. For example, in a democratic (post-apartheid) constitutional legal-political context, the state's role must be interpreted constitutionally, which will influence the extent to which the Bill of Rights is given effect to by the state, and the level of democracy adhered to by the state (i.e. accountability and public participation in law making), and includes the political will to dismantle property strongholds through redistribution and strengthening of property rights. In addition, it must be acknowledged that part of the legal-political context is also the public's judgment of the state's ability, i.e. the legitimacy of a government in the eyes of its people. See also De Vos 2001: 1-33.
[106] Viljoen 2016: 20; Alexander 2012: 1853-1887.

legal-political context from a colonial-apartheid era to one of constitutionalism, therefore, necessitated the introduction of the new state controls of statutory public trusteeship and statutory state custodianship in an attempt to address ongoing systemic inequalities.

2.2 STATE CONTROL, ECONOMIC WEALTH, AND THE LAW

2.2.1 State regulation and the accumulation of wealth

The centuries-long battle for control of South Africa's land and natural resources and, therefore, its economic wealth has been a protracted and painfully racialised one. The use of laws and policies by past regimes to reinforce Eurocentrism and discriminatory ideology and sustain a select privileged minority is well documented. Apartheid land policy was supplemented by seemingly "neutral" common law principles of property law, which resulted in a system of extreme economic exploitation[107] that created a legal-political context that normalised and legalised the dispossession of property rights as a means to accumulate wealth.[108] Critical to this was the state's interference with and control of natural resources, especially land. As a result, South Africa's legal-political history is marred by the exploitative economic agenda of colonisation, which was followed by the exclusionary laws of apartheid.

The apartheid political agenda pivoted on a segregation-based system that led to the imposition of severe legislative constraints on non-white individuals' full participation in the economic benefits of the country. The colonial-apartheid eras concentrated the exercise of state power on the exploitation of minerals at all costs, which exacerbated the tension between property rights and the public interest. A heightened preoccupation with statutory control over property rights was a key feature of the interventionist apartheid government and its political policies. The

[107] Van der Schyff 2016: 3-4, 18; Davenport 1985: 53-57.
[108] Badenhorst 1991: 122, who states that the mineral policy of this era was located "between the two absolutes of complete state monopoly and unfettered private enterprise".

control over *access* to the economic wealth of natural resources was inseparable from *who* was permitted to have land rights in the private property regime.[109]

The control of land was central to the political agenda and was made possible by a private property system that legalised the exclusion of non-white people from the benefit of South Africa's natural resources by dispossessing them of or limiting their landownership.[110] Therefore, the state regulation of South Africa's natural resources is historically and inextricably intertwined with land and property law to such an extent that it would be impossible to discuss the state's role in relation to natural resources without also discussing the state's regulation of land rights. Indeed, the state has always played a significant role in the regulation and exploitation of the country's mineral resources[111] and used to regulate the development of mineral and petroleum resources within a private property framework (prior to the MPRDA).[112] This framework was based on the common law principle that the owner of the land is also the owner of the minerals contained in the land.[113]

Seemingly neutral common law principles such as this were used to create exclusionary outcomes in law. According to Van der Walt, the apartheid ideology and the Roman-Dutch common law are synergistic because of their shared exclusionary codes[114] that are "far from being neutral",[115] which is evident from their detrimental effect on the socioeconomic circumstances of non-whites.

This then serves as the legal-political context within which the common law concepts and principles historically used to shape and inform the state's role and powers in

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[109] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (Bengwenyama-ye-Maswati Royal Council Intervening)* 2011 4 SA 113 CC: par. 1. See also Van der Schyff 2016: 6. "Where the private-property rights framework within which the control of and access to a country's diverse mineral resources are regulated is supplemented by a discriminatory racially based land ownership model, the unequal impact on the allocation and distribution of wealth and economic power is extreme."
[110] 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.
[111] Van der Schyff 2016: 173.
[112] Lewis 1985: 241-261, 266.
[113] Van der Schyff 2016: 5.
[114] Van der Walt 2001: 258-311, 265; Singer 1996:1283-1497.
[115] Van der Walt 1995: 169-206, 187.

relation to South Africa's natural resources, and the economic wealth derived therefrom, are discussed.

2.2.2 The common law and state regulation of mineral resources

2.2.2.1 *Limiting the* cuius est solum *maxim for access to mineral resources*

The English practice of the state reserving mineral rights upon the granting of land was introduced in the Cape Colony as early as 1813, although mineral rights also formed part of the landowner's rights and were regarded as limited real rights in respect of land, and could be registered as such since the 19th century.[116] However, the importance of the mining industry in the South African economy resulted in extensive statutory and judicial development of the law pertaining to minerals and mineral resources.[117] The *cuius est solum, eius est usque ad coelum et ad inferos* (hereinafter the "*cuius est solum* maxim"), a standard Roman-Dutch common law principle of property law, was the first common law principle used to gain access to the country's mineral resources.[118] The South African common law recognised this maxim, which provided that the landowner had the right to the land surface and to what lies beneath it (the minerals) in "all the fullness that the common law allows".[119]

Yet the state developed and applied an adapted version of the *cuius est solum* maxim regarding minerals. One of the significant adaptations was the introduction of severance (i.e. the separation or removal of the natural resource from landownership) by amending the definition of the rights and duties of the mineral right holder and the surface owner.[120] This adaptation allowed the state to control the exploitation of minerals while also protecting landownership. Ownership of land brought with it access to economic wealth through not only the use of the land, but

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[116] Mostert 2013: 7; Badenhorst *et al*. 2006: 667.
[117] *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 A: 509D-G; *Du Preez v Beyers* 1989 1 SA 320 T: 324F; Mostert 2013:7.
[118] Viljoen & Bosman 1979: 7-20; Hall 1976: 192; *Neebe v Registar of Mining Rights* 1902 TS 65: 83; Lee 1946: 185-186; Hahlo & Kahn 1968: 764; Pienaar 1989: 216-227.
[119] Mostert 2013:7; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 A: 509 D-G.
[120] Van der Merwe 1989: 551; Viljoen & Bosman 1979:7; Franklin & Kaplan 1982: 4-5; Mostert 2013:7.

also the exploitation of the natural resources within it. Therefore, the notion of severance was used to statutorily curtail landownership, separating the mineral rights in land from the ownership title to the land, so that the state could separately alienate and deal with the minerals.[121]

The extent to which the common law was deployed and adapted was informed by the prevailing political agenda at the time.[122] Through the use of severance, colonial powers were able to circumvent the legal implications of the *cuius est solum* maxim that made the landowner the owner of the mineral resources. This served the fundamental purpose of exploiting South Africa's mineral resources for the Crown. Once the right to minerals was severed, the mineral right holder (often the Crown or state) was entitled to search for, mine and dispose of minerals for their own account.[123] Severance resulted in the legal separation of the minerals from landownership and, in effect, from the private property regime in which land operated, allowing the colonial powers to reserve title rights in and exploit South Africa's mineral wealth. This was the common law foundational principle that would later inform the notion of state custodianship introduced in the MPRDA.[124]

Statutory interference under the auspices of the *cuius est solum* maxim during the colonial rule was the genesis of state control over mineral rights in South Africa. The statutory adaptation of the *cuius est solum* maxim began in all earnest following the discovery of diamonds and especially also gold. The legal principle of severance was adopted into South African law from 1881, once the extent of the country's mineral wealth became clear. From then on, mineral rights could be separated from the *dominium* of the land in some parts of South Africa, and by 1911, the practice of severance had become firmly established. The severance of mineral rights from the surface rights (private property regime) enabled third parties to become holders of

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[121] Mostert 2013:7; Hahlo & Kahn 1968: 761.
[122] See Feinstein 2005; Bradbrook 1988: 478-489.
[123] Mostert 2013:7; *Hudson v Mann* 1950 4 SA 485 T: 488 B-D; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 1 SA 350 T: 379.
[124] This point is elaborated on in par. 4.2, which discusses the characteristic features and legal implications of state custodianship, including the legal consequences of removing the natural resource from the private property regime.

the mineral rights.[125] The legal implication was that ownership of the minerals passed from the landowner to the mineral right holder upon severance.[126]

Minerals were valuable assets in the hands of the mineral right holders.[127] The common law developed extensive entitlements to benefit mineral right holders, based on private property rights (limited real rights) such as the right to dispose of and transfer the mineral rights to others. However, the exercise of these extensive entitlements by the mineral right holder conflicted with the landowner's rights.[128] Therefore, the state proceeded to make landownership rights secondary to the mineral right holder's interests, particularly to the interests of the state, which they reinforced after the discovery of substantial mineral wealth. Therefore, the common law was developed to generally obligate the landowner not to disturb prospecting or mining activities, and to permit mineral right holders to do all that was necessary for the proper exercise of their mineral rights. The landowner's rights were statutorily overridden and made subject to state statutory regulation of mineral resources, which has seen the state historically regulating access to and use of land and the benefit derived therefrom from as early as 1813. While political considerations governing the regulation of mineral resources may have varied over time, the chief aim of creating a statutory regulatory context has always been the 'optimal' exploitation of mineral resources.[129]

The extent to which mineral law and policy was both proprietary and administrative depended on the extent of state regulatory interference or intervention by the political order of the day. Moreover, the political agenda played a major part in the construction and deconstruction of property rights in land and natural resources. The state had a vested interest in its national policy, and laws were enacted or

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[125] Mostert 2013: 8-11; Birks 1985: 1-37.
[126] Viljoen & Bosman 1979: 9-10; *Registration of Deeds and Titles Act* 25/1909 (T): subsec. 30, 32; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 A: 509C; *Taylor and Claridge v Van Jaarsveld and Nellmapius* 1889-1890 3 SAR TS 79: 81; *Deeds Registries Act* 47/1937: sec. 70(1); Badenhorst *et al.* 2007: par 40; Badenhorst *et al.* 2006: 693-694.
[127] *Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 GNP: par. 7.
[128] Mostert 2013: 11-13; Badenhorst *et al.* 2006: 47-49.
[129] Mostert 2013: 13-15; Badenhorst *et al.* 2006: 667.

interpreted to give effect to the national policy direction. This is a significant observation in view of the state's public trustee or custodian role in relation to natural resources.

It is also worth noting from the paragraphs above that the separation of natural resources from the private property regime for regulatory purposes is nothing unusual in South Africa. Under the MPRDA, having finally abrogated the *cuius est solum* maxim in regard to mineral resources, that this severance now only takes place in a democratic constitutional legal-context and under the auspices of state custodianship. This time, however, it is aimed at the equitable redistribution of South Africa's economic wealth for the benefit of all South Africans, and not a select minority. As such, the legal-political agenda of the MPRDA, unlike that of previous dispensations, is intended to be one of inclusivity in the national interest.

Yet the state, as custodian, also holds wide statutory powers under the MPRDA. These once again allow mineral right holders extensive rights akin to private ownership entitlements, though subject only to the state (as in past dispensations), thereby maintaining the heavy reliance on private property law constructs[130] that previously resulted in exclusionary outcomes for the majority of South Africa's indigenous peoples.

The next section discusses other common law concepts and principles historically relied on for the regulation of water resources and the control of its beneficial use that also resulted in exclusionary outcomes in terms of the distribution of land and resources.

[130] Whether state custodianship under the MPRDA is indeed capable of equitable redistribution that benefits all South African citizens and breaks free of the apartheid regulatory framework in respect of mineral resources is discussed later in par.4.2.3.

2.2.3 The common law and state regulation of water resources

2.2.3.1 *Exclusionary regulation:* Dominus fluminis *and riparian ownership*

Prior to the Dutch and British colonisation, African customary law governed water rights in South Africa. The Bantu people of Southern Africa had a subsistence economy, the San were hunter-gatherers, and the Khoikhoi were stock farmers. In these communities, water was free, but the arrival of the Dutch and their decision to settle at the Cape of Good Hope resulted in increasing encroachment on native resources by settlers, which eventually led to the subjugation of the African communities.[131] The doctrine of state ownership of all public rivers was adopted in the 17th century. However, the term *dominus fluminis* was coined by South African jurists and was not derived from Roman or Roman-Dutch law.[132] *Dominus fluminis* was used to indicate full state control over the use of water, although the state did not necessarily own the resource. The law assigned the state as *dominus fluminis* over all South Africa's rivers and waterbodies.[133]

The state as *dominus fluminis* was similar to the state's modern-day role as public trustee of water, except that the state's control of water under the *dominus fluminis* principle was limited to rivers and waterbodies. Under this form of state regulation, the state granted settlers water use entitlements, which were based on taking turns to use the resource. Users received permission to use water for short periods and had the absolute right to transfer such permission to whomever they chose. The state granted these water use rights as a privilege (entitlement) only and could withdraw them at any time.[134]

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[131] Tewari 2009: 694-695; Botha 1919: 149-160.
[132] Uys 1996.
[133] Tewari 2009: 696; Badenhorst 1987: 108-112.
[134] Tewari 2009: 696; *Ackerman v Company* 1763; *Stellenbosch v Lower Owners* 1805. See also Viljoen 2016: 161: "Riparian owners did not have special water use rights due to their close proximity to the river, but had to receive privileges, authorisations or entitlements from the VOC to use water. It should be reiterated that even where land was granted in full private ownership, the grant did not include a right to use water, for the state remained *dominus fluminis* and controlled the use of the water. By allocating these entitlements, the VOC exercised its rights as *dominus fluminis.* In fact, the

The *dominus fluminis* principle, therefore, permitted settlers to transfer their water use entitlements between one another as private individuals.[135] The governing authority could grant, issue, withdraw and determine the duration of water use rights, and control was tightened or relaxed according to the demand or extent of competition.[136]

During the British rule, the predominance of land-intensive industry in the economy directed the use of water rights. In 1813, a dramatic change in land tenure was introduced by Sir John Cradock through a proclamation that provided landowners with security of tenure and devolved landownership from the state to individuals.[137] In effect, this reversed the property rights system from state regulatory control over water to one that prioritised individual ownership. The state as *dominus fluminis* struggled for survival under this more liberal British system. Landownership and administrative legal reforms were introduced in the 19th century, along with the land-based riparian principle as a new water management system. The British system of landownership incentivised people by allowing greater access to public water, thereby facilitating the shift to a riparian system of water rights. The ownership of water rights was closely linked to land rights and was a far cry from the Dutch regulatory permit system. Water legislation was particularly aimed at protecting farmers' water rights, as irrigation development was one of the major objectives of the British water rights system. The statutory protection of access to and the beneficial use of water was concretised for landowners during the British rule.[138] In

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dominus fluminis-principle developed through the use of *placaaten* and its application broadened with the system of water entitlements that was used as a tool to regulate water use."

[135] This practice is not permitted under the public trust doctrine because of its potential to result in the accumulation of water use entitlements, with discriminatory or exclusionary outcomes.

[136] Thompson 2006:36.

[137] Tewari 2009: 697; Christopher 1983: 369-383.

[138] Tewari 2009: 699. "When the Union of South Africa was formed in 1910, the Irrigation and Conservation of Waters Act of 1912 (the 1912 Act) was promulgated to codify all the laws of the Union … Riparian users were given rights to use public water which was redefined as the normal and surplus flows of a river … [They] were allowed to use surplus water to the greatest extent that they could beneficially use it." In sum, therefore, the 1912 Act divided water into public *(res communis)* and private *(res privatae),* and the concept of "perennial" water was abandoned for "surplus flow" and "normal flow". Although the 1912 Act recognised riparian rights as dominant, there was provision for grants to non-riparian owners to use water not utilised by riparian owners. See also Van der Walt

this regard, Van Koppen notes that it is through the British title deed system, which was characterised by security of tenure through registration, that the colonial government was able to vest most of the water rights in the white minority by applying a riparian rights system (ownership) throughout South Africa.[139]

In 1948, the National Party came to power and introduced the system of apartheid. With it, the *dominus fluminis* principle was revived. A large section of the party's political support base were irrigation farmers in rural areas, which led to a number of large water projects to encourage economic development in these areas. By this time, South Africa was sufficiently industrialised, and the increasing demand for water placed a burden on limited water resources. Demand could no longer be accommodated by the traditional riparian principle. In other words, the high demand for water rendered it a scarce resource that now required greater regulation. The *Water Act* 54 of 1956 was promulgated, which vested in the state a large measure of control over public water through the principle of "control areas". This meant that the apartheid government could declare certain water areas under its control as desirable in the "public interest" or "national interest".

Through the *Water Act*, state control and regulation of water was reintroduced, with strict controls on industrial and groundwater uses. The apartheid government reassigned the state as *dominus fluminis*, but retained the exclusionary riparian (private) ownership rights in respect of water, which continued to benefit the minority, particularly white irrigation farmers. In defence of its re-emergence as *dominus fluminis*, the apartheid state cited issues of sustainability, arguing that increasing water scarcity required state interference to ration and develop water resources in the national interest. Thus, the monopolisation of financial benefit accrued during the colonial-apartheid era was derived from legislated inequitable access to South Africa's natural resources, like water, on large commercial irrigation farms. Throughout South Africa's natural resource history, there are clear examples of

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2011:1; *Minister van Waterwese v Mostert* 1964 2 SA 656 A: par. 669; Hall & Burger 1974: 1-7; Hall 1934: 12-13.

[139] Van Koppen 2005: 26-28.

exclusionary laws and policies designed to prevent the majority of its citizens from accessing equitable benefit in the economic wealth that was reserved for a select few.[140]

2.2.4 The common law and state regulation of land

2.2.4.1 *State regulation of land in the national interest*

On the eve of the end of apartheid, the black majority, representing at least 80% of South Africans, had access to only 13% of the country's land. This land (the so-called reserves or Bantustans) was held "in trust" by the state, with traditional authorities appointed by the apartheid government to administer it under an imposed communal land tenure system.[141] Evidently, the underlying philosophy of the apartheid-era law relating to land, water and minerals was that the state was vested with statutory control over the exploitation of natural resources. This approach of "statutory custodianship" narrowly managed to avoid the nationalisation of resources.[142] Yet statutory state control over the exploitation and use of natural resources was so institutionalised that the minority enjoyed preferential legal and political advantage in the South African economy. As will be argued later, this approach may be regarded as the precursor to the state custodianship approach in recent land reform laws and policies.[143]

The increased state regulation of natural resources was justified as being in the national interest, and that the scarcity of resources required urgent intervention. Indeed, it cannot be denied that the laws and policies were in many instances designed and directed at the optimal use and sustainability of natural resources. However, in the absence of a constitutional and human rights foundation, the

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[140] Such as the *Native Land Act* 27/1913, *Development Trust and Land Act* 18/1936 and *Group Areas Act* 41/1950. The *Water Act* 54/1956 too promoted separate development for different races and also represented a fundamental policy shift towards regulating water for use in mining, irrigation and manufacturing industries. See also Dugard 1989: 97-99.
[141] Kepe 2012: 394; Cousins 2009: 1-21.
[142] Mostert 2013: 45; Badenhorst *et al.* 1994: 287-298; See discussion in par. 4.3.
[143] See detailed discussion in par. 6.4.

apartheid state's 'national interest' was accompanied by far-reaching human and property rights violations.

The discussion of the state's role in relation to access to and the use of natural resources would not be complete without also contemplating the Roman-Dutch common law concept of *res publicae*. In fact, at each stage of history, the very idea of public use and its evolution has been linked to *res publicae* in some or other way.[144]

2.2.4.2 Res publicae *and the state as custodian of common-pool resources*

The organisation of the Roman law system to meet the aims of order, founded on the highest values of justice, and accommodating the expression of a political economic conscience, prioritised the collective use of "public goods".[145] Roman and later Roman-Dutch law provided the means by which South African property law was classified and characterised, and was adopted with very little alteration. The categorisation of property through the Roman property law system assisted South African jurists to identify legal rules and principles[146] by which to organise the South African property system. Therefore, traditionally, the sources of the law of things are described within the ambit of Roman-Dutch private law. In the South African property law context, therefore, the sources of the law of things are described as Roman-Dutch common law, complemented by South African legislation and case law.[147]

The Roman concept of *res* (thing) was subdivided into a number of categories. The most important distinction is between *res extra nostrum patrimonium* (*res extra commercium*) and *res in nostro patrimonio* (*res in commercio*). The former refers to things not susceptible to private ownership, while the latter denotes things capable of

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[144] Alburquerque 2018: 80. "It could be said that, in the language, interdictal and jurisprudential perspective, converges a tendency that could suppose in part an embryonic approach to the antecedents of the legal protection of natural resources and environment." See in general Johnston 1999.
[145] Alburquerque 2018: 72.
[146] Thomas *et al*. 2000: 155.
[147] Badenhorst *et al.* 2006:12; Van der Merwe & De Waal 1993: 10-21; Horn *et al*. 2021: 5; Van der Merwe 1989; Nathan 1904; Giglio 2012: 1-28.

private ownership and of forming part of private individuals' estate.[148] *Res extra commercium* (things incapable of private ownership) were further divided into things that belonged to the gods or fell under their protection, and things that accrued to all peoples collectively – *res humani iuris*. *Res humani iuris* occurred in various forms, and in this regard, a distinction is made between *res communes*, *res publicae* and *res universitatis*. *Res communes* were things that could be used by the general public, such as the air or sea. *Res publicae* were things that belonged to the state, such as rivers, harbours, bridges, and public roads. *Res universitatis* denoted things that the inhabitants of a particular city had common use and enjoyment of.[149]

In short, *res publicae* vested in the state the ownership of certain property or natural resources that were used by the public and were wholly incapable of private ownership. As a form of *res humani iuris*, this also meant that these public things accrued to all people collectively. Therefore, the notion that *res publicae* vested 'ownership' in the state should not be confused with private law ownership. In South African law, the insusceptibility of *res publicae* to private ownership is derived from several Supreme Court judgments, which serve as clear authority for the exclusion of these things from private ownership.[150] *Res publicae* are generally accepted as being precluded from both ownership by private individuals and private ownership by the state, the latter constituting a different category of public things. Yet in Roman law, the most comprehensive right that anyone (including the state) could hold in respect of a thing was ownership, which to this day forms the basis of most private law systems. This is not to say that there were no limitations or restrictions on the right of ownership. Ownership was always subject to various restrictions like neighbor law, including those imposed by public law, principles of morality and ethics, and any misuse of property that was in conflict with the general interest.[151]

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[148] Van Zyl 1983: 128.
[149] Van Zyl 1983:129; Van der Merwe & Pope 2007: 405-732; Rose 2013: 89-110.
[150] *Anderson and Murison v Colonial Government* 1891 8 SC 294; *Horne v Stuben* 1902 19 AC 317; *Pharo v Stephen* 1917 AD 1; *Union Government, Minister of Lands v Lovemore* 1930 AD 13.
[151] Van der Schyff 2016: 207-211.

The kind of private ownership that is associated with independence and the resultant ability to exclude[152] was not as comprehensive in Roman law as it became in later law,[153] largely through common law developments and adaptations during the colonial-apartheid era.[154] Therefore, in contrast to private ownership, *res publicae* were open to the public by operation of the law, offering non-exclusive access to common-pool resources; yet the maintenance and governance of these resources vested in the state.[155] *Res publicae*, therefore, was inclusionary rather than exclusionary in its most authentic, beneficial application.

The question whether the state in South Africa could grant rights in respect of *res publicae* received attention in *Surveyor-General (Cape) v Estate De Villiers*,[156] where the court confirmed that "it is difficult to conceive that the state would deliberately grant to a private person part of the seashore which in common law was inalienable". Innes CJ held that ownership of the shore was vested in the Crown (the state at the time), but that this did not mean that the state could deprive the public of its common law entitlement to use and enjoy the shore.[157] On appeal, Innes CJ touched on the extent of the public's rights in respect of the seashore, affirming their rights of use and enjoyment and that any interference with those rights would be a wrongful act. Steyn JA, in the dissenting judgment, regarded the state as a mere "custodian" of the seashore "on behalf of the public". Steyn JA further held that there was a strong presumption against the granting of full ownership in respect of *res publicae* and against any concession of a lesser right.[158] Our common law, therefore, suggests that *res publicae* are public things that are not owned by the state, but actually constitute the people's property.[159]

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[152] Van Warmelo 1959: 84-98; Visser 1985: 39-52; Van der Walt 1990: 26-48; Dorfman 2010: 1-35.
[153] Van Zyl 1983:132-133; Muller *et al.* 2019: 38-40
[154] Van Warmelo 1950: 205-242; Van der Walt 1992a: 431-450; Pienaar 1986: 295-308.
[155] Van der Schyff 2016: 408.
[156] 1923 AD 588.
[157] Mbodla 2000: 4.
[158] Mbodla 2000: 4.
[159] Van der Schyff 2016: 209.

The minority judgment in *Consolidated Diamond Mines of SWA Ltd v Administrator, SWA*[160] reiterated the opinion that the state was merely the "custodian" of the seashore "on behalf of the public" in line with Roman law heritage.[161] Interestingly, the court in this instance used the term "custodian" to indicate that the state merely governed the property on behalf of the public, thereby exercising a custodial sovereignty.[162] The term is in no way indicative of private law ownership by the state, nor is it at all similar to state custodianship under the MPRDA, for reasons to follow.[163]

The state is often described as either the 'custodian' or 'trustee' of public things,[164] meaning that the state has an obligation to govern over the use of the *res publicae* for the benefit of the public. Therefore, in its most authentic form, *res publicae* involve entrusting the state with the role of 'guardian' or 'keeper' of public things for the use and enjoyment of the nation. As such, *res publicae* remain insusceptible to any form of private ownership, which therefore also precludes the state from becoming the private owner of the *res publicae*.[165]

Modern South African property law is clear that *res publicae* are things that belong to an entire civil community, and that a distinction should be made between property intended for direct public use, and property that belongs to the state as private law owner and only *indirectly* benefits members of the public. Only the former can be classified as both public and out of commerce, while things not intended for direct public use are in commerce and fall within the ambit of private law.[166] The Roman law understanding of *res publicae* provides a theoretical foundation for

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[160] 1958 4 SA 572 A.
[161] Mostert & Van den Berg 2014: 76-97.
[162] Van der Schyff 1998: 33.
[163] This aspect is discussed in chapter 4.
[164] *Anderson and Murison v Colonial Government* 1891 8: par. 293. De Villiers CJ stated: "The Government are in some sense the custodian of the seashore, but they are such only on behalf of the public." As Voet 2018: par. 1.8.9 points out, government may "grant permission to individuals to build on the seashore … but that permission is, I take it, subject to the condition that the rights of the public shall not be interfered with".
[165] Van der Schyff 2016: 212.
[166] Muller *et al*. 2019: 33.

understanding the public property regime by emphasising the public use and the public interest purpose of the property.[167]

State regulation of the public use of property commonly takes place through statutes such as the *Integrated Coastal Management Act* 24 of 2008 (ICMA). ICMA states that all coastal public property is held "in trust by the state" on behalf of the citizens of South Africa, and that such property is inalienable and cannot be sold, attached or acquired by prescription, nor can rights over it be acquired by prescription.[168] It clearly defines all coastal public property as being held by the state as trustee, rendering the property neither individuals' nor the state's private property. ICMA further reaffirms the public's right to use and enjoy the property,[169] and the function of the state as trustee to protect the property from adverse effects.[170]

Statutes such as ICMA are commonly used to codify the state's role in relation to the environment. They often include regulations that impose restrictions on the exercise of the public's rights to use and enjoy the public thing. Historically, however, legislation has served as a tool to distort the original intent of property law principles and concepts, as discussed above. This is also true of the Roman-Dutch construct of *res publicae*, which has been used to advance political agendas and has caused a departure from its original intent, namely, to be used by all people of the country,[171] to one that limits its application. As a result, this state-regulated use of *res publicae* became a familiar practice in our common law, with restrictions in the form of racially segregated use imposed during apartheid, which had exclusionary outcomes.[172]

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[167] Viljoen 2016: 76.
[168] ICMA: sec. 11(2).
[169] ICMA: sec. 13(1)(b)(i), (iii).
[170] ICMA: chapters 5-8.
[171] Van der Schyff 2016: 212.
[172] *Sea-shore Act* 21/1935; *Reservation of Separate Amenities Act* 49/1953.

2.2.4.3 Res publicae *set apart from state custodianship in the MPRDA*

Res publicae – as things held by the state for the beneficial use of the public – is similar to public trusteeship in the NWA and state custodianship in the MPRDA in that these constructs both also seek to benefit all citizens of South Africa. Moreover, as with *res publicae*, both public trusteeship and state custodianship also authorise the state to assume complete regulatory control over the use and enjoyment of the property that falls within the public law domain.

The MPRDA is used as a legislative vehicle to introduce state custodianship in order to solidify the state's legal authority to act as custodian of mineral and petroleum resources for the benefit of the nation. Through the MPRDA, however, the state acquires the power to grant mineral rights to individuals or corporations. This power to grant use rights in common property to private persons is inconsistent with the substance of the common law concept of *res publicae*, which notably precludes such private ownership.[173] This feature of *res publicae* Voet describes as "those things in public ownership of many people".[174] However, not all Roman-Dutch commentators agreed with Voet's description of public ownership in respect of *res publicae*. Van der Leeuwen held that *res publicae* became part of the *regalia*, and that the ownership of *res publicae* and the use and enjoyment thereof had been separated.[175] Yet the most widely accepted view is that *res publicae* assumes that the state holds the thing in trust for the use and enjoyment of the general public, and that it is the citizens of South Africa who collectively own the thing.[176]

Furthermore, *res publicae* is "inalienable" by the state, implying that the state cannot alienate or preclude the general public's use and enjoyment of the property unless the public adversely affects or impedes the state's duty to protect the property.[177] State custodianship in the MPRDA, however, permits the state to exercise wide

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[173] Van der Vyver 2012: 134.
[174] Van der Schyff 1998: 30; Voet 2018: par. 1.8.1, 1.8.8.
[175] Van der Schyff 1998: 30.
[176] Muller *et al*. 2019:34.
[177] Muller *et al*. 2019:34.

discretionary powers to interfere in the use and enjoyment of the natural resource. The state, as custodian, has the power to refuse or grant public use of the natural resource.[178] State control over mining activities under the auspices of state custodianship in terms of the MPRDA is no longer limited to earlier common law concepts of public property, but involves a far more extensive state control.[179] Therefore, it would be inconsistent with our common law to argue that state custodianship in the MPRDA converted the mineral and petroleum resources into *res publicae* in the sense of Roman-Dutch common law.[180]

2.3 CONCLUSION

This chapter explored the historical common law concepts and principles that have been used not only to describe the role of the state, but to manipulate the legal interpretations of the state's role in relation to South Africa's natural resources. The various political interpretations of the common law in relation to the regulation of access to and use of natural resources over the centuries affected the generation of economic wealth and were justified as being in the national interest. It has been established that the state regulation of land, water and minerals in South Africa is not new, but that varying degrees of state regulation of natural resources have indeed taken place over the course of history. History has shown that an overly ideological approach to state regulation can lead to the infringement of property rights that often overlap with socioeconomic rights. The legal-political contexts in the colonial-apartheid eras vested in the state a large measure of control, which was justified as being in the public or national interest,[181] and saw the introduction of extensive

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[178] MPRDA: sec. 3(2), 23(3), 26.
[179] Van der Vyver 2012: 141. This extensive state control, according to Van der Vyver, is because state regulation and control of natural resources under state custodianship in the MPRDA is derived from the state having become the owner of the mineral and petroleum resources in the land.
[180] Van der Vyver 2012: 134.
[181] The apartheid government put the state in control of water resources and, through the *Water Act* 54/1956, reinvested the state as *dominus fluminis*, while still retaining some riparian ownership rights. The apartheid government defended this selective quasi-public-private rights

legislation and policies to secure the state's control over natural resources.[182] The use of common law principles such as the *cuius est solum* maxim and the severance principle resulted in the legalised exclusion of the majority of South Africans from the benefits of the nation's economic wealth. A preoccupation with the enactment of statutory controls and policies over land was a key feature of the interventionist apartheid state. Legal constructs such as *dominus fluminis* and riparian ownership were tools to redefine and restructure the property regime to serve a particular sociopolitical agenda. Therefore, when the modern-day state amends its regulatory framework, it too redefines the existing property regimes, subjecting them to ever more complex systems of control.[183]

An examination of the Roman-Dutch common law principle of *res publicae* compared to the legal construct of state custodianship in the MPRDA reveals important differences. *Res publicae* denoted particular categories of public things that could not by law be privately owned, as the use and enjoyment of the things was available to all citizens as commonly held resources, in which the public retained a vested interest.[184] Under state custodianship of mineral and petroleum resources, however, the capacity afforded to the state to grant mining rights to (private) individuals or (private) corporations is out of keeping with the substance of the common law *res publicae*,[185] which affords the public an unrestricted right to access and use of the thing (for example the seashore) and does not permit the depletion or complete consumption of the thing. Under *res publicae*, one person's use of the resource also does not reduce, weaken or prohibit another person's corresponding right to the

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approach by stating that the increasingly scarce water resources in the country necessitated such state interference.

[182] Mostert 2013:7. In the mining industry, the discovery of diamonds and gold resulted in extensive statutory and judicial development of the law pertaining to minerals and mineral resources. *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 A: 509 D-G; *Du Preez v Beyers* 1989 1 SA 320 T: 324F.

[183] Viljoen 2016: 20.

[184] Blackmore 2018: 4.

[185] Van der Vyver 2012: 134.

same resource.[186] The same cannot be said of state custodianship under the MPRDA, which clearly limits access to and use of the natural resource by others.

South Africa is no stranger to the radical development or transformation of its regulatory property framework in the public or national interest. This has been demonstrated in many shapes and forms throughout the country's history. As such, the enactment of transformative laws and policies can result in the reconstruction of the property rights system. However, whether transformative state interventions will lead to just outcomes will largely depend on the legal-political context and constitutional interpretation.[187]

In the next chapter, the understanding of the state's role as trustee or custodian of natural resources is explored from a modern-day South African law perspective. This entails a comprehensive discussion of public trusteeship and the stewardship ethic.

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[186] Van der Schyff 1998: 30, where it is stated that Van der Leeuwen held that "no-one was entitled to appropriate to himself the exclusive use of common property, as everyone was entitled to its use and enjoyment".

[187] Albertyn 2018: 441-468. "[T]he equality-centred, democratic Constitution represented an important anti-colonial and anti-patriarchal achievement, but … the plasticity of equality meant that it would always be open to different interpretations by the executive and parliament, as well as by courts tasked with enforcing the Constitution. The conditions of the transition and early years of democracy saw the emergence of a social democratic/liberal egalitarian equality as the dominant political and legal, if not economic, idea, most especially in the jurisprudence of the Constitutional Court. This jurisprudence was often powerfully inclusive, but less likely to be transformative, would prefer process over substance (especially in socio-economic rights) and was better at addressing inequalities of recognition than redistribution. Although it clearly registers a commitment to substantive rather than formal equality, it also reveals the differences within substantive equality between a social democratic/liberal egalitarian model and a more transformative approach." See also Coombe 1989: 603-652.

CHAPTER 3

THE STATE AS TRUSTEE OR CUSTODIAN OF NATURAL RESOURCES

3.1 INTRODUCTION

The state as public trustee or custodian of the environment is the primary legal justification for the regulation of access to and the beneficial use of water, minerals, and land.[188] This necessitates an exploration of the idea of the state as trustee, and what this capacity entails. In South Africa, the state is most commonly referred to as the 'public trustee' or as exercising 'public trusteeship' in respect of the environment and its natural resources. Critical to this discussion, therefore, would be the origins and foundational principles of the public trust doctrine, its incorporation and development in other international jurisdictions, and its influence on the development of public trusteeship in South Africa. South Africa's unique public trusteeship and its manifestation of the stewardship ethic will be investigated, also paying attention to the state's fiduciary rights and duties and the importance of infusing human rights and constitutionalism into the exercise of public trusteeship.

This chapter seeks to provide a perspective on the international democratisation of resource rights, which entails public participation and accountability in resource management. The state's environmental responsibility as trustee includes rights and duties, the latter being owed to both current and future generations of South Africans. Therefore, Barnes states that the state's environmental stewardship responsibility goes beyond mere perspective and policy.[189] In this regard, international interpretations of the stewardship ethic are useful in understanding the constitutional human rights trends that influence how stewardship and ethical resource management are viewed.

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[188] Mureinik 1994: 31-32; Kibet & Fombad 2017: 351; Pienaar 2014: 641; Sparks 2011: 301-332; Van der Merwe 1989: 663-692; Feinstein 2005: 13; Giliomee 2020: 8; Changuion & Steenkamp 2011: 17-18; Carey Miller & Pope 2000: 3-4; Bennett 1996: 66.
[189] Barnes 2009:156.

The discussion that follows considers the evolving nature of the stewardship ethic in resource management in South Africa, its context sensitivity, its recognition of social justice and inequalities, its rootedness in democratic principles and constitutional values, and its cognisance of international resource property dynamics.

3.2 AN EVOLVING STEWARDSHIP ETHIC IN RESOURCE MANAGEMENT

3.2.1 Growing a context-sensitive stewardship ethic

South Africa has historically followed a biodiversity stewardship approach in its laws and policies regarding environmental resources.[190] This approach seeks to secure land in biodiversity priority areas by entering into agreements with private and communal landowners, as directed by conservation authorities.[191] Biodiversity stewardship has been institutionalised in South African policy but can perpetuate exclusionary practices. In South Africa, the structural inequalities created during the colonial-apartheid eras have many dimensions, including race, gender, geography, and economy, which do not operate in isolation. In view of these structural inequalities, Western concepts of environmental stewardship clearly need to be expanded to include (constitutional) values and collaborative management (policy) approaches,[192] in ways that are mindful of the socioeconomic context and are "reasonable" in terms of ensuring accountability.[193] What is required, therefore, is a context-sensitive stewardship approach. This is particularly necessary where equitable access to natural resources and beneficial use for all is a constitutional objective, alongside the protection and sustainability of the environment for future

[190] *National Environmental Management: Biodiversity Act* 10/2004.
[191] South African National Biodiversity Institute 2016.
[192] Barendse 2016: 28.
[193] Bennett & Powell 2000: 607. Bennett discusses the criteria of "reasonableness" to hold local authorities accountable for their fiduciary duties with regard to land management, explaining that the undefined content of the fiduciary duty still poses challenges to the enforcement of accountability of other state institutions under administrative law. See also Liebenberg 2008: 464-480; Quinot & Liebenberg 2011: 639-663.

generations.[194] A stewardship ethic sits at the core of both public trusteeship and state custodianship. Thus, part of understanding the legal construct of state custodianship would be to understand its cultural ethic and the theoretical basis for its recognition in South African law.

In using the terms "trustee" and "custodian" interchangeably in reference to the state in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[195] the high court directly linked these terms to the concept of stewardship for future generations.[196] Clearly, in South Africa, a stewardship ethic is intended to inform the ethical culture of the management of environmental resources held under public trusteeship. In other words, the duty of care expected of the state is supported by the fact that the Constitution confers on state authorities a stewardship responsibility to protect the (beneficial) exercise of everyone's environmental rights for both present and future generations.[197]

For this reason, many South African non-governmental organisations (NGOs) are adopting a more holistic and integrated interpretation of stewardship – a "social-ecological stewardship", which is better suited to address South Africa's complex socioeconomic challenges.[198] This broadening of the stewardship narrative among NGOs has been accompanied by a fairly rapid diversification away from a sole focus on biodiversity to incorporate socio-political issues as well, particularly in countries that have a legacy of postcolonial landownership.[199]

In general, a steward is defined as the "person entrusted with the management of another's property",[200] while stewardship is regarded as the "careful and responsible

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[194] Constitution: sec. 24(b)(iii), 25(4)(a); Viljoen & Makama 2018: 209-230.
[195] 2006 ZAGPHC 132: par. 19.
[196] Van der Schyff 2016:231; *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 ZAGPHC 132: par. 19.
[197] Constitution: sec 24(b). "Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures …".
[198] Cockburn *et al*. 2019: 6-7; Liebenberg 2008: 464-480.
[199] Barendse 2016: 21; Viljoen 2009: 503-527; Zambara 2010: 458-478.
[200] From *Concise Oxford Dictionary of Current English* 1985.

management of something under one's care".[201] While these general definitions emphasise the relationship of trust and care in respect of others' property, the stewardship ethic entails much more, being one of the dominant terms used to describe goals, principles and actions taken to achieve sustainability in natural resource management.[202] Stewardship, therefore, provides the guiding ethos or principles that characterise the execution of management policies, and the stewardship ethic should be reflected in the way in which the public trustee manages natural resources. In essence, "stewardship" describes the interaction between humans (regulation) and nature (natural resources).

Given the close relationship between societal needs and the environment, the understanding of the stewardship ethic has internationally developed to incorporate concerns of social justice and democracy to provide a deeper ethical basis of human responsibility and care for nature. Therefore, international interpretations of the stewardship ethic indicate that resource management discourses and ideologies are becoming increasingly integrated with systemic understandings of the relationship between humans and nature.[203]

3.2.1.1 *Stewardship ethic and social justice*

In South Africa, as in many Southern African nations, the struggle to redress the ills of colonialism has shifted from a fight for liberation from colonisation to a reignited discourse on radical economic transformation and inclusive growth.[204] Extreme inequality continues to undermine economic growth. In many of these countries, the African political elite inherited an almost intact colonial administrative system, complete with laws, attitudes and traditions.[205] In an attempt to counter the inherited inequalities of resource distribution, there has been a surge in non-binding

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[201] From *Oxford Advanced Learner's Dictionary* 2015.
[202] Barendse 2016: 21; Anonymous "Auditor-general reveals shocking state of South Africa's municipalities" https://businesstech.co.za/news/government/325671/auditor-general-reveals-shocking-state-of-south-africas-minicipalities/ (accessed on 11 August 2021).
[203] Cockburn *et al*. 2019: 1.
[204] Musendekwa et al. 2021: 84; Oloka-Onyango 1995: 1-71; Mostert & Bennett 2012: 1-22.
[205] Kibet & Fombad 2017: 351.

international land and resource instruments that impose limits on absolute and exclusive individual property rights over natural resources, while formally, governments remain the authority in making and enforcing rules on (resource) property.[206]

Therefore, it is unsurprising that social justice is increasingly forming part of the stewardship ethic. South Africa's stewardship ethic, for example, recognises that inequality manifests in high levels of unemployment and poverty, which are largely due to the control of international economic wealth. Incomes and investment resources continue to be monopolised by a small group of corporate and financial elites, whose interests dominate global events, including social development and equitable redistribution of resources in countries such as South Africa.[207] In fact, as part of the drive for economic transformation, the state has set out its developmental goals in its NDP 2030.[208]

An increase in private-sector participation was highlighted as a need in the NDP, and in 2017, it was stated that certain "trade-offs" were to be expected.[209] The budget review noted that, with the increased focus on the growth of the private sector, ensuring effective regulatory authorities to "curb the power of monopolies" would be essential.[210] From this statement, one can deduce that the "trade-off" for economic transformation may be a withdrawal from or restriction on social development, which previously received considerable investment. However, it is also widely accepted

[206] Alonso-Fradejas 2021: 6; Adams 2013: 91-97.
[207] Werner 2015: 67. "[C]ommunal tenure reforms have gradually increased the advantages of communal tenure for ruling elites. … [T]he nature of communal tenure in its various administrative incarnations – native reserves, homelands, communal areas – has changed from primarily providing access to land for poor households and labour migrants to becoming sites of capital accumulation."
[208] The NDP 2030 and its objectives alongside recent land reform laws and policy developments, and the increased state regulation of rural land economy under custodianship is discussed in greater detail in chapter 6.
[209] National Treasury 2017: 1; Van Dijk & Croukamp 2007: 673. Ideally, the developmental state should have the capacity both to intervene in the economy and regulate its own extractive and distributive obligations in a functional manner to enhance the greater good. This might be seen as a paradox, as the South African government is also constitutionally committed to democratic and participatory governance. In this context, it is argued that the move towards a developmental state may well mean that effective management comes at the expense of better (more responsive) governance.
[210] National Treasury 2017: 1.

that it is the protected concentration of economic wealth in the hands of a few that undermines political, social and cultural development to the detriment of the most vulnerable.[211] Therefore, while the NDP seems promising in many respects, if it is not carefully monitored, its economic transformation model could leave the most vulnerable members of society behind, prejudice their future generations, and merely recreate disproportionate benefit by establishing a dual-class system.[212]

The balancing of potential trade-offs between social and economic dynamics will require a strong, context-sensitive stewardship ethic that is cognisant of social justice by determining the freedoms that make life meaningful and fulfilling, and ensuring that these are not seriously undermined by legislative (regulatory) interventions.[213] Therefore, the central position should be the advancement rather than the restriction of economic freedoms for previously disadvantaged groups.[214] Any legislation or other measures implemented by the state with regard to its fiduciary duties as trustee or custodian of the environment must be "reasonable".[215]

The recognition and application of a stewardship ethic of care, or an ethical management culture, is a constitutional expectation of a state that acts on behalf of present and future generations. Should state authorities not exercise their powers with the requisite stewardship ethic in the management, protection, and conservation of natural resources, this would point to a failed state that does not meet the reasonable standard of care expected of a trustee acting on behalf of the nation.

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[211] Govender 2016: 244.
[212] Etebari "Trickle-down economics: Four reasons why it just doesn't work" https://www.faireconomy.org/trickle_down_economics_four_reasonskle-Down (accessed on 9 September 2022).
[213] The use of laws and policies to effect political agendas that can have exclusionary outcomes, undermining certain freedoms and rights, is discussed in chapter 6.
[214] Njoya 2021: 192-193.
[215] Constitution: sec. 24(b), 25(5); Nickel 1993: 77-86.

3.2.1.2 *Stewardship rooted in democracy and constitutional values*

History has shown that the dismantling or reconstruction of property rights, supported by political ideology and legislative interventions, can be an effective and long-term means of controlling socioeconomic conditions in a country.[216] However, history has also shown that where legislative interventions are not embedded in constitutional values, basic human rights and democratic principles, political influences on the law can have destructive consequences.[217] What is needed, therefore, is the stewardship ethic put into practice, translating the theory or ideals of stewardship into tangible actions based on that ethic[218] or underlying values. Consequently, the stewardship ethic forms an intrinsic part of the way in which state interventions are implemented. In South Africa, this means that all tangible actions taken by the state must be based on the kind of stewardship ethic that is informed by and consistent with the Constitution.

However, it is generally accepted that a stewardship ethic is not exclusive to state actors but requires participation by the public.[219] While the constitutional duty of public trusteeship lies with the state, its stewardship ethic requires that the public participates in the development of legislation that is to shape natural resource property relations. Unlike in the colonial-apartheid eras, the stewardship ethic of the constitutional era is embedded in a uniquely South African public trusteeship that is based on altruistic values and aimed at long-term environmental sustainability,[220] supports democratic principles of public participation (involving interested and affected parties through consultation and collaboration) and upholds the Bill of

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[216] Zirker 2003: 621-641; Cousins 2011: 2-21.
[217] Bennett 1996: 65-94.
[218] Cockburn *et al*. 2019: 2.
[219] A prime example of such participation and collaboration was the seventh Annual Water Stewardship event on 23 November 2021, which was hosted by the Strategic Water Partners Network and where Deputy Minister Dikeledi Magadzi gave the keynote address under the theme “Water stewardship in action: A journey to economic recovery”.
[220] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management* 2007 6 SA 4 CC: par. 44. On the topic of sustainable development, the court held: “Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment”.

Rights. These democratic principles and constitutional values can be found in the provisions of natural resource laws such as the NWA and NEMA.[221] As such, the South African stewardship ethic should be infused with the democratic principles and constitutional values on which the country's democracy has been built.

Public participation[222] is also how the nation holds state actors accountable for the proper exercise of their stewardship of the country's natural resources and lies at the heart of democracy. Therefore, it may be necessary to have sanctions that could be imposed on a steward, particularly the state, that fails to meet its stewardship duties. Having said that, Barnes warns that there must also be limits to public engagement in decisions about the use and management of natural resources.[223] For the sake of state efficacy, trustee accountability and democracy, a careful balance must be achieved between the exercise of state regulation, public participation and individual decision making.

3.2.1.3 *International resource property dynamics and the Constitution*

Recent resource property dynamics reveal an interesting trend in contemporary (resource) property law that frames land, water, and other natural resources as property rights. Followers of this trend in its most extreme form believe that there is a human right to all these forms of property. Regardless, it would seem that international efforts to overcome the current social and ecological "crisis of inequalities" have given rise to new and more transformative responses, which have resulted in two major international breakthroughs for the democratisation of resource rights.[224] The first was when, in 2010, the United Nations (UN) recognised the human right to water and sanitation, illustrating the growing strength of human rights claims relating to resources.[225] The second occurred in 2018, when the UN

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[221] NEMA: sec. 21, sec. 24.
[222] Arnstein 1969: 216-224; Muller 2011: 742-758. See also Currie *et al.* 2001: 87-90. "Participatory democracy means that individuals or institutions must be given the opportunity to take part in the making of decisions that affect them."
[223] Barnes 2009: 162.
[224] Alonso-Fradejas 2021: 6-7.
[225] Alonso-Fradejas 2021: 7; Durand-Lasserve & Royston 2002: 8-9.

recognised the right to land and other resources as a substantive human right.[226] The takeaway here, besides the trend itself, is that the international community has reaffirmed that stewardship by states is to be based on values of altruism and long-term benefits.[227]

One could safely say that the objectives contained in the Constitution and its provisions are altruistic and forward-thinking in their progressive realisation and are aimed at securing long-term benefit in the environment for generations to come. The Constitution places a stewardship responsibility on the state to secure the sustainable development and use of natural resources, while promoting justifiable economic and social development.[228] This should be read in tandem with the property clause, which confirms that equitable access to land and all South Africa's natural resources is in the public interest.[229] The state, therefore, is mandated to take reasonable legislative and other measures to ensure that *all* citizens gain equitable access to land.[230] While the stewardship ethic has been infused into the natural resource laws of South Africa by virtue of the state's public trusteeship in statutes such as the NWA and NEMA,[231] this should by no means be seen as an acceptance of the global trend that all natural resources constitute property to which everyone has an unqualified basic human right. What the Constitution does demand, however, is a stewardship ethic that is conscious of both the domestic and international human rights trajectory of the stewardship responsibility in respect of natural resources.[232]

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[226] Alonso-Fradejas 2021: 7.
[227] Barendse 2016: 21.
[228] Constitution: sec. 24(b)(iii). "Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."
[229] Constitution: sec. 25(4)(a). "[T]he public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources ..."
[230] Constitution: sec. 25(5). "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."
[231] See discussion under par. 3.4 below.
[232] Constitution: sec. 39(1). "When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

3.3 In summary

The conscious manifestation of the stewardship ethic in public trusteeship is significant for the restructuring of the property rights system. It allows for efficacy and accountability through greater public participation, which is crucial to achieve a democratised property law regime.[233] Therefore, one can conclude that the ideal stewardship ethic in a property structure is one where natural resources management is subject to responsibilities of care and does not result in the exclusion, absolute control and alienation of trust assets. The steward (state) is, in essence, a duty bearer rather than a right holder.[234]

3.4 THE DEVELOPMENT OF PUBLIC TRUSTEESHIP IN SOUTH AFRICA

3.4.1 A uniquely South African public trusteeship

Competing interests in respect of the wealth derived from natural resources such as water, minerals and land remains a remnant of South Africa's colonial history of dispossession. However, certain reform laws and policies introduced to centralise control over who gains access to and use of natural resources in the hands of the state have resulted in further dispossession of rights and interests in these resources for some communities.[235] This perpetuation of socioeconomic inequalities post-

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[233] Albertyn 2018: 467. "Participation is linked to the constitutional value of (participative) democracy at all levels of life and asks whether conditions are such that people are able to participate fully in social, economic and political life, across the public/private divide? And does everyone have a roughly equal say in political, social and economic institutions, regardless of wealth, property, class, power and privilege".; Sheppard 2010: ch 6.

[234] Lucy & Mitchell 1996: 160.

[235] Mnwana "Why giving South Africa's chiefs more power adds to land dispossession" https://theconversation.com/why-giving-south-africas-chiefs-more-power-adds-to-land-dispossession-93958 (accessed on 14 September 2022). According to Mnwana, the ironic discovery of platinum in the former Bantustan homeland areas "hasn't been an economic saviour for the ordinary residents in the mine villages who face grim living conditions. Most are characterised by extreme poverty, severe inequalities and high unemployment. This is even though some of these communities have been recipients of substantial mining revenues. But these are controlled and distributed by local traditional authorities, known as chiefs, who have positioned themselves as custodians of rural land and mineral resources. They have done so in collusion with the state and mining companies … The main piece of legislation that did this was the Traditional Leadership and Governance Framework Act of 2003. It

apartheid has sparked many an academic debate around the restructuring of a property resource system that somehow continues to be dominated by the private property regime.[236]

It was clear from the outset that the post-apartheid conditions would require legislative measures to combat the deep socioeconomic divide and inequalities among the South African people. Accordingly, as early as 1998, the concept of public trusteeship emerged in the *White Paper on National Water Policy for South Africa* ("*White Paper on Water Policy*") and was formally included in sections 2 and 3 of the NWA.

According to Van der Schyff, the drafters of the *White Paper on Water Policy* "romanticised" the concept of public trusteeship by promising that "the values of our democracy and our Constitution are to be given full force in South Africa's new water law", that the "idea of water as a 'public good' will be redeveloped into a doctrine of public trust, which is 'uniquely' South African", and that the state, as public trustee, will retain the right to "influence the country's economic and social development".[237] In so doing, the *White Paper on Water Policy* reaffirmed water as a resource common to *all*, with its use subject to national control.[238] Water was consequently placed under the centralised authority of the state. Section 3 of the NWA[239] formally

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reenacts (*sic*) traditional ('tribal') authorities to preside over precisely the same geographic areas that were defined by the apartheid government. But there's ambiguity around what powers the Act actually gives chiefs (*sic*). It has been interpreted as giving them and their traditional councils powers over the administration and control of communal land and natural resources, economic development, health, and welfare, and to administer justice … Centralising this power in the hands of chiefs is another form of dispossession".

[236] Donaldson *et al.* 2002: 11-24; Alonso-Fradejas 2021: 9. The commonly held perception that private property protects exclusivity and that control of property is the sole cause for the ongoing unequal distribution of property advances what Alonso-Fradejas describes as an "unstable middle-ground of political compromise" – a narrative in which polar opposites are compared in a debate where neither private ownership nor state regulation could ever be the clear winner. It is suggested that the continuation of this debate only delays economic transformation and the redistribution of property. In addition, the "unstable middle-ground" risks losing the public's confidence due to its neglect of its fiduciary duties as steward, which can lead to socio-political unrest. See also Bennett 1996: 65-94; Rose 1996: 329-370; Mostert 2002; Mostert & Lei 2010: 383.

[237] Van der Schyff 1998: 1; Klug 1997: 5-10.

[238] Van der Walt 2011: 74.

[239] NWA: sec 3(1). "As the public trustee of the nation's water resources the National Government, acting through the Minister must ensure that water is protected, used, developed, conserved,

introduced the concept of public trusteeship, followed by NEMA and then the *National Environmental Management Act: Biodiversity* (NEMBA).[240] Each statute ingrained the concept of public trusteeship firmly into South African jurisprudence. Public trusteeship in the NWA confers on the state a duty to act as trustee of all water belonging to the South African nation. It is important to note that the concept of public trusteeship as envisaged by the drafters of the NWA was not meant to appoint the state as the owner of water or to confer on the state any ownership entitlements; rather, the NWA installs the state as public trustee or "guardian of the nation's water resources".[241]

The statutory rights and duties in these regulatory statutes place the environment in public trust on behalf of the South African people and determine the extent of the state's public trusteeship.[242] Therefore, the state, as public trustee, is required to ensure equitable allocation and beneficial use in the interest of the public, and promote environmental values at the same time.[243] Consequently, public trusteeship in South Africa not only involves the stewardship ethic; it goes beyond its philosophical basis of public trust by legislating public trusteeship for the unique South African socioeconomic context.[244]

To better describe public trusteeship as it applies in the South African context, the origins and international prevalence of the public trust doctrine are explored next.

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managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate."

[240] 107/1998 and 10/2004 respectively.

[241] Department of Water Affairs 1997.

[242] *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products* 2004 1 All SA 636 E 658.

[243] NWA: sec. 3(2).

[244] Brady 1990: 621-646.

3.5 THE INTERNATIONAL PREVALENCE OF THE PUBLIC TRUST DOCTRINE

3.5.1 The philosophical foundation and ethical basis of public trusteeship

The concept of public trust or public trusteeship is found in many international property regimes and is by no means new in legal philosophy. According to Locke, governments "merely exercise a fiduciary trust" on behalf of their people.[245] To Pound, the management of the state's role with regard to natural resources is based on "a sort of guardianship for social purposes".[246] Marx, in turn, states that society, or the nation as occupants, users and diligent guardians, must hand the earth down to generations to come.[247] Sand believes that while these statements constitute the fundamental political and philosophical dimensions of trusteeship, the public trust doctrine and its stewardship characteristics is much more than a philosophical notion. Instead, it compels the sovereign to act as the "guardian" of certain public interests and forms the core of many foreign legal constructs of public trusteeship.[248]

Academic commentary suggests that the public trust doctrine has its roots in the Roman law concepts of public and common property, and that Roman law is probably the most doctrinally pure form of public trust, as illustrated by the property classification of *res publicae*.[249] After all, the origins of the public trust doctrine stem from the Roman law maxim in the *Corpus Iuris Civilis* of Emperor Justinian I: "So surely by the law of nature, the atmosphere, watercourses, the sea and hence the seashore, are common to all."[250] Yet it is the evolution of the public trust doctrine from these Roman roots, and its flexibility in addressing previously inconceivable threats to the natural environment, that has led to its implicit or explicit incorporation

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[245] Van Aswegen 2019: 7.
[246] Van Aswegen 2019: 7.
[247] Van Aswegen 2019: 7.
[248] Van Aswegen 2019: 7.
[249] Young 2014: 147.
[250] Sand 2013: 210; Tewari 2009: 702. Tewari explains the operation of the Roman law maxim in South Africa by highlighting that the development of South African water rights largely hinged on Roman-Dutch law. Under that system, rivers were seen as resources belonging to the nation as a whole and were available for "common use" by all citizens but were controlled by the state in the public interest, which is sometimes known as the "public trust doctrine".

in many other jurisdictions, including Brazil, Canada, Ecuador, India, Kenya, Namibia, Nigeria, Pakistan, Swaziland and the Philippines.[251]

3.5.1.1 *The English legal system*

Upon its adoption into the English legal system in 1215 AD, the public trust doctrine was incorporated into the Magna Carta, which sought to limit the powers of the king, preventing him from granting noblemen exclusive rights to hunt or fish in certain areas.[252] In this way, the public trust doctrine curtailed the king's powers, even though the king held the resource in trust for the "benefit of the public".[253] From the 18th century onwards, the English courts interpreted the text (the Roman law maxim) as not only excluding private property rights in tidelands and navigable waters, but also conferring fiduciary rights and duties on the sovereign so as to ensure public access for the "benefit of the people".[254]

Clearly, therefore, from its earliest inception, the public trust doctrine was aimed at balancing the public's access and use rights with the protection of the resource, and limiting the sovereign's ability to confer or alienate interest in the resource that belongs to the people. Hence, all natural resources must benefit the people and their descendants.

3.5.1.2 *The American legal system*

Prior to attaining independence in 1776, the United States of America was an English colony, which explains why the public trust doctrine can also be traced to the American legal system.[255] In the 19th century, the United States of America (US) courts designated their state governments as public trustees to ensure beneficial use of the navigable territorial and internal waters as well as subjacent lands. Over time, however, American jurisprudence extended the scope of public trusteeship to include

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[251] Blackmore 2018: 2.
[252] Tewari 2009: 703.
[253] Young 2014: 149.
[254] Sand 2013: 210.
[255] Sand 2013: 211.

a broader range of environmental resources.[256] The US public trust doctrine recognises that certain public uses ought to be specifically protected and, in doing so, makes a clear distinction between private ownership title and public rights, and recognises that the state, as sovereign, is the trustee of the public rights in certain natural resources.[257]

Perhaps most central to the application of the public trust doctrine in the US is the presumption that the sovereign may not part with any portion of the trust asset, and that whatever title a grantee may receive remains burdened by the public trust. According to the public trust presumption, the state lacks the power to diminish public trust rights when trust property is transferred to private parties. Thus, when a private party acquires property burdened with the public trust, it acquires only the "use" thereof.[258] As such, it is a well-established principle in American case law that private ownership of property held under public trust by the state is excluded by limiting the state's right to alienate or *abdicate* its public trustee duties in a manner that would be inconsistent with the public trust.[259]

The nature of public trusteeship over natural resources can be found in public law, which is why American courts have emphasised that state ownership of land subject to the public trust is held by a title different from that which applies to land available for sale.[260] Joseph L. Sax is credited for most of the development of the American public trust doctrine and his seminal article in the *Michigan Law Review* established the doctrinal basis for the *Michigan Environmental Protection Act,*[261] and has served as a template for subsequent legislation at both state and federal level.[262] Sax broadened the scope of public trusteeship from its narrower historical origins to the

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[256] Sand 2013: 211.
[257] Van der Schyff 2010: 126.
[258] Van der Schyff 2010: 129.
[259] *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892).
[260] Van der Schyff 1998: 11. "The title *jus privatum* in property falling under the public trust belongs to the sovereign, while the dominium, *jus publicum*, is vested in the sovereign as representative of the nation for the public benefit."
[261] *Michigan Environmental Protection Act*/1970.
[262] Sand 2013: 218-220; Van der Schyff 2011: 329.

full spectrum of environmental resources. At the same time, he empowered the ultimate beneficiaries of the trust (the nation) to enforce the terms of the trust relationship against trustees (the state) by using citizen legal actions that are on par with protections afforded to private property owners by virtue of their status as members of the public.[263]

Significantly, Sax provided three general principles that have shaped the nature of public trust restrictions to be imposed on a state: First, property that falls within the public trust must be accessible for public use, which must serve a public purpose/interest. Secondly, property subject to the public trust is incapable of alienation/transfer.[264] Thirdly, the property must be maintained for specific uses (that are aligned with the public purpose/interest).[265]

To Sax, the public trust doctrine means that governments' principal purpose is to promote the interests of the general public, and not to redistribute public goods from broad public uses to restricted private benefit.[266] The central thought is that when the state holds a resource that is available for free (common) use by the general public, a court must regard with considerable scepticism any government conduct that is calculated either to reallocate that resource to more restricted uses, or subject public uses to the self-interest of private parties.[267]

3.5.1.3 *African legal systems*

Public trusteeship has found its way into African legal systems through the historical roots of the common law, statutory enforcement as well as case law development by the judiciary.[268] Nigeria's *Land Use Act*[269] vests all land within the territories of each state in the sole trusteeship of the governor of the state, who is expected to hold it "in

[263] Sand 2013: 218.
[264] Sax 1970: 475. See further Van der Schyff 2011: 329.
[265] Sax 1970: 475.
[266] Huffmann 1986: 582.
[267] Blackmore 2018: 3.
[268] Van der Schyff 1998: 12.
[269] *Nigerian Land Use* Act/1978.

trust" for the people.[270] The *Constitution of Uganda* of 1995[271] and the Uganda *Land Act*[272] explicitly determine that the government shall hold "in trust" for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and all land reserved for ecological and tourist purposes, for the common good of all citizens. The high court of Uganda has indicated in its jurisprudence that the essence of the doctrine of public trust is the legal right of the public to use certain land and water, and that this doctrine governs the use of property where a given authority holds title "in trust" for citizens.[273]

It can be said that Africa has embraced the doctrine of public trust, which is significant given the continent's colonial history of resource exploitation. If properly applied, the public trust doctrine enables African nations to hold their states accountable for the fulfilment of their fiduciary duties to protect, conserve and preserve the environment for the benefit of present and future generations. The public trust doctrine is flexible enough to encourage the promulgation of laws that include every aspect of a country's natural and cultural environment. Through the enactment of statutory public trusteeship, African states are seizing the opportunity to determine the extent of regulatory control over natural resources and the content of statutory use rights, although this must be subject to the limitations (parameters) of the trust doctrine[274] and constitutional limitations and values.[275]

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[270] Van der Schyff 1998: 13.
[271] Art. 237(2)(b).
[272] *Uganda Land Act* 16/1998.
[273] *Advocates Coalition for Development and Environment v Attorney General and NEMA*, 13 July 2005, Miscellaneous Cause No. 0100 of 2004.
[274] Brown 2006: 12. "The state was neither free to alienate its navigable waters nor abdicate its public trust responsibilities over such waters in a manner inconsistent with its public trust duties."
[275] Constitution: sec. 36(1). "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose." Kibet & Fombad 2017: 342. "The primary function of constitutions is to strike the balance by establishing power maps for the exercise of public power in a fashion that ensures that the government is neither too weak nor despotic. Thus, constitutions create state institutions, allocate to them powers and, importantly, define the limits of their powers. In

For South Africa, the public trust envisaged in the *White Paper on Water Policy* and legislated in the NWA was not a revival of the trust tenure system imposed under the South African Development Trust (SADT) during the apartheid era. The SADT was a statutory form of 'supervised' trust tenure based on the patriarchal paternalistic assumption that black tenure was an economic failure and that communal tenure was the preferred tenure for all black people, effectively removing the *choice* of tenure from non-whites. This, of course, was an idea created to justify the economic and political motivations behind the apartheid state's control of land and natural resources.[276] Trust tenure was a form of tenancy that placed the control of land in the hands of state officials[277] and traditional authorities.[278] The SADT controlled matters of black tenure in line with segregation prescripts under the *Native Trust and Land Act* 18 of 1936, later renamed the *Development Trust and Land Act* 18 of 1936. This mode of trusteeship is another example of the use of private law constructs (trusts) by the state to further its political agenda,[279] and is vastly different from the constitutional purposive basis of public trusteeship in the NWA.

In *Lindiwe Mazibuko v City of Johannesburg* CCT 39/09 (2009) ZACC 28,[280] the Constitutional Court noted that the achievement of equality would not be accomplished while water was abundantly available to the wealthy, but not to the poor. In light of South Africa's socioeconomic crisis,[281] the public trusteeship construct has the potential to achieve the objectives of the Constitution but will

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this sense, constitutionalism is the notion of government limited by law." See also Nwabueze 2003: 36-45; Bradley & Ewing 2010.

[276] Atkinson 2009: 269. The apartheid state emphasised differences in a manner that was discriminatory to justify economic and political exclusion, proclaiming that "the duty of the native … is not to become a black European but to become a better native, with ideals and a culture of his own". See also Schoombie 1985: 77-118.

[277] Carey Miller & Pope 2000: 25-27.

[278] Claassens 2014a: 18-23; Ntsebeza 1999.

[279] Atkinson 2009: 269.

[280] 2009 ZACC 28: par. 2.

[281] Sibeko "South Africa's never-ending crisis" https://www.ips-journal.eu/topics/economy-and-ecology/south-africas-never-ending-crisis-5331/ (accessed on 14 October 2022).

ultimately depend on the political will to apply it properly, which demands state accountability.[282]

3.5.2 The fiduciary rights and duties of the state

3.5.2.1 *Protecting inalienable public trust assets*

The extent to which statutory public trusteeship appears in a country's property regime typically varies, with each jurisdiction adapting its existing property regimes accordingly. The statutory rights and duties afforded to the public trustee would need to meet the regulatory needs of each natural resource. The different pieces of legislation would incorporate the regulatory role of the state as public trustee, and would each identify the natural resource that is to be protected for intergenerational access and beneficial use, all the while under the state authority's fiduciary control.[283] States' fiduciary accountability for sustainable management of natural resources is universally recognised in international environmental law.[284]

In fact, it is the fiduciary *dominium* entrenched in the right of the public or the beneficiary to access and use the natural resource that implies the fiduciary responsibility on the state to protect such resource.[285] The public trustee is cloaked with a fiduciary responsibility in respect of certain specified natural resources, which duty must be exercised on behalf of the people.[286] This is the one characteristic at the heart of public trusteeship that is intrinsically part of any state's property system.

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[282] Edigheji 2010:1. "A lesson that was learnt from the 20th century developmental states was that the state has to be one of the 'institutional keystones' needed to bring about economic success. This is becoming clearer, as the idea that globalisation and neoliberal policies are beneficial to the development of developing countries is not supported by the evidence anymore. In fact, the evidence spawned from the recent global economic crisis suggests quite the contrary, i.e. that unregulated markets are 'unworkable and unsustainable in the long run' and an increased role of the state is essential." Currie *et al*. 2001: 89. "Reference to democracy in the Constitution is often followed by reference to the values of openness, responsiveness and accountability. The idea is that government institutions must be accessible and that government officials must be responsive to the people they govern. Accountability means that government must explain its laws and actions if required to do so and may be required to justify them."

[283] Van Aswegen 2019: 29.

[284] Sand 2013: 218; Du Plessis 2017: 239-262.

[285] Van Aswegen 2019: 9; *Martin v Waddell's Lessee* 41 US 367 (1842); *Knight v United States Land Association* 142 US 161 (1891).

[286] Van der Schyff 1998: 8.

As Sand puts it: “The sovereign rights of nation-states over certain environmental resources are not proprietary, but *fiduciary*.”[287]

Thus, certain natural resources, whether they are earmarked for public or private use, are defined as being part of “inalienable public trusts”, and the state, as public trustee, has a fiduciary duty to protect these resources[288] and is not intended to benefit therefrom. At the same time, every citizen, as a beneficiary of the trust asset, has a corresponding right to hold the state accountable for the proper management of the natural resource that is held in trust for their benefit.

3.5.2.2 *The duty to act in the public interest*

Section 24 of the Constitution confers on the state a fiduciary obligation, as the public trustee of South Africa’s environment, to protect and conserve the environment in the public interest, while vesting in the trustee the necessary power to regulate access to and use of the resource for the benefit of present and future generations.[289] The Constitution requires the state to do so through reasonable legislative and other measures.[290] Consequently, the state must allocate statutory rights to access and use the natural resources in a manner that is in line with its fiduciary obligations.

Environmental and natural resource legislation must give direction and substance to the fiduciary duty of the state, as public trustee, in respect of the statutorily identified natural resources. In South Africa, this has been done through the enactment of legislation such as the NWA and NEMA. The fiduciary responsibility vested in the state entails making sure that the public interest in the natural resource is maintained and protected in line with the legislated environmental scope of public trusteeship under the NWA.[291] In so doing, the public interest of conserving the environment for

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[287] Van Aswegen 2019: 13.
[288] Sand 2004: 48-49.
[289] Van Aswegen 2019: 3.
[290] Constitution: sec. 24(b).
[291] Sand 2004: 50.

future generations[292] and of effecting reforms to bring about equitable access to all South Africa's natural resources[293] for beneficial use is safeguarded through the mechanism of public trusteeship.

3.5.2.3 *Determining the scope of fiduciary rights and duties*

It must, however, be pointed out that public trusteeship is not uniformly or automatically adopted into all statutes pertaining to South Africa's natural resources. Therefore, specific fiduciary duties imposed and powers granted to the state may differ, depending on the statute and the resource.[294]

This inconsistency in adopting public trusteeship in statutes may be because of a sensitivity to limiting public trusteeship in certain resources more than others, or could indicate the drafters' uncertainty as to the exact scope of the legal construct of public trusteeship. Nonetheless, the origins of the fiduciary responsibility imposed on the state, whether in state custodianship or public trusteeship, are derived from the Constitution.[295] Inconsistency in the extent of public trusteeship rights and duties may also be due to inconsistent terminology used by the drafters of the resource legislation. Van der Schyff, for instance, emphasises that while terms and phrases such as "custodian" and "trustee" as well as "owns" and "belongs to" may often be used interchangeably in different pieces of legislation, they are not necessarily synonyms.[296]

What is clear, however, is the legislature's intention to create a legal construct that statutorily entrenches the state's fiduciary responsibility in respect of the statutorily identified resource, thereby centralising the state's control over the resource and recognising that some resources cannot be dealt with through contemporary private

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[292] Constitution: sec. 24(b). See also Van Aswegen 2019: 11. "The statutory incorporation of public trusteeship will therefore acknowledge the intergenerational importance of the resource."
[293] Constitution: sec. 25(4)(a).
[294] Blackmore 2018: 3.
[295] Van Aswegen 2019: 19. See also Van der Schyff 2016: 246. "The first noteworthy similarity between the notion of state custodianship and the public trust doctrine is the *fiduciary* responsibility that is imposed on the state as custodian."
[296] Van der Schyff 1998: 38. The MPRDA, NEMA and ICMA refer to the state's role as "custodian" as being analogous to the role of "trustee" of resources that form part of the environment.

law relationships.[297] Trying to do so may irreversibly alienate the public trust asset (resource) protected in terms of the public trusteeship relationship.

3.6 CONCLUSION

South Africa applies a statutory public trusteeship that is *unique* in its response to the country's socioeconomic context. In addition, the extent of the public trustee's statutory rights to administer the property is determined by statute, and the nature of the fiduciary rights and duties should be derived from the trusteeship role of the state. The foundational principles of the public trust doctrine provide public trusteeship with a sound philosophical basis for its interpretation and conceptual parameters. The powers of the public trustee are limited by statute, by the public interest requirement, and by the fundamentals of the public trust doctrine to the extent that the nature of the legal construct remains unaltered by the statute. Statutes such as the NWA are tools used to shape the extent of the powers of the public trustee and establish the basis on which accountability can be determined. As such, these statutes are also the mechanism by which public trusteeship can evolve and take on its own unique South African character.[298]

The stewardship ethic forms part of the development of a distinctly South African public trusteeship construction. It is suggested that the stewardship ethic be exercised in a context-sensitive way, which includes an awareness of prevailing inequalities and the desire for social justice. The stewardship ethic goes beyond morals and also speaks to underlying values that serve to guide national goals and policy. As such, the state, as steward, must appropriately respond to the nation's corresponding right to have democratic principles (more specifically, public

[297] Van der Schyff 1998: 38.
[298] Blackmore 2018: 4. Van der Schyff 2010: 130. "Through statute [public trusteeship] is able to persevere as a value system that manifests the stewardship ethic in law as it mutates and evolves." See also Takacs 2008: 711-765.

participation and trustee accountability) and constitutional values applied in state resource management practices.

The next chapter focuses on the similarities and differences between public trusteeship in the NWA and state custodianship in the MPRDA, and their legal implications.

CHAPTER 4

PUBLIC TRUSTEESHIP VERSUS STATE CUSTODIANSHIP

4.1 INTRODUCTION

In the previous chapter, it was established that the state's rights and duties that are inherent to the legal concept of public trusteeship are limited, extended and/or affected in a few ways, including by statute, the public interest, the fundamental principles of the public trust doctrine, the stewardship ethic, and international law trends.

This chapter hones in on the two property-regime-changing constructs of public trusteeship in the NWA and state custodianship in the MPRDA. Both aim to transform existing property structures to achieve the state's constitutional mandates as trustee or custodian. Yet state custodianship as it appears in the MPRDA is generally less understood. While public trusteeship has a strong philosophical basis that places robust limitations on its regulation, such limitations are either absent or not comprehensively established for state custodianship, which is a novel construct in South Africa.

This has resulted in considerable uncertainty as to the content, characteristic features and legal implications of state custodianship under the MPRDA. The South African courts have not offered much assistance in clarifying the legal origins and content of state custodianship[299] and, in fact, appear to refrain from commenting on its parameters.[300] As such, state custodianship has become the subject of much academic debate and judicial speculation, and is prone to criticism.[301]

It is generally accepted, albeit not ideally so, that the terms 'trustee' and 'custodian' are used interchangeably as synonyms for the interpretation of public trusteeship in

[299] *Agri SA*: par. 71.
[300] Mostert & Young 2016: 156; *Agri SA*: par. 71.
[301] Mostert & Young 2016: 153; Mostert 2010: 238.

different pieces of legislation.[302] NEMA, for instance, states that the environment is held "in trust" for the people, and the state is appointed as "custodian" thereof.[303] In the context of the management of immovable property held by the state, the *Government Immovable Asset Management Act* 19 of 2007, describes custodianship as where any of the departments managed by the executive organs of state within the national and provincial sphere act as "caretaker" of the immovable property of which it is "custodian", which includes the capacity to acquire, manage and dispose of the property.[304] The use of both 'public trusteeship' and 'state custodianship' to describe and deal with the management of public assets for the benefit of the people of South Africa muddies the intent of the legislation,[305] creates uncertainty, and has caused many questions and somewhat cursory observations about state custodianship.

The ad hoc comparative discussion in this chapter is aimed at clarifying to some extent the nature of state custodianship, thereby venturing a bit further than the cursory observations made to date. It will identify and discuss the characteristic features and legal implications of the construct by comparing it to public trusteeship.

4.1.1 Cursory introductory observations regarding state custodianship

The lack of certainty that surrounds state custodianship creates a natural suspicion of this legal concept, and the fact that it is an excessively interventionist mechanism of state control does not assist to quell concerns either. Even though similar criticism has been launched against public trusteeship,[306] it has not been as pronounced as in

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[302] Van der Schyff 1998: 43.
[303] NEMA: sec. 3.
[304] Sec. 4.
[305] See in general Bronstein 2004: ch. 15.
[306] Tewari 2009: 705; Kidd 2009: 87-104. The NWA is undeniably more superior than its predecessor but still the water rights regulatory system has been critiqued as being unnecessarily interventionist for allowing too much state interference in water rights through legislation and that any temptation on the state to exercise its extensive powers as provided in the NWA should be largely resisted by the public authority. Burger 2007: 77, 80-81. "The permit system of public trusteeship has been critiqued for undermining security of tenure. Without security of tenure of agricultural farmers in water, farmers will be unlikely to invest their time and money in infrastructure. In addition, it is unlikely that banking institutions would be willing to finance agricultural operations where licenses can be easily revoked.

the case of state custodianship. This may be because public trusteeship stems from a well-documented altruistic bloodline of legal philosophy, stewardship ethic and established international environmental law jurisprudence, which makes it seem less foreign than the as-yet indeterminate notion of state custodianship. Alternatively, it could be because of the latest attempt to extend the reach of state custodianship to include land, being a much-contested national asset.

The concept of the state as custodian in relation to land, as a "common heritage of all people of South Africa", has been incorporated into proposed land laws and existing land policy to promote "optimal land use", "reasonable access to land" and "effective regulatory systems" over all agricultural land as a "national asset".[307] A policy of 'optimal land use' similar to the 'use it or lose it' policy in respect of water is being applied. The reasoning behind the policy (in the context of water) is that if the resource is not being used *beneficially*, the public authority may cancel the water use right and reallocate it to where there is an actual need. The unexercised and reallocated water use rights are not replaced, and only beneficially used water attracts compensation under the public trusteeship model. This principle of beneficial use of the resource is applied to influence the availability of water for reform purposes, and therefore, water use entitlements must be exercised beneficially, proportionally, and fairly so that other water users' rights are not affected.[308]

The 'beneficial use' refrain and the objectives of access and reforms are found in both the NWA and MPRDA, and form part of the principled basis for both these

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Other criticisms have been that the discretionary powers of authorizations by the Minister exclude the legislature and seriously curtail the function of the courts as well as high levels of corruption and maladministration." Mostert & Young 2016: 147-148. "The state's water governance and management is criticised for its complexity; lack of information and data regarding how and where water is used; lack of qualified personnel; vacancies for accounting and engineering specialists remain; political deficiencies at municipal level; corruption and maladministration and fraud within state departments are major concerns; insufficient monitoring and reporting mechanisms to ensure compliance with licensing conditions; no structured community engagement and poor financial management, leading to poor service delivery."

[307] Draft *Preservation and Development of Agricultural Land Framework Bill* 2014: sec. 3(1). "Agricultural land is the common heritage of all the people of South Africa and the Department [of Agriculture, Forestry and Fisheries] is the custodian thereof for the benefit of all South Africans." Department of Agriculture, Land Reform and Rural Development 2011: 1-4.

[308] Van der Walt 2011: 210-211.

regulatory regimes. However, because of the wide discretionary state powers and stringent regulations associated with state custodianship in the MPRDA, the concept requires deeper scrutiny. This will shed light on its implications should it ever be applied to land as a natural resource.

The similarities between public trusteeship and state custodianship cannot be denied: For example, neither concept results in the state acquiring private ownership of the natural resource.[309] At the same time, however, the two regulatory constructs are legally distinguishable.

4.2 CHARACTERISTIC FEATURES AND LEGAL IMPLICATIONS

The similarities and differences between public trusteeship and state custodianship are best explained with reference to the following seven characteristic features and legal implications:

- Equitable access to and beneficial use of natural resources for all South Africans
- The exclusion of private ownership of natural resources
- A property regime change from private to public
- The extent of judicial oversight
- The flexible and indeterminate nature of state custodianship
- An expansive jurisdictional (resource) footprint
- The exclusion of expropriation with compensation

The analytical and comparative discussion in this chapter draws on certain features of the public trust doctrine to emphasise areas where state custodianship, as understood under the MPRDA and in *Agri SA*, deviates from the archetypal public

[309] *Agri SA*: par. 71.

trusteeship model, and to identify possible factors that contribute to or necessitate such deviations.

4.2.1 Equitable access and beneficial use for all South African citizens

Statutory public trusteeship is resource-specific and applies to natural resources that are common to all citizens of the country.[310] The NWA expressly identifies water, stating that it must be used beneficially in the public interest. Citizens have an enforceable right to hold the state accountable for failing to execute its fiduciary duties in accordance with this constitutional obligation and its statutory responsibilities to deal with the natural resources in the public interest.[311] Likewise, the White Paper on Minerals and Mining Policy for South Africa as early as 1998 introduced the objective that all mineral rights should be vested in the state for the benefit and on behalf of all the people of South Africa.[312] The state custodianship model in the MPRDA, in turn, also expressly provides that minerals and petroleum belong to the nation and that the state is responsible for ensuring that these are exploited for the benefit of the nation as a whole.[313]

Both public trusteeship and state custodianship are linked to a clearly identified natural resource in the respective statutes, and both imply a fiduciary duty on the state to provide equitable access to all South Africa's natural resources in terms of the Constitution.[314]

However, public trusteeship differs from state custodianship in that the former limits the state's ability to alienate, transfer or extinguish the common property held in trust

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[310] NWA: preamble. "[W]ater is a natural resource that belongs to all people ..."
[311] Constitution: sec. 25(4)(a). The "public interest" includes reforms to bring about equitable access to all South Africa's natural resources.
[312] Department of Minerals and Energy 1998: par. 1.3.6.1(ii).
[313] MPRDA: sec. 3(1).
[314] Constitution: sec. 25(4)(a). See also sec. 25(8), which states: "No provision of this section [the property clause] may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)." Constitution: sec. 44(1)(a)(iii). "The national legislative authority as vested in Parliament – (a) confers on the National Assembly the power – (iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government …"

on behalf of the nation.[315] The presumption against alienation is an essential and well-established characteristic of the public trust doctrine[316] and is given effect in the state's fiducial duty to ensure the "ecologically sustainable development and use of the natural resource".[317] Therefore, the NWA requires the public trustee to manage and conserve all water resources.[318]

In addition, the state under its public trusteeship may curtail the water use entitlement but cannot expropriate it.[319] This is because under public trusteeship, the irretrievable depletion or alienation of the natural resource from the public trust assets is to be avoided at all costs. Under this property regime change, water is incapable of private ownership. This is evident from the preamble of the NWA, which recognises that water has a "unitary" nature that is described as an "inter-dependent cycle" of water.[320] Public trust assets are managed by the public trustee and are inalienable from the public trust relationship. In effect, the restriction on the state's ability to irretrievably deplete and/or alienate the natural resource protects the public's right of use, ensures the availability of the resource so that it can continue to be managed for sustainability and equity purposes,[321] and safeguards the resource from private or personal interests. The latter serves as a useful protection against third-party accumulation of the natural resource for personal benefit.

4.2.1.1 *The nature of the natural resource is a factor*

As not all natural resources are alike, the state may need to manage access to and use of different resources in different ways. In this regard, access and use under public trusteeship differs from that under state custodianship. Access to water, for

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[315] Blumm 1989: 584-585.
[316] Van der Schyff 2010: 129; *Illinois Central Railroad v Illinois* 146 U.S. 387 (1892).
[317] Constitution: sec. 24(b)(iii).
[318] NWA: sec 3(1). The public trustee must ensure that water is "protected, used, developed, conserved, managed and controlled".
[319] Van der Schyff 1998: 86.
[320] NWA: preamble. "Recognizing that water is a scarce and unevenly distributed national resource which occurs in many different forms which are all part of a unitary, inter-dependent cycle …"
[321] Department of Water and Sanitation 2021: 20. "Any authorised water use (including existing lawful use) unutilised for a specified period should be reallocated to the public trust. This water will be reallocated to address social and economic equity."

example, is a basic human right and required by all human beings to survive, which automatically entitles all human beings to direct access to water from the nation's water resources for their immediate benefit.[322] Therefore, the kind of access to water envisaged as a basic human right is an unqualified right owed to everyone and does not require any special actions on the part of the beneficiary to access or share in the benefit of the nation's water.[323] Moreover, while water forms part of a "unitary inter-dependent cycle",[324] mineral and petroleum resources do not.

Minerals and petroleum are natural resources that must be mined to derive direct benefit and, therefore, require technical and financial capabilities to exploit. In addition, minerals and petroleum are at risk of being indefinitely depleted if not conservatively managed.[325] Because of the nature of minerals and petroleum, therefore, it would be impractical for these resources to be directly distributed for beneficial use among all South Africans as a basic human right on the same basis as water. Nevertheless, like public trusteeship, state custodianship is also intended for the benefit of all South Africans.

This means that under state custodianship, the idea of access and beneficial use for all South African citizens, both present and future generations, must be understood in a broader, 'indirect' sense. Ultimately, not all South Africans are in a position to benefit directly from the exploitation of minerals; yet there are broader, nationally shared benefits that the nation is intended to benefit from indirectly. These indirect benefits include employment, community development, a contribution to revenue, improved international relations, and foreign investment.[326] Holders of mining rights must also contribute to the advancement of socioeconomic welfare, the promotion of

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[322] Constitution: sec. 27(1)(b). "Everyone has the right to have access to – (b) sufficient food and water …"
[323] As opposed to the special actions required to benefit from mineral and petroleum resources. See Cawood 2004: 127-133, who states that the technical yet standard requirements to obtain mining licences and mineral rights include an environmental impact assessment report.
[324] NWA: preamble.
[325] Cawood 2004: 127-133; Mostert 2013: 230.
[326] Tlale 2020: 6; Bennett & Powell 2000: 604.

economic growth, and the promotion of equitable access to information.[327] These broader national benefits flow from the state's ability to balance capitalism with society's need for environmental, social and sustainable development.

4.2.2 The exclusion of private ownership of natural resources

Another distinguishing characteristic is the type of rights that are afforded to the holder or beneficiary. Public trusteeship provides the beneficiary or holder with statutory use rights in the natural resource; therefore, the NWA refers to the granting of "water use rights",[328] which are neither ownership nor limited real rights in water. The implication is that neither the state nor the beneficiary or holder can become the private law owner of the nation's water. According to the NWA, private persons or entities are very clearly considered to be "users". Water users may use water in accordance with the water licence issued to the water license holder by the state. The water user and water licence holder are not always the same individual or juristic person.

The apparent rationale behind the granting of water use rights in terms of the NWA is that the permanent allocation of water in the form of registrable real rights in the private property regime would impede water reforms and could lead to the kind of accumulation and monopolisation of the water resource seen during the apartheid regime. Additionally, the interpretation and provision of use rights (rather than ownership) by the public trustee is in line with the public trust doctrine. It must, however, be pointed out that state regulation of access and use through 'statutory use rights' (i.e. the granting of licences, general authorisations and use permits) is highly dependent on the efficacy of the state administration and state capacity.

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[327] Tlale 2020: 6-7.

[328] NWA: sec. 21(a). "Water use" is defined broadly as any taking of water from a water resource, storing, impending, diverting or engaging in a stream flow of water, engaging in controlled activity of water, discharging water, disposing of wastewater and altering the course of water. Sec. 22 provides for the ways in which a person may use water; sec. 24 refers to licences for "water use"; sec. 25 refers to "water use authorisations"; sec. 26 provides for the regulation of water use by the Minister.

On the other hand, minerals that are not yet removed from the land are treated as being owned by the nation; however, once extracted from the earth under licence, it becomes susceptible to private ownership by the extracting mining company.[329] For this reason, it is debatable whether the MPRDA has truly eradicated the dual system of public and private ownership of mineral rights that was in force during the apartheid era and successfully substituted it with a system of state custodianship for the benefit of all the people of South Africa.[330] This has led Mostert to state that the policy shift from the *Minerals Act* to the MPRDA has simply enabled the state to do explicitly under the new act what it already did implicitly and indirectly under its predecessor.[331] The policy of state custodianship is an undisguised preference for broader state control over the granting, exercise and retention of rights pertaining to South Africa's mineral and petroleum resources.[332]

The removal of water from the private property regime is unequivocal under public trusteeship: Private ownership is not possible, and the trade in or transfer of water between private parties is unlawful. Yet the same cannot be said of state custodianship. There has been much academic debate as to whether state custodianship amounts to ownership due to the extensive nature of the Minister's fiduciary powers in terms of the MPRDA.[333] However, the Constitutional Court in *Agri SA* explained that the Minister was entrusted with the power to confer mineral rights, the contents of which were very similar to, and in some respects, indistinguishable from, the contents of common law mineral rights.[334] Regardless, the state is afforded certain entitlements akin to ownership, such as the right to dispose of the custodial asset under certain circumstances – even though this still does not make the state the owner of the asset.

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[329] Mostert & Young 2016: 156; MPRDA: sec. 3; *Agri SA*: par. 68-69.
[330] Marumo 2014: 45.
[331] Mostert 2013: 78.
[332] Mostert 2013: 78.
[333] MPRDA: sec. 3(1), 3(2).
[334] *Agri SA*: par. 82.

In addition, section 4(2) of the MPRDA provides that where the common law is inconsistent with the MPRDA, the MPRDA shall prevail.[335] The divergence of state custodianship on this characteristic feature can be attributed to the fact that minerals and petroleum – unlike water – are not "unitary" or part of an "inter-dependent cycle";[336] that mineral right holders require 'stronger' rights than statutory use rights due to the nature of the natural resource, which compels competitive participation in economic markets for the generation of wealth. Therefore, mineral rights under the MPRDA are more akin to the bundle of rights associated with private ownership under the pre-constitutional laws.[337]

The MPRDA defines the legal rights for prospecting, mining, exploration and production as limited real rights.[338] Moreover, Mogoeng CJ in *Agri SA* confirmed that one of the MPRDA objectives was to give effect to state custodianship "by granting *various* kinds of rights to successful applicants".[339] In *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* ("*Maledu*"),[340] the Constitutional Court relied on private law principles and rules to resolve the rights disputes between a mining company and an indigenous community.[341] In this respect, Badenhorst points out that the application of private law principles in the sphere of the MPRDA differs from the past dispensation, as the MPRDA empowers the custodian state to grant rights without it (the state) being the private law successor in title or formal holder of the rights.[342] Importantly, also, the MPRDA extends the limited real rights to minerals and the land, and as far as the registration and content of these limited real rights are concerned, the MPRDA must be read with the *Mining Titles Registration Act* 16 of

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[335] Marumo 2014: 44; Badenhorst 2012: 620.
[336] NWA: preamble.
[337] Mostert 2013: 85. "The rights created in terms of the Act have been compared to the prospecting leases and mining leases that were available in terms of the *Mining Rights Act* 20 of 1967, the *Precious Stones Act* 73 of 1964 and its predecessors, and the claim licenses that were available under these earlier laws."
[338] MPRDA: sec. 5(1).
[339] *Agri SA*: par. 25 (own emphasis).
[340] 2019 2 SA 1 CC.
[341] *Maledu*: par. 45-46, 109-111.
[342] Badenhorst 2021: 10; *Agri SA*: par. 33, 54, 68, 71, 80-81, 104.

1967.[343] As a result, the hierarchy of registrable real rights above unregistered land tenure rights is solidified in the MPRDA. Therefore, one cannot convincingly say that state custodianship under the MPRDA has broken free of the private property regime; in fact, state custodianship relies on it.

Hermanus argues that the MPRDA formally reconverts exclusive property rights, which were previously allocated as private concessions for a fixed period of time, into state property rights.[344] This, Hermanus continues, puts a new spin on "accumulation by dispossession": While the state attempts to make private titles more widely accessible to a greater variety of actors, accumulation by dispossession simply continues and is transformed through a narrow form of redistribution.[345] Still, the MPRDA refers to mineral and petroleum resources as the "common heritage of all the people of South Africa" and provides that the state is the "custodian" thereof for the "benefit of all South Africans".[346]

4.2.2.1 *Public interest concerns are a factor*

The statutory use rights granted in terms of the NWA differ from the bundle of entitlements in ownership: The latter are real rights in the private law domain, while the former are statutory use rights in the public law domain. As a result, the use of the water resource must be consistent with public interest concerns, such as equitable access and use. Statutory use rights may be diminished or altered, as long as the public interest is not substantially impaired and/or prohibited. Therefore, the NWA establishes a type of permit system of use rights that is integral to the goals of water reform, including equitable water redistribution.[347]

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[343] Sec. 5(1), 2(4), 5(3). These provisions pertain to rights holders' ability to enter land with employees, plant and machinery to exercise their rights; to prospect, mine, explore and produce for their own account on or under the land; to remove and dispose of minerals and petroleum; to use water so as to exercise their rights, and for incidental activities. Mostert 2013: 80.
[344] Hermanus *et al*. 2015: 33.
[345] Hermanus *et al.* 2015: 33.
[346] MPRDA: sec. 3.
[347] Young 2014: 317; Msibi & Dlamini 2011: 36.

It is submitted that the reasoning under the MPRDA is that, unlike with water, it is in the public interest to allow the transfer of mineral rights to third parties to enable better commercial dealings[348] – hence the transferability, alienation, letting, cession and encumbrance of mineral rights is uncontested by the public.[349] Under the MPRDA, the state has wide regulatory powers, including the registered transfer and encumbrance of mining rights and permits,[350] which heavily rely on private law constructs and interpretations of real rights, despite having ostensibly been severed from the private property regime.

Public trusteeship as applied in the NWA excludes private ownership because of the public trust doctrine that certain natural resources by their very nature cannot be treated as being privately owned and capable of transfer, alienation or disposal to third parties. The fiduciary duty of the state, as public trustee of water, and with the bequest to the nation of the natural resource as a public trust asset, are the key characteristics of the public trust doctrine[351] that preclude private ownership. This is in stark contrast to the transfer, alienation and disposal of natural resources permitted under state custodianship in terms of the MPRDA. Importantly, both public trusteeship and state custodianship are regulatory measures used to achieve equitable redistribution. However, while in regulating water under the NWA, the state excludes real rights held by third parties to avoid further inequity, limited real rights in minerals and petroleum are regulated under the MPRDA without any such reservations. It is concluded, therefore, that the state's regulation of natural resources does not always occur under the same mechanism and may include varying degrees of private law rights based on the level of independence and, accordingly, exclusivity required.

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[348] Mostert 2013: 88. "Sec 11(1) and sec 11(2) of the MPRDA render the rights that are granted commercially useful, in that a wide range of transactions with regard to these rights is allowed, provided that the conditions of the rights and the requirements of the Act can be met. The range of transactions includes cession and transfer, letting (lease), assignment, alienation and disposal in any other way."
[349] MPRDA: sec. 11(1), 11(2); Mostert 2013: 88.
[350] MPRDA: sec. 11.
[351] Marumo 2014: 36.

4.2.3 A property regime change from private to public

Under statutory public trusteeship, the natural resource is removed from the private property regime and included in the public property regime for state regulation. Yet the state does not become the owner of the public trust asset, nor is the natural resource nationalised.

As discussed earlier,[352] the removal of natural resources from the private property regime is not a new political strategy in South Africa. Common law property concepts and principles have been adapted throughout history. The apartheid state used the principle of *dominus fluminis*[353] to control and legislate the use of water, even though it did not own the resource. Albeit to a more limited extent, the apartheid state had *dominus fluminis* status over all rivers and waterbodies of the country.[354] The NWA achieves the same outcome over all water resources, for the same reason, namely to ensure sustainability, but also to meet the basic human needs of present and future generations, promote equitable access to water, redress past racial and gender discrimination, promote the beneficial use of water in the public interest, and facilitate social and economic development.[355]

The court in *Agri SA*[356] confirmed that custodianship did not mean that the state acquired, and thus became the private owner of, the mineral rights concerned.[357] Rather, the legal effect of statutory state custodianship is that it places the natural resource in the realm of public law under state control.[358] Therefore, minerals, petroleum and water resources are public resources held under custodianship or

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[352] See chapter 2.
[353] See the discussion of *dominus fluminis* under par. 2.2.3.1.
[354] Tewari 2009: 696.
[355] NWA: sec. 2.
[356] See discussion of *Agri SA* and the exclusion of expropriation with compensation under par. 4.2.7.
[357] *Agri SA*: par. 71.
[358] Pienaar & Van der Schyff 2007: 189. "[T]he demand on a natural resource can be so extensive that it is detrimental to the resource's existence to leave it in private hands and in certain scenarios past injustices that occurred in the allocation of resource-use and the development that has since taken place, requires a re-allocation of the rights relating to the resource. The only way to allow justice to prevail is to remove the resource from the sphere of private property. Private property can thus be converted into a public resource."

trusteeship respectively, and are regulated by the state as either custodian or public trustee. The Minister in the MPRDA is tasked with what can be collectively described as the overall administration of South Africa's mineral and petroleum resources.[359] State administration is purposeful in the sense that administrative power must be exercised for a reason consistent with the purpose for which it is held. In this instance, the administrative power is held for equitable access and the benefit of present and future generations.[360] Moreover, state administration has an institutional character, with its own substantive values.[361] The substantive and institutional values based on which the MPRDA has incorporated the concept of state custodianship are derived from the Constitution.[362] Ultimately, it will be the state's adherence to these constitutional values that will distinguish its state custodianship from earlier exercises of state regulatory powers, for instance under the *dominus fluminis* principle.

4.2.4 The extent of judicial oversight

Public trusteeship does not preclude the judicial review of administrative action in respect of natural resources management.[363] Public trusteeship allows sufficient

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[359] MPRDA: sec. 3.
[360] Constitution: sec. 24.
[361] Fox-Decent 2008: 301. See also Constitution: sec. 33(1), 33(2), 33(3)(a)-(c). "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration." Lubbe 2019: 21. See also Hoexter 2012: 177. "Administrative action by a state functionary is decided upon by enquiring into the nature of the power such an official is exercising. Administrative action taken by an official – such as an MEC – by virtue of a discretionary power conferred by statute or delegation, must be lawful and reasonable." Claassens 2009: 19. "The literature illustrates that in practice a range of non-state actors engage in governance activities and that globalisation has increased the number and variety of different agencies fulfilling governance roles."
[362] Constitution: sec. 24.
[363] Constitution: sec. 33(3), which provides for national legislation that gives effect to the right to administrative action that is lawful, reasonable and procedurally fair, and that expressly provides for the review of administrative action by the court. Sec. 34 gives everyone the right to have any dispute resolved by the application of the law in a fair public hearing before a court, while sec. 24 provides: "Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii)

room for courts to scrutinise state actions and decisions, although some commentators believe that judicial interference in the state's management of trust assets could undermine the public allocation of natural resources. The counterargument is that the state owes a fiduciary duty to the nation on whose behalf it exercises control. In turn, the nation has a corresponding right to hold the state accountable for any perceived mismanagement of the public interest in the natural resource.[364]

The notion of the state keeping power in trust for its citizenry dates back to Plato, Aristotle and Cicero. Sovereign institutions were thought to hold the citizens' interests in a public trust constrained by fiduciary standards and the reasonable expectation of careful and responsible management of something entrusted to one's care.[365] This concept is premised on citizens' vulnerability to the potential abuse of state powers, and the citizenry's need to place their trust in public institutions. The relationship between state and citizens is a fiduciary one and is intended to control the political discretion of office-bearers. The legal imposition of the fiduciary duty is justified by the beneficiary's right.[366]

Citizens are vulnerable to the potential abuse of power, yet have little choice but to trust those who govern them. In many countries, the courts can set aside laws and official actions that violate the state's fiduciary role and the trust placed in the state. This reinforces the notion that judicial officers must hold political actors accountable

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promote conservation; and (iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development."

[364] Young 2014: 316. "[C]oncerned parties argue that the licensing system is 'vulnerable to political influence' and has been abused by those with political connections" and that "the permit system creates uncertainty, particularly in the context of agriculture where water rights are not permanent under a permit system". Van der Schyff 1998: 54, 91-92. "[T]hrough the heavy emphasis placed on the 'public interest' a corresponding public right is created … [L]egal mechanisms are only as effective as the people steering them. It is imperative that the Minister of Water Affairs, together with the national government, embrace their role as guardian of the nation's water resources ... The people of the country should also rise and challenge the public trustee to fulfill its duties as set out in the NWA." See also Merrill 2011: 75-103.

[365] Tlale 2020: 4.

[366] Fox-Decent 2008: 259.

for their fiduciary responsibilities.[367] This equally applies to the fiduciary duties of the state under its custodianship of South Africa's mineral and petroleum resources under the MPRDA, and the nation's corresponding right to hold the state accountable for any failure in executing its duties.[368] As custodian of South Africa's minerals and petroleum, the state has a duty to ensure that these natural resources are used sustainably in the context of national environmental policies, while simultaneously promoting social and economic development for the benefit of society as a whole.[369]

Unfortunately, the exercise of state custodianship powers in terms of the MPRDA has led to infringements of land rights, which in *Baleni v Minister of Mineral Resources*[370] ("*Baleni*") necessitated the court to interpret the authority of the state custodian. The issue in *Baleni* was whether the state was required to obtain the landowner's consent before granting mineral rights to mine on the community's land. The matter highlights the extent of the judiciary's involvement to ensure that the exercise of state custodianship is aligned with the public interest. It illustrates how state custodianship is susceptible to abuse and, if not correctly exercised, can have devastating consequences for land tenure.[371] The court in *Baleni* held that the *Interim Protection of Informal Land Rights Act* 31 of 1996 (IPILRA) and the MPRDA had the purpose of redressing historic and economic dispossession, and both sought to restore natural resources to victims of historical discrimination. The court confirmed that the protection of community rights to land was part of the purpose of the MPRDA, and therefore, the two statutes should be read together. Finally, the court found that the Minister of Mineral Resources lacked the legal authority to grant

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[367] Leib *et al*. 2013: 708-710, 712.
[368] Fox-Decent 2008: 275.
[369] Tlale 2020: 5.
[370] 2019 2 SA 453 GP.
[371] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 479. "Land owned collectively through title deeds held by traditional councils, Trusts and Communal Property Associations is susceptible to abuse by leaders of these collectives, who claim ownership when their role should be trusteeship on behalf of the members of the collective."

mining rights without implementing the provisions of IPILRA.[372] Accordingly, the legislative requirement of consent in terms of IPILRA and of consultation in terms of the MPRDA had to be interpreted in light of the Constitution and the "broader social and historical context".[373]

In indicating its intention to appeal the court's decision in *Baleni*, the state argued that the ruling "usurps the authority of the state" to issue mining licences and would "create chaos" – arguments that demonstrated a disregard for the constitutional constraints on the notion of state custodianship, as well as an interpretation of state custodianship that differed from that of the courts.[374] Public functionaries are expected to correct unlawfulness within the boundaries of the law and the interests of justice, and to respect, protect, promote and fulfil the rights in the Bill of Rights.[375] As bearers of the fiduciary duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in public administration, seek to redress it.[376] State custodianship does not confer unfettered authority on the state.

The redistribution of assets and other forms of wealth has been a prominent feature of the economic and political debate in South Africa.[377] Yet it is highly questionable whether statutory state custodianship as a regulatory regime succeeds in liberating the majority of previously disadvantaged persons by providing access and benefit that alters their socioeconomic standing. The majority of the rural black population remain exposed to poor socioeconomic conditions, now coupled with the possibility of having their already insecure land rights infringed by mining companies and elites,

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[372] Meyer 2020: 7-11.
[373] Tlale 2020: 7.
[374] Tlale 2020: 13.
[375] Constitution: sec. 7(2); Rautenbach 2015: 822-833.
[376] Raligilia & Odeku 2014: 114.
[377] Lahiff *et al*. 2008: 7.

emboldened by a state that may be operating under a misconstrued sense of unrestrained state custodianship.[378]

In *Aquila Steel (Pty) Ltd v Minister of Mineral Resources* ("*Aquila Steel*"),[379] in turn, the state, as custodian of minerals for the benefit of all South Africans, was exposed for having disregarded its fiduciary duties owing to beneficiaries under the MPRDA by abusing its custodian position.[380] This has led Badenhorst to call for a review of the ability of a state custodianship structure to achieve equality and prosperity for all South Africans.[381]

In *Aquila Steel*, the state not only granted new prospecting and mining rights to land that was still subject to transitional arrangement applications, but also granted inconsistent competing rights that caused a dispute between the mining companies as to which rights were to be given priority – actions that Cameron J labelled as "delinquent" and "unlawful".[382] The companies involved were Aquila Steel (Pty) Ltd, a subsidiary of an Australian resources company incorporated in South Africa, and the Pan African Mineral Development Company (Pty) Ltd (PAMDC), a private company established by the Zimbabwean, Zambian and South African governments as a special-purpose vehicle to co-own the mineral rights and prospecting activities of ZIZA Ltd, a deregistered Zimbabwean and Zambian company.

The Constitutional Court highlighted the following administrative errors on the part of the state:

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[378] *Baleni*: par. 26. The Department of Mineral Resources and mining company Transworld Energy and Minerals argued that the MPRDA did not require the consent of the landowner or land occupier before the Department (the state) could award mineral rights in their land. The state further argued that to allow community consent would be adding "unintended words" to the MPRDA, which in effect "trumped" the IPILRA, implying that no landowner could resist mining. See also Tlale 2020: 9; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 CC; *Meepo v Kotze* 2008 1 SA 104 NC: par. 13.
[379] 2018 3 SA 621 CC.
[380] Badenhorst 2021: 11; Mostert & Young 2016: 151.
[381] Badenhorst 2021: 11.
[382] *Aquila Steel*: par. 3.

- The granting of a grossly defective application for the prospecting right that did not meet the MPRDA's requirements;
- The granting of a mining right to ZIZA when an earlier application by another mining company was first in the queue;[383]
- That the "legally null award of the prospecting right to ZIZA does not enjoy a 'zombie afterlife' to thwart the legal conclusion that a mining right could validly be granted to Aquila";[384]
- A failure to set out just and equitable conditions, which forced the Constitutional Court to issue a substitution order granting the mining right to Aquila instead, subject to conditions that the state needed to determine within three months, which conditions had to be just and equitable.[385]

For the minority, Theron J stated that a substitution order was inappropriate and that the court was not in as good a position as the administrator (the state) to determine the requirements for the granting of mining rights.[386] The judge's reasoning here clearly was that, while the courts played an invaluable role in holding the state accountable for its fiduciary duties by restraining an overestimation of state custodianship, this was not ideal if it placed the judiciary in the undesirable position of having to correct administrative errors of this nature in the state's management of natural resources.

Based on the above, it is suggested that, in respect of the state's fiduciary duties in exercising state custodianship in particular, the judiciary's oversight role within the current legal-political context cannot be overstated, and that the transformation of property systems in ways that permit increasing state regulation will demand more

[383] An action prohibited under MPRDA: sec. 9.
[384] *Aquila Steel*: par. 98.
[385] *Aquila Steel*: par. 120-122.
[386] *Aquila Steel*: par. 52, 127, 134.

robust judicial involvement.[387] Hence, state custodianship as a conceptual basis for regulation requires rigorous judicial oversight to ensure that state actions are supported by public participation, democratic principles and accountability, and do not exceed the constitutional limitations of fiduciary powers expected of trustees or custodians acting in accordance with a stewardship ethic.

4.2.5 A flexible and indeterminate nature

Public trusteeship is flexible enough to be capable of development and adaptation, while remaining constrained by its doctrinal basis. The flexible and indeterminate nature of state custodianship, on the other hand, has increased fears that political parties may use it to achieve mass land expropriation without compensation.[388] Commentators fear that a state wishing to nationalise a resource could do so under its supposed authority as custodian.[389] This intent was, after all, part of the transformation of the mineral regime in South Africa, for which the MPRDA was introduced.[390] According to Jeffery, if the precedent of *Agri SA* is to be followed in respect of land, vesting all farming land in the custodianship of the state could result in the effective yet uncompensated expropriation of all farm land.[391]

The problem is that, because of its indeterminate nature, state custodianship under the MPRDA has proved to be susceptible to abuse by state actors that prioritise mineral rights above land rights. As a result, existing land tenure rights, especially informal and unregistered rights, have been circumvented and infringed in favour of capitalist mining companies.[392] Therefore, state interests can be in tension with the rights of future land reform beneficiaries and landholders, who receive less benefit,

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[387] See discussion on the transformative constitutional restructuring of landholding under par. 5.2, and the role of the judiciary in this regard; Olivier 2013: 431-643; See also Mostert 2000: 295.
[388] Democratic Alliance "ANC and EFF motion trying to sneak state custodianship through Parliament" https://www.da.org.za/2021/06/anc-and-eff-motion-trying-to-sneak-state-custodianship-through-parliament (accessed on 9 October 2022). The same sentiment that was commonly expressed with reference to state custodianship of mineral and petroleum resources under the MPRDA has been stated with regard to the proposed state custodianship of land.
[389] Mostert & Young 2016: 154.
[390] Badenhorst 2021: 1.
[391] Jeffery 2015: 8.
[392] Hermanus et al. 2015: 15; MPRDA: sec. 16(2)(b), 22(2)(b).

but make the greater sacrifice. While dividends may be payable via the MPRDA, it comes at a detrimental cost to the public good, placing the mining industry in conflict with the very people (previously disadvantaged persons) who are supposed to be reaping the benefits of democracy in South Africa.[393]

The flexibility and indeterminate nature of state custodianship may present the state with an opportunity to determine the extent of its own regulatory control over specific natural resources as well as the content of the statutory rights to be granted to existing and prospective right holders. Although such determinations are subject to the public interest and constitutional limitations,[394] without any concrete doctrinal basis, it falls to the courts to provide interpretative substance to the concept. If not, the notion of state custodianship will remain vague, easily manipulated, and open to state interpretation.

4.2.6 An expansive jurisdictional footprint

Public trusteeship allows the state to retain ongoing jurisdiction over the natural resource to enable ongoing decisions in the public interest. Yet the regulation of water is not as disruptive to the security of land tenure than the regulation of minerals found and extracted from the land. In fact, state regulation under the MPRDA is so extensive that it has expanded the jurisdictional footprint of state custodianship to not only the minerals, but also to the land in which the minerals are found, as well as the water that is required to exploit such minerals.

State custodianship has enabled the state to increase the pace and scope of mining, causing more land disturbance with a detrimental effect on the public good. Many attribute this to the prioritisation of mining to the detriment of other land uses and land rights.[395] It is argued that the greater 'national interests' that coincide with capitalist interests often seem to override the effective socioeconomic development of local landholding communities, with state custodianship in terms of the MPRDA

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[393] Hermanus *et al.* 2015: 29-33; Claassens & Matlala 2018: 117-139.
[394] Constitution: sec. 36.
[395] Hermanus *et al*. 2015: 11-12.

merely enabling the state to retain ongoing and extensive control over minerals, land and water. The underlying interests being prioritised therefore demonstrate little change or transformation from that observed in the previous regime, if real and inclusive transformative outcomes are the objective.

4.2.7 The exclusion of expropriation with compensation

In principle, public trusteeship excludes any prospect of compensation for public trust assets that the state holds as trustee on behalf of the nation. However, the NWA does provide for compensation where a refusal or amendment of a compulsory licence application for existing lawful water use severely prejudices the economic viability of an undertaking.[396] This is consistent with the 'use it or lose it' policy, which states that only beneficial use of water may be compensated,[397] and that the amount of compensation must be determined in accordance with section 25(3) of the Constitution.[398]

This indicates a certain fairness in the application of public trusteeship under the NWA, allowing for instances where compensation may be deemed just and payable. Unexercised and reallocated water use rights are not replaced, and only beneficially used water can attract compensation under the public trusteeship model. The principle of 'beneficial use' of the resource is utilised to influence the availability of water for reform purposes, and therefore, water use entitlements must be exercised beneficially, proportionally, and fairly so that other water users' rights are not affected.[399]

The *Green Paper on Minerals and Mining Policy for South Africa* was the first formal document to outline government's intentions with regard to its minerals policy. Like the NWA, it included the 'use it or lose it' policy principle, which caused concern over the spectre of nationalisation without adequate compensation.[400] Ultimately,

[396] NWA: sec. 22(6), 49(4).
[397] Department of Water and Sanitation 2021: 20.
[398] NWA: sec. 22(7)(a).
[399] Van der Walt 2011: 210-211.
[400] Hermanus *et al*. 2015: 13-14.

institutionalising state custodianship of *all* mineral and petroleum resources on the same basis as public trusteeship in respect of water does not amount to expropriation, and therefore, compensation is not payable.[401] Since the state does not acquire the rights in the resource in terms of private law, the state, as the custodian of the resource, is not supposed to be a 'co-contender' or competitor for the right to mine or prospect for the resource. Instead, the state should act as a steward – a type of facilitator or supporter through which broader and equitable access to minerals and petroleum resources of the country can be fostered and must be realised for the benefit of present and future generations.[402]

In *De Beers Consolidated Mines v Ataqua Mining (Pty) Ltd*[403] and *De Beers Consolidated Mines v Regional Manager, Mineral Regulation Free State Region: DME*,[404] it was confirmed that the state had done away with the legal notion of private ownership of mining and mineral rights, and that such rights now vested in the custodianship of the state.[405] The MPRDA vests the state with control of all mineral resources, making the state the gatekeeper to all mineral and petroleum rights. As such, the MPRDA extensively and rigorously regulates prospecting rights, mining rights and mining permits.[406]

The interventionist regulatory system imposed through the mechanism of state custodianship is justified by the transformative purposes of the MPRDA.[407] In its role as custodian, the state is responsible for the granting, issuing, refusal, control, administration and management of any right in respect of South Africa's minerals; the state can determine the duration of the mineral right granted, can suspend or

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[401] Mostert & Young 2016: 155.
[402] Van der Waldt 2015: 43, citing Edigheji 2007: 3, 7. "To be developmental implies equity, justice, enabling a rapid growing economy and improving the quality of life of all South African citizens … [T]he capacity of Government is critical as the formulator and implementer of the state's developmental agenda." Van der Waldt 2015: 43 then adds: "As a catalyst, Government's role is to facilitate social development particularly by setting policy parameters, allocating and utilising resources, and establishing global networks and partnerships."
[403] 2007 ZAFSHC 74.
[404] 2008 ZAFSHC 40.
[405] MPRDA: sec. 3(1).
[406] Mostert & Young 2016: 152.
[407] Mostert & Young 2016: 154; *Agri SA*: par. 73-74.

cancel it, can regulate the manner in which the mineral right is exploited, and can determine under what circumstances the right can be exercised.[408]

Given the extensive custodial entitlements in the MPRDA, the Constitutional Court in *Agri SA* was faced with the question whether such vast regulatory rights perhaps resulted in state ownership of the mineral and petroleum resources through expropriation. In other words, the court had to determine whether state custodianship of natural resources legally implied expropriation. Significantly, if expropriation were possible under state custodianship, this would unquestionably distinguish state custodianship from public trusteeship, as the latter is legally incapable of private ownership by the state or any private individual. Yet the majority ruling by the Constitutional Court in *Agri SA* found that there was no transfer of ownership of mineral and petroleum resources to the state.[409] The interference in the mineral rights did not amount to an expropriation, which meant that no compensation was payable.[410] There can be no expropriation and compensation in a situation where the deprivation[411] through state regulation in the form of public trusteeship or state custodianship does not result in property rights being acquired or transferred to the state.[412]

From this, one can conclude that should state custodianship of land be statutorily enacted to expedite the redistribution and transformation of landholding patterns, compensation for the deprivation of existing property rights would not be required.

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[408] MPRDA: sec 17(6), 47, 56, 27(7)(a), 27(7)(d), 25(b), 19(2)(b).
[409] *Agri SA*: par. 71.
[410] *Agri SA*: par. 76.
[411] *Agri SA*: par. 48. Expropriation necessitates state acquisition of property in the public interest and should always be accompanied by compensation. Deprivation, on the other hand, refers to sacrifices that the holders of private property rights may have to make without compensation.
[412] *Agri SA*: par. 68; Marumo 2014: 36.

4.3 CONCLUSION

Statutory state custodianship of a natural resource does not make the state the owner of such resource. However, while the state does not acquire the title of private owner, custodianship does clearly confer on the state the power to grant ownership-like rights or entitlements in the resource. The heavy reliance on private property rights is somewhat unusual because to grant rights, one must ordinarily be the holder of such rights. Therefore, it is reasoned that the state holds these private ownership rights or entitlements in its capacity as custodian on behalf of the nation, but not as the owner thereof. In this way, the state narrowly circumvents the nationalisation of the resource, yet manages to maintain control over the ownership of the resource, which includes its transfer, disposal and encumbrance.[413] Under a state custodianship model, the state becomes the gatekeeper of all rights of access and use in respect of the natural resource. This is not to say that private ownership rights or entitlements are the only type of rights that can be granted by way of state custodianship. In fact, Mogoeng CJ confirmed that state custodianship is given effect to "by granting *various* kinds of rights to successful applicants".[414] In effect, state custodianship takes control in respect of the property away from the private individual and places the same control in the hands of the state, as custodian.

The express inclusion of state custodianship of land in the Constitution was prevented after the proposal was met with strong disapproval during the public participation process on the proposed amendments to the property clause.[415]

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[413] See discussion in par 2.2.4.1.
[414] *Agri SA*: par. 25 (own emphasis).
[415] Parliament of RSA "National Assembly fails to pass Constitution Eighteenth Amendment Bill" https://www.parliament.gov.za/index.php/news/national-assembly-fails-pass-constitution-eighteenth-amendment-bill (accessed on 9 September 2022). "The envisaged Constitution Eighteenth Amendment Bill, which aimed to amend section 25 in order to allow the state to expropriate land without compensation, failed to garner the requisite number of votes in the National Assembly. This means there will be no changes to the Constitution. According to section 74, any Bill that seeks to amend the Constitution must be passed by a 75 per cent majority in the National Assembly, or 267 members out of the total 400 ... [T]he Democratic Alliance dismissed the Bill, saying it was not necessary to amend the Constitution in order to expedite land reform. [They argued] that section 25 in its current form is clear on how the state can use existing laws to address land reform. 'The Bill

While the transformative potential of the legal construct of state custodianship is yet to be seen, what is clear is that its nature necessitates strong accountability mechanisms. These include high levels of judicial oversight, good stewardship and governance practices,[416] ethical and skilled management, and an incorruptible, capable state.

The next chapter explores the use of transformative statutes as conduits for state regulation of natural resources and, consequently, as vehicles for radical property-regime-changing measures such as public trusteeship and state custodianship.

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creates uncertainty on property rights and it goes against the rule of law …' … The Economic Freedom Fighters also rejected the Bill and accused the majority party of tampering with its original motion, which … was 'very radical and clear on expropriation of land without compensation'. 'The ruling party proposed a motion which took us [on] a long winding road. We tried, but the parliamentary process was hijacked by the ANC and its handlers. We are led by cowards who do not want to offend their handlers. They are scared to deal with the land issue decisively. This is a complete departure from the radical proposal by the EFF in 2018 ... The ruling party doesn't respect the rights of the dispossessed.' … [T]he Inkatha Freedom Party (IFP) said the Bill will not change South Africa's land ownership patterns. Furthermore, the Constitution is not to blame for the slow land reform programme. 'The process has been used as a political tool to convince people who are not legal experts that the Constitution is at fault for slow land reform. The truth is corruption delays land redistribution. There is an urgent need to conclude outstanding land claims since 1998 and stop playing political games at the expense of the people … There is no need to amend the Constitution; section 25 is broad enough to deal with the land issue. What we need is the will of government to act and advance land reform.' … [T]he Freedom Front Plus warned that land expropriation without compensation will … have dire consequences for South Africa and its economy. 'It will make property rights null and void, lead to economic failure and collapse of South Africa. International best practice guarantees property rights and the rule of law.'"

[416] Pienaar 2011: 15, 18-24, who says what is needed for good governance on South Africa's rocky restitutionary road is "'[s]ound policy and manageable procedures'; '[p]redictable, open, and enlightened policy-making, a bureaucracy imbued with a professional ethos, and executive arm of government accountable for actions; a strong civil society participating in public affairs and all behaving under the rule of law'". See also Feris 2010: 73-100.

CHAPTER 5

TRANSFORMATIVE STATUTES AND STATE CUSTODIANSHIP

5.1 INTRODUCTION

This chapter lays the foundation for the comprehensive discussion of state custodianship in the interest of land reform in chapter 6. The enactment of statutes such as the MPRDA and the NWA for the purpose of transformation to justify state custodianship and public trusteeship as forms of regulation in the public interest. This chapter also therefore considers what the statutory enactment of state custodianship could mean for land and the restructuring of land holding patterns, following what has been established about its characteristic features and legal implications in preceding chapters. It poses the important question as to whether land should be next? And contemplates the ways in which this may take place.

The MPRDA is a transformative statute aimed at bringing about socioeconomic change. It is intended to regulate access to and use of the mineral and petroleum resources of South Africa in ways that give effect to its constitutional objectives. Through state regulation, the statute is intended to promote systemic transformation of not just the property structure, but also existing property rights. To assist the state in performing its mandate, the MPRDA determines and prescribes fiduciary duties for the regulation of minerals and petroleum.[417]

The transformative purpose of the MPRDA is to promote equitable access and redistribution of the natural resources, to substantially and meaningfully expand opportunities for historically disadvantaged persons to benefit from the exploitation of minerals and petroleum resources, to promote economic growth, employment, social welfare and security of tenure, and to give effect to section 24 of the Constitution,

[417] MPRDA: sec. 3(2)(a).

namely that everyone has the right to a healthy, sustainable[418] and protected environment.[419] Underlying it all is the premise that the natural resource is the "common heritage of all the people of South Africa" and that the state is "custodian on behalf of the South African citizens"[420] and empowered with the necessary fiduciary responsibility to manage the natural resource on behalf of the nation.[421]

State custodianship as a regulatory construct, therefore, is meant to enable the state to achieve the transformative purposes of the Constitution, as reiterated in the MPRDA, more effectively and easily. As a transformative statute, the MPRDA serves as a conduit for state custodianship to transform the existing property regime regarding mineral resources, provided that Parliament expressly applies this mechanism in a context that demands reform and to a natural resource that compels the above purposes. The legal consequence of state custodianship is that the natural resource is unequivocally placed under state regulatory control.[422] The expectation associated with state custodianship is then, that by removing the natural resource from the private property regime and placing it in the public property domain, the state will be in a better position to achieve the abovementioned transformative objectives, which are so desperately needed in South African society.[423]

Thus, like public trusteeship, state custodianship gives effect to a property regime change of a specific natural resource once expressly provided for in a statute. However, as demonstrated in the previous chapter, state custodianship also has certain unique features and legal implications that are not found in the public trusteeship model.[424]

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[418] NWA: preamble.
[419] MPRDA: ch. 2, "Objects of the Act".
[420] MPRDA: preamble, "Custodianship of nation's mineral and petroleum resources".
[421] Marumo 2014: 57.
[422] *Agri SA*: par. 68.
[423] See detailed discussion in par. 4.2.3.

[424] MPRDA: sec. 11. For example, under the MPRDA, the state has wide regulatory powers, including the registered transfer and encumbrance of mining rights and permits, which rely on private law constructs of real rights.

5.1.1 State custodianship as a means to achieve transformation

There is very little certainty about the notion of state custodianship.[425] This void has led to substantial case law challenges,[426] suggesting that there are anomalies in the application of state custodianship to the mineral rights regulatory system – most notably that customary and communal landholding communities often lack the financial muscle to challenge the giant, wealthy mining companies.[427]

The differences between public trusteeship and state custodianship possibly account for some of the root causes for the anomalies occurring from the latter's implementation: For instance, state custodianship does not have the same strong philosophical foundation as public trusteeship to guide its interpretation, making state custodianship vague and susceptible to misinterpretation. In addition, its extensive jurisdictional footprint affects more than one natural resource, namely minerals, land, and water, giving rise to conflicting interests in interrelated and interdependent resources and rights.

Moreover, the skewed distribution of benefits enjoyed by rural communities, capitalist mining companies, elites and even state actors respectively cause scepticism about the actual transformative impact of state custodianship in the MPRDA. After all, while it is the "common use" of the citizenry that serves as the basis for designating certain natural resources as the nation's common heritage, or as public trust assets,[428] mining dividends benefit only an elite few, and previously disadvantaged persons in these mining communities derive very little benefit from the custodial asset and diminishes the premise of the nation's resources as the "common heritage of *all people* of South Africa"[429] and for the benefit of present and future generations.

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[425] *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 SCA; Van der Schyff 2016: 177.
[426] See case law discussion under par. 4.2.4.
[427] Tlale 2020: 7, who highlights that there is no level playing field between giant mining companies and customary communities. See also Badenhorst & Mostert 2007: 409-422.
[428] Dunning 1989: 522, 517, who argues that for a resource to be protected under public trust it must "be scarce" and "must have a natural suitability for common use". See also Van der Schyff 2010.
[429] MPRDA: sec. 3.

State custodianship in the MPRDA also makes use of private property constructs such as limited real rights and the formal registration and notarial execution of real rights. It retains rights akin to private ownership to ensure the transfer, letting, cession, sale and encumbrance of the custodial asset for third parties. This does little to transform the existing private-sector monopolies and inequalities in wealth redistribution. State custodianship permits the wide statutory powers to the state to grant ownership entitlements to third parties, while public trusteeship prohibits the disposal and depletion of trust assets and only affords use rights.

It is argued, therefore, that state custodianship is a novel regime-changing construct that deviates from the doctrinal public trusteeship principles in certain fundamental respects. It has led to questionable exclusionary outcomes that warrant its reconsideration before it can be applied to another natural resource like land, where the stakes are so incredibly high, given the uncertainties and ambiguities surrounding the security of land tenure rights in South Africa. It is imperative that in its exercise of fiduciary *dominium*, the state should keep in mind that its fiduciary responsibility to protect the natural resource is derived from the beneficiary's right of *access* and *use*.[430] At the same time, it must also be noted that criticisms directed at the water regulatory regime under public trusteeship and at the minerals and petroleum regulatory regime under state custodianship[431] do share the central concern of the state's inability to manage resources so as to meet its governance obligations.[432]

South Africa continues to struggle with the socioeconomic consequences of past state interferences in the constructs of landholding. The state must shoulder the task of re-envisaging South Africa's property system in ways that put security of tenure at the epicentre of inclusive economic growth for all. An inability on the part of the state to manage South Africa's natural resources in an ethical manner would place

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[430] Van Aswegen 2019: 9; *Martin v Waddell's Lessee* 41 US 367 (1842); *Knight v United States Land Association* 142 US 161 (1891).
[431] Mostert & Young 2016: 143.
[432] Dagan 2015: 1913; Mostert & Young 2016: 168.

invaluable resources at risk, which would have considerable socioeconomic consequences.

5.1.2 Public trusteeship as a means to achieve transformation

Public trusteeship demands of the state, as public trustee, to be accountable to the nation and, thus, to resource beneficiaries, thereby elevating the nation's position in the trust relationship. The NWA has been described as "a new water law premised on the idea of water as a public good".[433] The public trust doctrine had a profound influence on South Africa at the end of apartheid in 1994 and ushered in a radical statutory regime change regarding the use of water. As a result, South Africa's water law has shifted to a wholly centralised system of water use under the public trusteeship of the state.[434] It is also worth noting that this kind of centralisation is integral to the developmental state model. Additionally, the preamble to the NWA recognises that water is a scarce and unevenly distributed national resource that belongs to all people, and that the discriminatory laws and practices of the past prevented equal access to water use.[435]

Nevertheless, public trusteeship in the NWA is not above reproach. Moreover, past paternalistic notions of trusteeship should serve as a cautionary tale of the potential consequences of excessive bureaucratic state *dominium* over natural resources and property.[436] Though at the time of its inception, the NWA could be applauded for its transformative nature and comprehensive objectives, many argue that almost two decades later, the statute has done little to bring about a more just allocation of water use rights. Indeed, access to both land and water in South Africa continues to be concentrated in the hands of a privileged few and remains highly skewed along racial lines, despite regulatory mechanisms such as public trusteeship and state

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[433] Department of Water Affairs 1997.
[434] Turn to par. 3.4 for a discussion of the centralisation of water under public trusteeship. See also par. 6.4.1.1.
[435] NWA: preamble.
[436] Presidential Advisory Panel on Land Reform and Agriculture 2019: 67. "Trust is an essential element of democratic legitimacy, and the declining levels of trust between (political) leaders and institutions impact negatively on nation-building."

custodianship. Some attribute the lack of transformation to the strong neoliberal flavour of new emerging policies and laws.[437] However, most analyses on redistribution of water resources identify weak state implementation and enforcement as the main reason why water remains rooted in historical, locally specific patterns of use that reflect (pre-constitutional) power relations.[438] A 2017 high-level panel assessed fundamental change in South Africa and grappled with the question of whether the legislative output of the post-apartheid state was equal to the challenges

[437] Lahiff *et al*. 2008: 5. See also Terreblanche 2003: 422. "The economic system has been changed over the past 30 years from one of colonial and racial capitalism to a neo-liberal, first world, capitalist enclave that is disengaging itself from a large part of the black labour force … Although the black elite – both the bourgeoisie and petit bourgeoisie – has been adopted as a junior partner, the new system has retained a racial character; it is still a white-controlled enclave in a sea of black poverty." Branson 2016: 1; Wolpe 1972: 1-4.

[438] Liebrand *et al.* 2012: 775; *South African Association for Water User Associations v Minister of Water and Sanitation* (71913/2018) [2020] ("the SAAWUA case"). The SAAWUA case raised a number of important issues that provided insight into the status of (post-apartheid) water redistribution in South Africa, such as the fundamentals of statutory public trusteeship of water and the effectiveness of this regulatory system in practice. Exclusionary practices of private property transactions cannot be applied to water, which is regulated under the statutory public trust framework of the NWA. The high court in the SAAWUA matter held that there was no authority in the NWA that permitted holders of water use entitlements to sell such entitlements, and that to accept such a construct would result in the privatisation of a natural resource to which all persons must have access. The court confirmed that sec. 3 of the NWA imposed an obligation on the state to allocate water equitably for the beneficial use of the public (and not the private) interest. In addition, the SAAWUA case highlighted the disparity in economic wealth and the ongoing monopolisation of access to and use of water by a privileged class. The high court held that the sale of water use entitlements in private agreements discriminated against those who could not afford the costs unilaterally determined by the holders and maintained the (apartheid-style) monopoly of access to water resources by established farmers who were financially well resourced. These practices, the court said, frustrated equal access and kept historically disadvantaged persons out of the agricultural industry. The SAAWUA case also demonstrated how the poor construction of section 25 of the NWA coupled with contradictory wording in the National Water Policy presented an opportunity for interpretative challenges to the fundamental basis of the public trust doctrine. Following further appeals in the Supreme Court, the matter has been referred to the Constitutional Court for final judgment. The Constitutional Court's ruling will affect not only South Africa's public trusteeship principles in respect of natural resources, but will also set the tone for the level of state regulation over commercial irrigation farming in so far as water access, use and trade is concerned. This matter also has interesting historical implications, as the reintroduction of the *dominus fluminis* status of the state during apartheid meant that the state retained control over rivers and waterbodies, although in effect allowing white irrigation farmers to exchange water use between one another. Of course, this practice differs from the public trust doctrine and South Africa's unique public trusteeship in terms of the NWA, as informed by sec. 24 of the Constitution and the purposes set out in sec. 2 of the NWA.

already entrenched in society, and sadly revealed that the ills of the past were being reproduced in post-apartheid society, despite extensive legislative reform.[439]

The state is expressly acknowledged as having the overall responsibility as national government to enable the equitable allocation and redistribution of water resources for the benefit of *all* users.[440] South Africa's stewardship ethic, as manifested in its public trusteeship, is analogous with international law principles, yet also distinctly South African, giving impetus to the constitutional objectives incorporated into the NWA, in conjunction with other environmental legislation. This provides a strong interpretative doctrinal basis for the public trusteeship of water in South Africa and is essential for the enforcement of state accountability.

5.2 A TRANSFORMATIVE RESTRUCTURING OF LANDHOLDING

The state's stewardship over water and minerals is inextricably tied to land, despite water and minerals having been severed from land. Therefore, the exercise of regulatory powers over water and minerals cannot be undertaken without also considering its impact on land reform and, consequently, land tenure rights. Ultimately, land forms part of the same environment or ecosystem as all other natural resources. Governments have historically reconstructed and intervened in private property by adopting varied institutional approaches and legal mechanisms to regulate access to 'common-pool resources' for political objectives.[441] A transformative constitutional restructuring of landholding is required but must be implemented in a manner that achieves constitutional outcomes. The question is: Can state custodianship achieve these constitutional outcomes?

The absence of a doctrinal basis for state custodianship is already proving problematic for governance accountability and results in an overreliance on the

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[439] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 31.
[440] NWA: preamble (own emphasis).
[441] Libecap 2008: 547-548; Viljoen 2016: 74.

judiciary for oversight of administrative functions, which, according to Kibet and Fombad, is to be expected when applying transformative constitutionalism.[442] A deeper understanding of constitutionalism, however, requires us to look beyond the idea of a Bill of Rights upheld by the power of judicial review. Instead, we need to understand how the protection of rights is intimately linked to the effective operation of democratic governance. The courts' deference to the democratic will is a key aspect of democratic constitutionalism. Because of their central role in fostering the processes of democratic government established under the Constitution, the courts can withstand the power of the executive and legislative branches of government in defence of a constitutional principle. Applying constitutional rules, the courts have the power to decide when either the executive or legislative branch of government is not effectively meeting democratic demands within the confines of the Constitution.[443]

Nonetheless, the absence of a doctrinal basis for state custodianship increases the vulnerability of already vulnerable groups, who are expected to defend their competing rights to access and use of the natural resources against capitalist mining companies and even state actors. As Mostert argues, instead of rising to the challenge of creating a more justly balanced property regime, government appears to remain stuck in attempts to extend its regulatory reach over an ever wider range of natural resources.[444] As a result, the state's approach as public trustee of the environment as a whole has shifted to an increasingly paternalistic custodial approach in respect of South Africa's natural resources, particularly also rural land.

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[442] Kibet & Fombad 2017: 342.
[443] Currie *et al.* 2001: 36-37, 95. See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 CC: par. 112. The Constitutional Court stated that the checks and balances in the Constitution both protected against the overconcentration of power and advanced the requirement of an energetic and effective, yet answerable executive. See also in general Brand 2009 that discusses transformative politics.
[444] Mostert & Young 2016: 147-148.

5.2.1 State custodianship: Should land be next?

To Klare,[445] the idea of legislation giving effect to a constitutional right is deceptively simple, as the grandest of intentions may still lead to unconstitutional outcomes. This has indeed been the case with some land reform statutes.[446] Therefore, Van der Walt contends that the question for the Constitutional Court is not whether the legislation gives *effect* to a right in the Bill of Rights, but whether it was, in fact, *enacted* to do so.[447] If this reasoning is followed and applied to the MPRDA, one can safely say that the statute and its incorporation of the principle of state custodianship is an example of transformative legislation that has been *enacted* to give effect to rights in the Bill of Rights. This, then, clarifies the intent and purpose of the enactment of state custodianship. Thus, the Constitutional Court has declared the legal construct of state custodianship to be a constitutionally reasonable, lawful and justifiable measure or mechanism available for statutory incorporation by the state in the national interest.

Whether state custodianship, as an *enacted* mechanism, gives *effect* to the rights in the Bill of Rights in its implementation in the applicable context is another issue entirely, and will likely only be determinable once administrative action under the auspices of state custodianship has taken place. Ultimately, the success of legal and policy mechanisms such as public trusteeship and state custodianship when applied to natural resources depends on their sensitivity to context. In terms of land reform programmes, strategies and plans, this would mean taking into account multiple potential land uses beyond commercial irrigation farming, and what beneficiaries want and can do on the land. While this is perhaps a tall order, ignoring the connections between people and nature will eventually result in social justice failure.[448]

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[445] Klare 2008: 129-154; Van der Walt 2012: 1-179.
[446] *Communal Land Rights Act* 11/2004.
[447] Van der Walt 2012: 40.
[448] Mograbi *et al*. "South Africa's land reform policies need to embrace social, economic and ecological sustainability" https://theconversation.com/south-africas-land-reform-policices-need-to-

The statutory mechanism of state custodianship in respect of minerals for the purpose of ensuring equitable access has created the precedent for the potential further extension of state custodianship to land, being a national asset and a natural resource identified for reform or transformation. Indeed, some supporters of state custodianship of land argue that the failure of existing land reform laws and policies to achieve their transformative goals necessitates a more 'radical' approach, and that state custodianship is the only solution.[449] However, experts argue that the exercise of fiduciary duties in respect of the environment cannot be extended by the state trustee or custodian into the realm of private and communal ownership[450] without risking unlawful expropriation.[451] And, of course, the slow transformation of the property landscape can be attributed to many different factors, including the poor drafting of legislation, inefficiencies in the land administration system, endemic corruption, misapplication of the Constitution, and particularly also slavish adherence to market-driven compensation. It is said that market-friendly policies have failed the Constitution's socially redistributive and inclusive goals.[452]

Regardless, what is certain is that for state custodianship to effect a property regime change in respect of land, it requires legislative enactment. If we are to follow the route of the MPRDA in respect of land, state custodianship would need to be enacted into transformative land reform statutes that expressly designate the role of the state as 'custodian of all rural and agricultural land'. The legal consequence of

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embrace-social-economic-and-ecological-sustainability-145571 (accessed on 9 September 2022). This means taking into account multiple potential uses for land, not just commercial irrigation farming, and what beneficiaries want and can do on the land. It is a tall order, but ignoring the connections between people and nature will ultimately result in social justice failure.

[449] Parliamentary Monitoring Group "State custodianship of land is the only rational approach to expropriation without compensation: The Economic Freedom Fighters position" https://pmg.org.za/files/210702State_Custodianship_of_Land-Updated.docx (accessed on 5 May 2021). See also Genocide Watch "South Africa: ANC & EFF propose 'state custodianship'" https://www.genocidewatch.com/single-post/south-africa-anc-eff-propose-state-custodianship (accessed on 10 June 2022).

[450] Weinberg 2015: 18. See also Okoth-Ogendo 2008: 95-100. "The central fallacy of colonial thought on customary land tenure was that it confers no property rights in land. This fallacy has been subsequently internalized and used for similar purposes by post-colonial governments."

[451] Blackmore 2018: 4.

[452] Ngcukaitobi 2021: 206; Nedelsky 1996: 417-432.

the deprivation of land under the auspices of state custodianship would exclude the need to pay compensation for deprived land rights. The land would be vested in the state, as custodian on behalf of the nation, for land reform purposes, and the statute would be the vehicle to facilitate this property regime change.

Undoubtedly, as with the MPRDA, this would be met with strong opposition from agricultural landowners, as it would alter existing, largely ownership-based landholding structures. From the characteristic features and legal implications of state custodianship, it is further concluded that if applied to land, the state would hold ownership rights or entitlements as custodian, with the statutory authority to grant (or withhold) either ownership entitlements or lesser use rights. Concerted opposition from other landowners, investors and banks is almost guaranteed in their scramble to protect their financial investments. Likewise, the nature of any new property rights will very likely be shrouded in uncertainty, considering the state's poor track record of conceptualising new property rights that go beyond traditional private property law categories to break away from exclusionary outcomes while securing tenure. This incapability by the state renders the fear of greater tenure insecurity, food insecurity and eventual economic collapse quite plausible should state custodianship of all rural or agricultural land be expressly incorporated into transformative statutes aimed at transforming the rural economy.

Given the anticipated opposition from the private sector and the risk of losing their contribution to the economy, coupled with weak political will, the state will more likely err on the side of caution and capitulate to capitalist (private-sector) forces. Thus, the state may rather opt for the less risky alternative, which is to collaborate with the private sector while promising 'eventual' tenure security and socioeconomic development to the masses instead of implementing outright state custodianship of all rural and agricultural land. In so doing, the existing economic contributors are safeguarded; yet the trade-off is that the entrenched hierarchy that privileges a select few is maintained in respect of land and other natural resources.

An additional consideration in the implementation of a state custodianship model is that the degree of state control imposed would have a significant impact on security

of land tenure for land claimants, and land reform beneficiaries, who generally hold land under customary communal landownership and statutory tenure structures. This is particularly the case if the state custodianship approach in land reform laws and policies reflect nuances of apartheid-era custodianship.[453] The state would have the authority to determine the nature and extent of land rights held under land reform statutes, which would characteristically provide extensive authority to the Minister to regulate the resource by imposing conditions or limitations on land claimant and beneficiary rights granted in terms of the statute. Technically, however, the state would not be the private law owner of the land, thereby avoiding nationalisation of land as a natural resource.[454]

In the next chapter, certain land reform laws and policies are examined as potentially exhibiting a state custodianship approach to land.[455] These are identifiable in that they breed similar outcomes to those of the MPRDA under state custodianship, causing difficulty for landholding communities to assert their land rights and enforce accountability for land reform governance – a poignant illustration that the implementation of state custodianship does not always give effect to the rights in the Bill of Rights. Therefore, it is important to remain vigilant in seeking balanced approaches to property rights that are supported by evidence-based policymaking and lessons learnt from history, including the importance of accountability, judicial oversight, public participation and quality drafting of statutes and policies, with proper regard to the legal consequences as well as the strong influence of the political context on a country's laws. In the South African context, an important lesson learnt from the country's colonial-apartheid history is the significance of understanding the impact of state interventions on individuals' living conditions and on group life.[456]

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[453] See chapter 6 for a discussion of recent land reform laws and policies that reflect apartheid custodianship and ideologies.
[454] See par. 3.5.2 for more on the nature of the regulatory authority of the state as custodian under the MPRDA.
[455] Lahiff 2014: 13.
[456] Albertyn 2018: 464-465. See also High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 31. "Legislation can have both positive and negative impacts on people's lives, as we know from the legislative history of colonialism and apartheid. In

State custodianship is intended as a vehicle to effect transformation. This would require the state to use it as a tool to restructure complex and intersectional relations, structures and processes of inequality towards economic development. Doing so, however, would require tremendous political will from the state. State custodianship would need to be seen to *effect* the rights in the Bill of Rights. This means that laws and policies aimed at economic transformation would need to be aligned with the needs of the people. Social cohesion cannot be abandoned in pursuit of economic prosperity – the two must be understood as being symbiotic. If not, transformative statutes will not give effect to the rights in the Bill of Rights; instead, they may simply recreate past injustices.

5.3 CONCLUSION

State interference in property is often a predictable consequence of the prevailing legal-political context. However, concerns arise when statutory interventions and policies exceed the limitations of public administration, and 'radical' laws and policies are imposed that conflict with or contrary to the trusteeship or custodianship expected of the state.

It has been shown that public trusteeship and state custodianship are interventionist measures that authorise the state powers to regulate specifically the ability to access and use identified scarce natural resources and property. While each has its characteristic features and legal implications, both are aimed at transforming existing property structures and imposing statutory and other measures for the equitable redistribution of natural resources in accordance with the values expressed in the Constitution. This means removing discriminatory barriers to the economy for previously disadvantaged persons. The redistribution of natural resources to

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focusing on positive interventions to bring about change, the Panel remains vigilant about the possible unintended consequences of recent laws, and the need to 'first do no harm'."

previously disadvantaged persons is commonly referred to as the "equitable distribution of wealth"[457] or "wealth redistribution".[458]

In this thesis, it is argued that the legal constructs of statutory public trusteeship and statutory state custodianship through their respective governing statutes introduce separate property regime changes in respect of separate natural resources, yet both regimes must achieve equitable redistribution and increase economic and social development. Moreover, while there are similarities in the purpose of the two legal constructs, they have different legal implications.

Statutory state custodianship is a novel concept that deviates from the doctrinal public trusteeship principles in fundamental ways, which has led to questionable exclusionary outcomes.[459]

As such, the next chapter examines whether a predisposed patriarchal and paternalistic tendency continues to prevail in South Africa's constitutional land reform laws and policies under the guise of state custodianship. If so, this chapter has made clear what the potential legal implications could be. While it is conceded that necessary reforms must involve a degree of land regulation by the state, statutory and policy measures must at all costs avoid apartheid-style ideology that is contrary to or in conflict with the constitutional objectives of land redistribution and security of tenure.[460] However, land reform experts have confirmed that many of the new land reform laws still uphold or entrench the underlying hierarchies of power that

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[457] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 30. The expert panel was tasked to review post-apartheid legislation in the three key areas of "(i) poverty, unemployment and the equitable distribution of wealth; (ii) land reform: restitution, redistribution and security of tenure; and (iii) social cohesion and nation-building".

[458] Njoya 2021: 72. "The concept of equity rejects formal equality on grounds that treating everybody equally would heap more unfair advantage on those who already have an advantaged position in life. The egalitarian conviction is that human beings ought as much as possible to enjoy equal social and material status which can be achieved through 'wealth redistribution'."

[459] Claassens 2014b: 762-765. "State custodianship has been critiqued as having exclusionary consequences reminiscent of a 'Bantustan-era'."

[460] Van der Walt 2001: 271, who explains that apartheid-style ideology was based on the "maintenance and protection of existing land rights in a spatialized framework, which emphasized the exclusivity of individual and (race) group land holdings" and the "hierarchical superiority of individual ownership compared to any other property rights".

characterised apartheid land law.[461] This makes it imperative to ascertain whether a state custodianship approach with apartheid ideological nuances is being unwittingly applied to modern-day land reform laws and policies.

[461] Van der Walt 1999: 260.

CHAPTER 6

STATE CUSTODIANSHIP IN THE INTEREST OF LAND REFORM

6.1 INTRODUCTION

State custodianship in the MPRDA is a radical, regulatory legislative measure used for the transformation of existing property structures and rights in line with the public interest.[462] This can be said because its implementation by all accounts was a radical move by Parliament and the legislature towards greater equitable access to specific resources, and as such, is justified as being in the public interest. Consequently, the MPRDA is an example of a statute having been enacted as a vehicle through which to achieve the transformation of existing property holding structures.

However, concerns as to the deficiencies and unforeseen consequences in the application of state custodianship under the MPRDA have since emerged. These include concerns that state custodianship has produced little social change and has resulted in the disproportionate distribution of benefits in minerals and petroleum resources, worsening rather than improving communal landowners' socioeconomic circumstances and security of tenure[463] – this while legally secure tenure or comparable redress are constitutional objectives and form part of the state's fiduciary duties towards landholding communities.[464] This raises questions as to the property regime in which state custodianship operates, and why it is failing to deliver the equitable outcomes envisaged by the Constitution.

The balancing act of, often radical, state regulation of property to achieve the constitutional objectives of redistribution and security of land tenure has led to

[462] *Agri SA*: par. 91; Van der Schyff 2016: 254. It is radical in that there was no precedent for the implementation of such large-scale transformative legislation.
[463] Mostert & Young 2016: 147-148.
[464] Constitution: sec. 25(6). "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

conflicting rights and interests. Therefore, theoretical arguments as to the weight to be attributed to the state's regulation of property in the public interest on the one hand, and to the protection of private property on the other, are to be expected. This forms part of what could be called South Africa's great property regime conundrum. However, it is contended that the so-called irreconcilable tension between these two positions is, in fact, fictitious and follows the oppositional and exclusionary rationale of pre-constitutional ideology.[465]

This chapter discusses the reconceptualisation of property rights for regulation and examines the legal implications of state custodianship that compels a property regime change from the private to the public property regime. To this end, it considers modern academic debates on the relevance of the private property regime, and whether the theoretical property law distinction between private and public property could affect the efficacy of state custodianship. Finally, in doing so, manifestations of a state custodianship approach to land reform is considered against that of past apartheid ideologies, and also discussed in consideration of South Africa's present National Development Plan 2030.

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[465] Van der Walt 2001: 264-265. "[T]he dynamics of apartheid land law can be portrayed as a stationary, circling dance, enclosing and excluding, around and around its axis. This image reflects the exclusionary tendency of both the legal and ideological roots of apartheid land law. Apartheid law consisted of a mixture of a seemingly innocent legal code and the ideological code of the Afrikaner nationalism, and again the mixture created a whole new, inseparable layer of legal and political meaning … [A]partheid embodied a synergy between the equally exclusionary codes of apartheid ideology and Roman-Dutch law."

6.2 SOUTH AFRICA'S PROPERTY REGIME CONUNDRUM

Academic debates on South Africa's property regime conundrum tend to revert to oppositional dialogues that frame the protection of private ownership and, consequently, the granting of ownership title as somehow being at odds with land reform. This is because radical land reform laws and policies often intertwine with broader political agendas or national interests, including the establishment of legitimate new regimes.[466] The elevated position of ownership experienced to this day was inherited from the hierarchical exclusionary apartheid system, which intentionally structured the property system to revolve around ownership,[467] while failing to develop other forms of legally secure tenure on the same basis. Common law property theory proved ideal for legitimising a distorted property rights structure that continues to be sustained by oppositional property rights dialogue, even under constitutional rule.

This oppositional property rights dialogue is based on what is perceived as irreconcilable tensions, essentially creating South Africa's property regime conundrum. A good example of this is the willing-buyer willing-seller policy, which links compensation for expropriation to market pricing. It allows farmers' insistence on commercial prices for their farms, instead of the need for redress, to justify the scale of compensation paid.[468] Common law property theory conveniently fails to contextualise the legal issue. As a result, the protection of ownership supersedes constitutional land reform objectives. At the heart of this impasse is the belief that private ownership is more valuable than land reform – a belief that originates from the oppositional dialogues associated with a hierarchal property rights structure that negates the immediate reality of constitutional supremacy.

However, such an insular understanding of the public and private spheres as innately distinct is illogical. The law in practice must be understood holistically and as

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[466] Kepe 2012: 392.
[467] See discussion under par. 4.2.2 on the exclusion of private ownership of natural resources.
[468] Du Plessis 2014: 799; Du Plessis 2018: 191-222.

replete with intersectionality. This is particularly so for property given its functional nature. Therefore, it must be understood that when effecting changes to a property system, the overall property rights system must be consciously designed to maintain a proper social and political order, which cannot be left to private market forces alone.[469] If the property regime conundrum is correctly viewed from the perspective that there is but one legal system,[470] and that all laws, policies and especially politics are subject to constitutional interpretation as the departure point, the conundrum ceases to exist and justifiable state regulation of property can be accepted as a necessary consequence flowing from the Constitution. Having said that, justifiable forms of statutory state intervention such as public trusteeship and state custodianship must adhere to a clearly defined property rights regime.

A clearly defined property rights regime carries multiple benefits that contribute to the proper functioning of society: It specifies the nature, limit and type of property rights available. It sets the framework from which implementable property laws and government policies are developed. It provides certainty as to legal rules, consequences and remedies. It promotes normative justifications for the allocation of property rights in a way that is commonly accepted. It fosters a deeper understanding of the public interests and basic human rights that must be considered based on the kind of property regime that applies. Of course, the converse would be true in the absence of a clearly defined property regime.

Under the common law property rights system, rights in property could easily be categorised along the lines of real rights, which were recognised, registrable and protected against the world at large, and personal rights, which were recognised, unregistrable, yet protected between the parties.[471] While these property laws and rules provided a clearly defined property regime, their implementation had exclusionary outcomes for the majority of South Africans holding informal or

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[469] Micklitz 2016: 237-238.
[470] Alexander 2014: 1257-1296; Pienaar & Kotze 2018: 341-373; Quinot & Van der Sijde 2018: 447-468.
[471] Van der Walt 1992b: 170-203.

customary land rights. As a result, the majority of the population's land rights were unrecognised, unregistered and largely unprotected by law, creating insecure land tenure.

Therefore, besides a clear property rights regime that affords defined property rights, an additional requirement is constitutional, inclusionary laws and policies. Consequently, it stands to reason that statutory regulatory measures taken by the state must either achieve legally secure tenure or provide comparable redress to those previously disadvantaged by the apartheid property system.[472] Viewed from this angle, public trusteeship under the NWA and state custodianship under the MPRDA are legislative attempts to escape the exclusionary common law property rights system by replacing it with a statutory (regulatory) public property rights regime. This is being done in the hope of creating inclusionary outcomes, such as the equitable redistribution of natural resources, legally secure tenure, and the promotion of social and economic development.

6.3 RECONCEPTUALISING PROPERTY RIGHTS FOR REGULATION

Progressive property theorists are of the view that property and regulation are not alternatives that we choose between or balance against each other, but that the property system itself is a form of regulation.[473] The enactment of the Constitution demanded a reconceptualisation of property rights[474] and necessitated a different outlook on the interaction between property rights and public interests in the South African constitutional context. This means that constitutional property is conceptualised as an entitlement that is both recognised and circumscribed by the

[472] Constitution: sec. 25(6).
[473] Van der Walt & Viljoen 2015: 1041; In general Kroeze 1997that discusses private law and constitutional perspectives on property
[474] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 CC: par. 22. Yacoob J stressed the importance of contextual interpretation of land reform, as "[property] rights must be understood in their social and historical context". See also Dhliwayo & Dyal-Chand 2018: 295-317.

provisions of the Constitution, and for this reason, the regulation of property must be understood with reference to the broader "constitutional matrix".[475]

The transformative potential of the constitutional property system depends on the extent to which the state can adopt laws and policies that reflect the features and outcomes required to promote the spirit, purport and objects of the Bill of Rights.[476] The constitutional matrix demands that the state adopt land reform laws and policies that achieve transformation of the property system, which means equitable access to land through redistribution, and establishing legally secure tenure. The extent to which the state can capably regulate property while remaining within the parameters of the constitutional matrix will depend on the lawful consequences of its laws, policies and regulatory mechanisms, which include state custodianship. Through state custodianship under the MPRDA, the state has effectively replaced a private property regime with a license-based regime in which the state regulates and controls access to all mineral and petroleum resources.[477]

Regardless, the reconceptualisation of property to allow for state regulation in a 'constitutional property system' does not diminish the fact that clearly defined property rights are essential to avoid unjust concentrations of power, nor the fact that a holder's certainty of their property rights is inextricably linked to their sense of legally secure tenure and social wellbeing.[478] It then becomes imperative that land

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[475] Van der Sijde 2015: 284; Marais 2016: 576-592.
[476] Van der Walt 2012: 183.
[477] Rautenbach 2013: 743.
[478] Constitution: sec. 25(6); Mograbi *et al*. "South Africa's land reform policies need to embrace social, economic and ecological sustainability" https://theconversation.com/south-africas-land-reform-policies-need-to-embrace-social-economic-and-ecological-sustainability-145571 (accessed on 9 September 2022); Hay 2017: 1-28; Claassens 2009: 9-22. Recent land laws and policies have reintroduced apartheid-style feudal tenure forms that render communities, especially women, vulnerable to traditional leaders and patriarchal practices that have no historical foundation in living customary law and are fundamentally unconstitutional. These traditional laws have the potential to leave women socially, culturally and legally unprotected and affect not only their ability to protect their security of tenure, but also their social wellbeing in their communities. See also Farha 2008: 553-568.

reform laws and policies do not recreate apartheid-era insecure tenure under the guise of state custodianship.[479]

Part of the state's challenge is that property in a democracy must meet multiple and varying degrees of economic and human rights interests.[480] To this end, the state has the authority to interfere in property to achieve the constitutional objectives set out in section 25. Inevitably, increased state interference through deprivations and expropriations will challenge prevailing notions of property and oppositional arguments that perpetuate apartheid hierarchies. However, this does not mean that a constitutional property system will necessarily always put social development needs above the need for property ownership.[481]

It is suggested that the problem of insecure tenure, therefore, does not necessarily always lie with ownership *per se*. While ownership undeniably continues to predominate, it remains but one form of tenure and should be accessible to all South Africans who choose it.[482] Since the days of the 1955 Freedom Charter ("the Charter"), land expropriation has always formed part of official African National Congress (ANC) policy; the abolition of private landownership has not. In fact, the

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[479] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 503-504. The panel reported that the MPRDA had effectively abolished landowners' right to say no to mining on their land. While intended to advance transformation, state custodianship of minerals had had devastating impacts on members of rural and customary communities. Mining had led to the dispossession of land and loss of livelihoods, with communities' land rights being ignored by mining companies and the Department of Mineral Resources in the negotiation of mining rights on communal land. Pienaar 2014: 641 confirms that "a fragmented, diverse, inequitable and complex land control system resulted from the mechanics of (state) intervention, especially from those of the previous century".

[480] Barnes 2009: 61.

[481] Van der Walt & Viljoen 2015: 1044. The scholars caution that a constitutional analysis of land and social welfare should not "get stuck in the false property versus social welfare" binary that characterises libertarian and rights-based property theory, nor should it "adopt the facile assumption that ownership is the strongest right and that all other rights should be brought under its protective umbrella".

[482] Weinberg 2015: 21. "An … important tenet of a new communal land tenure policy would be to offer people a spectrum of land tenure options from which to choose, including the involvement of communal property institutions and rights on state-owned land that are legally protected. The spectrum of land tenure options should not be narrowed to traditional councils … It should also not be narrowed to individual title deeds."

Charter never envisaged the end of private property: Its concern was to abolish *racialised* private property ownership.[483]

In addition, it is proposed that perhaps the impediment lies with land laws and policies that fail to grant ownership to land reform beneficiaries and communities who seek it. Instead, laws and policies default to an approach of state custodianship of land that is reminiscent of apartheid trust tenure[484] and fails to provide alternative tenure forms that are just, legally secure, and reflective of present-day rural land tenure practices.

6.3.1 Private property under siege

> No society, whatever its ideological predilections, can avoid the fact that some resources are more amenable to some types of property rule than others.[485]

Some academics have argued that the increasingly common practice of state interventions in contemporary law through the introduction of laws that limit private property as well as the resurgent concept of public trusteeship indicate that the private property regime is becoming inadequate and outdated.[486] This line of thinking is based on the *functional* nature of property, namely that it is no longer relevant to think of property in terms of individual claims to particular objects or things because of the scarcity of natural resources. Therefore, the function of property has changed to one of sustainability and equitable access to resources.[487] This rationale stems from the argument that the private property regime is unsuitable for the demands of the modern environment, that private individuals or groups are incapable of

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[483] Ngcukaitobi 2021: 93.
[484] Wicomb 2014: 145. "The acceptance that the historical and ongoing non-recognition of customary forms of tenure are new examples of marginalisation and discrimination, provides the opportunity for customary communities to argue for the ring-fencing of their rights to resources in the face of state custodianship. [This] addresses the problem of state custodianship of resources that potentially limit the customary tenure protected by the Constitution." Deane 2005: 2-11.
[485] Waldron 1990: 45.
[486] Viljoen 2016: 41.
[487] Viljoen 2016: 39-41. See also Waldron 1990: 35, who argues that "the function of the law of property is to provide rules that govern access to and the control of a wide variety of resources" and asserts that a system of private property provides "a set of rules that governs access to and control of material resources that revolves around the idea that resources are separate objects that belong to particular individuals".

sustainable resources management, and that equitable access to resources is the exclusive domain of government.

The counterargument in defence of the established private property rules and laws is that private property provides the holder with exclusive rights to determine how and whether the resource is to be used,[488] including the right to sell, alienate or dispose of the resource.[489] Private property carries the proven benefits of well-defined property rights and remedial actions, legal certainty, and the promotion of individual economic prosperity, independent peace and liberty.[490] For persons previously denied the enjoyment of these rights in land by discriminatory colonial-apartheid laws, the private ownership of land may be a symbol of triumphing over an unfair system. Most land reform claimants and beneficiaries consider private ownership as "the most desirable form of tenure", and registered title deeds as the "gold standard",[491] because of the beneficial entitlements that accompany private property compared to their current insecure circumstances.

Interestingly, the reverse argument has also been made in favour of the increased importance of public property, namely that the placement of property in the public realm prioritises the public or national interest.[492] This, of course, assumes that the public interest is the same as the 'national interest'. Nonetheless, it is also argued that state regulation allows the state to establish rules to ensure that property is used in ways that promote the public interest,[493] and that the concept of 'property' is interpreted broadly enough to include alternative tenures that go beyond traditional private property tenure.[494] These arguments pivot around the portrayal of private property laws as inadequate and subordinate to public property law. More

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[488] Goldberg 2012: 1640; Van der Walt 2011: 109.
[489] Waldron 1985: 328.
[490] Viljoen 2016: 66.
[491] Ngcukaitobi 2021: 134.
[492] Viljoen 2016: 40-41; Waldron 1990: 40.
[493] Viljoen 2016: 79; Barnes 2009: 155.
[494] Cousins 2016: 1-23; Branson 2016: 14-17. It is clear that the creation of alternative tenure forms is crucial for security of tenure, as not all individuals are able to carry the cost associated with individual freehold title.

importantly, they assume that the public interest (land reform) is the exclusive domain of the public sphere. However, this assumption is fundamentally incorrect. Constitutional Court jurisprudence has stressed that private property is not constitutionally entrenched only to protect wealth, but requires the balancing of *both* private and public interests in property for the redistribution of resources.[495] Likewise, international environmental law emphasises that the stewardship of a nation's natural resources requires the participation of all stakeholders from both the public and private sectors.[496]

Property law may involve the laws and rules regulating individual holdings, but private property is just as crucial to the *collective*.[497] Van der Walt and Viljoen call this collective interest in private property the "social obligation";[498] others have referred to it as the social contract – a matter of social citizenship on the part of landowners. Accordingly, the Constitution must be approached as a deliberate embodiment of a web of transformative tensions between property and social welfare, and the regulation of property as an intricate balancing act between the protection of property and the entrenchment of the social obligation on private property owners as a matter of social citizenship.[499]

It is held, therefore, that property is fundamental to the social fabric of society, and social cohesion is critical to the objectives of a country such as South Africa, which aims to move from a welfare[500] to a developmental state.[501] It is the role of a developmental state to get all sectors of society to rally around a common national vision of transformation, which requires the commitment and involvement of all

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[495] Van der Walt & Viljoen 2015: 1041-1044.
[496] Barendse 2016: 21-35.
[497] Mostert & Young 2016: 142.
[498] Van der Walt & Viljoen 2015: 1041-1044.
[499] Van der Walt & Viljoen 2015: 1039-1044.
[500] Meyer & Van der Elst 2014: 78. "[T]he main role of government in a welfare state is based on intervention in order to ensure fairness, equity and social justice for all. In a welfare state it is accepted that a pure market economy will not benefit all and that injustices and imbalances will be created through free market practices. It is in fact believed that the deprivation gap between rich and poor will widen in a pure free-market dispensation."
[501] Van der Waldt 2015: 35.

sectors, both public and private.[502] For South Africa, this national vision and critical aspiration for social cohesion in all priority sectors is located in the NDP 2030.[503]

It would be difficult to argue against any statutory interventionist mechanism that seeks to achieve the public or national interest of land reform. The issue, therefore, is not the possibility of state custodianship or its constitutional recognition as a justifiable legal mechanism, but rather its suitability as a legal mechanism within the land reform context, and whether its application in this context could result in unreasonable land rights infringements in ways that exceed the parameters of the state's fiduciary authority. Some scholars hold the view that the state has overstepped the mark with state custodianship in the MPRDA; they remain convinced that it has resulted in the nationalisation of the resource.[504]

Yet the Constitutional Court found that this apprehension was outweighed by the transformative goals of equitable redistribution of all natural resources on which the notion of state custodianship is based. Consequently, state custodianship as a legal mechanism was found to be decidedly justifiable and reasonable in relation to minerals and petroleum resources.[505] While not all scholars may approve of state custodianship as a legal mechanism, most agree with the transformative goal of equitable redistribution in the public interest, which is why some academic commentary diminishes private property as no longer relevant. However, the technical rules of private property law are so germane to virtually all day-to-day transactions that its irrelevance would be an unfortunate by-product of transformation.

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[502] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 308.
[503] NPC 2012.
[504] Hermanus *et al.* 2015: 13-14; Van der Vyver 2012: 144.
[505] Mostert & Young 2016: 151. "The constitutional property clause mandates changes to the law to permit reform of land and natural resources. The NWA and MPRDA were enacted to rectify the prejudicial ills caused by the apartheid laws and policies." [Paraphrased] state custodianship must recognise "the need for equitable access to the mining sector, security of tenure, and redressing the results of past discrimination."

So, the question as to whether private property could ever meet the higher expectations of the transformation of the property system is debatable. But is it meant to singlehandedly bear this burden? Van der Walt provides a useful understanding of the flexibility required of the narrow notion of private law property in relation to the wider notion of constitutional property:

> It is the constitutional notion of property that reflects the particularly constitutional nature of property, which in turn guides and influences the interpretation and development of the notion of private law property towards the goal of promoting constitutional values and goals, *without replacing it* on the technical level.[506]

No South African law can remain impervious to the influence of constitutional values and goals, and private property law is no exception. This process of constitutional infusion is a natural consequence of the constitutional condition and has led some scholars to view private property as being in a state of flux or continuous decline because of its overemphasis on exclusive individual ownership rights. Sax, for instance, argues that a gradual and constructive redefinition of property is under way that is characterised by the "decline of private property prominence".[507]

Perhaps, however, it would be more correct to say that it is the common law understanding of private property that is in decline, in that it is undergoing a gradual surrender to what is described here as a process of constitutional infusion – by allowing constitutional values such as substantive equality to guide the interpretation and development of private property law, without discarding its technical usefulness. Therefore, the process of constitutional influencing makes private property rules and laws more constitutional, though not necessarily more public.[508]

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[506] Van der Walt 2012: 128 (own emphasis).
[507] Viljoen 2016: 39-40.
[508] Barnes 2009: ch. 3 & 4; Albertyn & Goldblatt 1998. See also Phooko & Radebe 2016: 311. "Equality as a value gives meaning to the vision of the Constitution by acting as an interpretive tool, while equality as a right provides a justiciable cause of action on which to seek substantive equality (remedies) for persons and groups of persons affected by structural forms of domination and material disadvantage. The learned authors warn in this context that the right to equality in s 9 of the Constitution should be interpreted in a flexible and evolving manner because interpreting it conservatively can lead to its use 'to restrict legal and administrative measures in favour of

6.4 APARTHEID IDEOLOGY: A PRECURSOR TO STATE CUSTODIANSHIP

Recent land reform statutes and policies contain nuances of apartheid ideologies that are arguably manifested in the state custodianship approach.[509] It is an extensively documented fact that political ideology was infused into apartheid land laws and policies. Indeed, South Africa's apartheid land history serves as a cautionary reminder that political ideology does inform law and policy. It also illustrates how land laws and policies can be used to justify the implementation of "development controls" purely on the grounds of exercising governmental "agriculture powers",[510] yet still deliver unconstitutional outcomes. This has led Okoth-Ogendo to caution that it is possible to have "constitutions without constitutionalism".[511]

Apartheid ideology was aimed at the accumulation of all South Africa's economic wealth derived from its natural resources, to the exclusion of the indigenous peoples – a process coined "accumulation by dispossession".[512] The hallmark of this extensive control over natural resources was that benefits accrued only to a privileged minority in order to amass economic wealth through the legalised removal of property and natural resources from entire race groups. To achieve this, the apartheid system was infused into every aspect of human life: The physical boundaries eventually became legal, social, economic and ideological boundaries, resulting in a country – and its land, its people and its resources – divided.[513]

Today, apartheid is recognised as a crime against humanity, and its oppressive land laws and policies have been abolished, repealed or amended in line with a

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disadvantaged groups or entrench privilege rather than remedy disadvantage'. Seen in this light, equality as an important ingredient in the transformation project must be interpreted and understood as substantive, rather than formal, equality."

[509] Van der Schyff 2016: 179, who calls it "ironic" that segregation measures that were implemented in the run-up to and perpetuation of the land policy under the apartheid regime would provide the first basis for comparison with state custodianship.

[510] Dullah Omar Institute 2016: 7, 8.

[511] Okoth-Ogendo 1993: 65, who explains that constitutionalism entails a culture or commitment by the political elite to respect and abide by constitutional limits.

[512] Arrighi *et al.* 2010: 410-438.

[513] Pienaar 2014: 53.

democratic society founded on a Bill of Rights.[514] It is the role of the legislature, executive and the judiciary to ensure that all land reform laws and policies are enacted and implemented in a manner that respects, protects and promotes the fulfilment of the rights in the Bill of Rights.[515] However, decades later, the pervasive remnants of apartheid ideology continue to produce inequity regarding the distribution and beneficial use of South Africa's natural resources. Why is land reform still being plagued by apartheid ideology, though?

The answer to this question is believed to be, in part, the result of the democratic state's custodial approach to rural land, which continues to cling to past constructs of property and fails to empower land reform beneficiaries with *actual* redistribution and legally secure tenure of land. The transformation of property is possible by creating the necessary space in the existing property framework to accommodate a variety of new land rights that are capable of registration, legally protected and enforceable, and sufficiently flexible to meet the needs of any landholder and to develop according to custom, where applicable. This will require a degree of adaptation to the existing property structure but is not inconceivable. Land reform ought to be free from the ghost of apartheid ideology; instead, current land reform laws and policies exhibit clear parallels and conceptual nuances reminiscent of apartheid land governance.

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514 Ngcukaitobi 2021:13-14.

515 Constitution: sec. 8(1). "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

6.4.1 Post-apartheid manifestations of apartheid custodianship ideology

The Constitutional Court has been steering the constitutional transformation of South Africa's property structures, delivering judgments aimed at eradicating persistent beliefs that undermine transformation.[516] As such, the court has described modern-day manifestations of apartheid ideology in land reform laws as "potentially restrictive survivals of the prior regime"[517] and, more specifically, "cloaked but ubiquitous" patriarchal structures.[518] Patriarchalism is defined as a moral order in which normative concepts such as 'the person', 'authority', 'responsibility' and 'rights' are given meaning within the parameters of a constant and pervasive hierarchy of status and responsibility.[519]

The same kind of 'authority' derived from patriarchalism is inherent in the state's custodianship approach to land, with the state in a sense being regarded as a more responsible moral agent, with more rights and obligations. The patriarch (the state) is construed as such because of the recognition afforded to it by the peoples it governs,[520] and traditional authorities have long been regarded as useful political allies in sustaining this construct because of their influence over communities.[521] It is

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[516] Kibet & Fombad 2017: 348; Fombad 2011: 1069.
[517] Van der Walt 2001: 282.
[518] *Rahube v Rahube* 2019 2 SA 54 CC: par. 2-3, 15, 21-23. The Constitutional Court recently declared sec. 2(1) of the *Upgrading of Land Tenure Rights Act* 112/1991 constitutionally invalid to the extent that it automatically converts holders of deeds of grant into property owners, without providing occupants or affected parties an opportunity to make submissions. Sec. 2(1) favoured patriarchal structures and ignored women as occupants by depriving them of the opportunity to receive ownership title to property they rightly occupied. The exclusion was inherently gendered because in terms of the proclamation promulgated in terms of the *Native Administrative Act* 38/1927, women could not be the "head of the family" and, thus, could not have a certificate or deed of grant registered in their name, as being the head of the family was a prerequisite for formal title in land during apartheid. This patriarchal ideology and practice had been carried over into the democratic era, thereby perpetuating apartheid patriarchal structures. The Constitutional Court recognised the pervasive effects of patriarchy that meant that women were often excluded by seemingly gender-neutral spaces, which the court described as the "cloaked but ubiquitous nature of patriarchy".
[519] Atkinson 2009: 262-263.
[520] Atkinson 2009: 262-263.
[521] Thipe 2013: 494; Van Kessel & Oomen 1996: 561-585; Oomen 2005: 104. See also Claassens & Matlala 2018: 135. "Parliament, in making these laws, has opted to cement Bantustan distortions that dovetail with the financial interests and autocratic leanings of the ruling elite, an approach that gives loyal allies a share of the spoils, but only on terms that exclude the majority of those with customary entitlements and the migrant workers who make up the bulk of the workforce. We see traditional

proposed, therefore, that a state custodianship approach exhibits patriarchal and paternalistic nuances similar to those found in apartheid ideology, which relied on patriarchal paternalistic discourse to rationalise the statutory trusteeship of land[522] for the "material, moral and social well-being of natives" residing on trust land.[523]

The discussion that follows highlights some of the manifestations of an apartheid-style custodianship in certain land reform laws and policies.

6.4.1.1 *Institutionalising a state custodianship approach to land*

Apartheid ideology relied on a false narrative that promoted racial assumptions and misconstructions of African peoples' property rights. Distorted ideas surrounding the nature of property rights held by Africans were codified through land laws and policies, which had perverse consequences of disenfranchisement. The ideology was premised on a narrative of racial superiority to justify the legalised prohibition and limitations placed on black land rights. Vital to the dispossession of land rights was the institutionalisation of a state custodianship approach, which enabled state interference in land rights and social structures for the benefit of the minority, and at the same time justified it as being in the majority's best interest.

The paternalist tone of custodianship with regard to indigenous peoples' land rights found in apartheid land laws and policies somehow made the discriminatory results

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leaders being cut a slice of mining profits on the one hand – and National Union of Mine Workers (NUM) shop stewards paid directly by mine management and increasingly insulated from the rest of the workforce on the other hand. The assumption appears to be that, in return, traditional leaders will deliver the rural vote, and that NUM will remain a loyal and powerful political ally within the Tripartite Alliance."

[522] Van der Walt 2001: 268. "Given the essentially paternalistic racial politics of apartheid, land rights in the black areas had to be 'redefined' to 'suit' the perceived circumstances and requirements of black people in the rural areas … [T]his redefinition meant that black land rights were downgraded, transformed into insecure, precarious rights, even in instances where the black people used to have ownership before they were removed from 'white land'." See also Pienaar 2014: 77-78. "[T]he establishment of the South African Union (1910) was characterised by a more *focused concern* with land rights in general and a *paternalistic approach* to the land rights of blacks, in particular." (Own emphasis)

[523] *Natives Trust and Land* Act 18/1936: sec. 9(1). Sec. 4(1) of the act also stipulates that the statute is "to be administered for the settlement, support, benefit, and material welfare of the natives of the Union".

more palatable. Hence, interventionist laws and policies of segregation were used to establish an entire structure of "social cooperation" that created conditions of effective domination and enforcement by a regulatory (custodial) apartheid state.[524] As any state who seeks to transform existing structural patterns, the apartheid state enacted and implemented interventionist statutes as a mechanism to introduce structural change to property relations. Therefore, to achieve extensive dispossession of property rights and social restructuring, apartheid ideology needed to be perceived as "socially acceptable", "legally justifiable" and in the "national interest".[525]

Apartheid ideology was masked by laws that, while framed as paternalist, bred inequitable outcomes made possible by neoliberal formalistic constructs of law and policy and a complete disregard for extraneous factors such as morality, fairness, and social values required of a just society.[526] Yet, decades down the line, South Africa seems to have retained this strong neoliberal character in its land reform laws and policy, which has resulted in limited equitable redistribution of land and ongoing insecurity of land tenure.[527] Land reform remains locked in the hierarchy of rights that privileges registered property rights in the deeds registry, without providing equivalent land tenure alternatives to private ownership apart from communal property associations, which are notoriously unsupported by the state and traditional

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[524] Van der Walt 2001: 266-269. "The legislature had to be able to promulgate segregation statutes without interference from the courts and the courts able to interpret these statutes without debilitating conflicts of conscience. Apartheid land law was largely future and goal orientated, justificatory, explaining the injustices as inconvenient but temporary, transitional situations to reach the goal."

[525] Mostert 2015b: 59-92.

[526] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 SA 1074: par. 1081D-G. According to Horn AJ, there are "two diametrically opposed fundamental interests", namely "the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner" and "the genuine despair of people in dire need of adequate accommodation". The judge stated that this required the court "to break away from a purely legalistic approach and have regard to *extraneous factors* such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment". See also Van der Walt 2001: 267.

[527] Russell 2013: 9. "When politics came into the open in 1990, the ANC's priority was a top down centralisation of control necessary for negotiation rather than a grass roots movement in rural areas for major land reform. In addition, the international financial institutions provided incentives for South Africa to take a market based approach ~~during~~ this neo-liberal ascendency, and on the land issue this meant a policy of 'willing buyer, willing seller'."

leaders.[528] The State Land Lease and Disposal Policy[529] demonstrates the state's reluctance to offer ownership title, and its preference for beneficiary tenancy,[530] despite the wishes of the land-claiming community.[531] Of course, to provide individual ownership title would place large tracts of land outside the state's regulation and control, which does not appear to be in line with the state's strategic plans. Similar to the water use rights in the NWA, land reform policies offer so-called "institutional use rights" in conjunction with long-term tenancy.[532] The rights in respect of land, however, differ from those in the NWA, as the state wields the power to grant either ownership title or leasehold to third parties.

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[528] Communal property associations (CPAs) remain the only post-apartheid tenure that offers registered ownership title, but only to communities, and not to individuals. However, this too is subject to regulatory state control, which is set to increase once the proposed *Communal Property Associations Amendment Bill* 2016 ("CPA Bill") is signed into law. The CPA Bill seeks to ensure the state's access to communal land by requiring first right of refusal to land should CPAs intend to sell any part of their land. SABC News "Communal Property Associations Amendment Bill" https://www.youtube.com/watch?v=tpYiWx1ou9Y (accessed on 10 August 2022). See also Mathis 2007: 117. "The bid for control of land by customary (traditional) leaders was aided by the government's tendency to work with them in resolving restitution claims. Therefore, civil society groups, such as the Masibuyela Trust, pose a threat to customary leaders not only because they claim land that the amakhosi (chiefs) would like for themselves, but also because if their claim succeeds, this would exemplify the rights of groups without even the nominal jurisdiction of any customary leader. Alternative forms of land ownership for blacks have not been possible since amakholwa freeholders were dispossessed in the wake of the 1913 Natives Land Act (this is indicative of a lack of political willingness and capacity to prioritise security of tenure beyond statutory measures of tenure control in rural areas)." Claassens 2014b: 765-766. "An early flashpoint for some traditional leaders concerned the transfer of land to elected landholding institutions representing land restitution beneficiaries, in terms of the Restitution of Land Rights Act 22/1994. Complementary legislation, the Communal Property Associations Act of 1996, enabled those who had lost communal land (or their descendants) to constitute themselves as land-holding legal entities (CPAs) so that title to their land could be transferred to them. This met with vehement objections from some traditional leaders". Weinberg 2013: 35. "It is clear that the main reason for the delay in transfer of title to CPA's is that the government is committed to pandering to the demands of traditional leader organisations, such as CONTRALESA, who want exclusive ownership and control over land in the former Bantustans. At the same time the government's attitude toward CPA's reveal a serious reversal of policy commitments that emerged during the 1990s which supported black people's rights to choose how to best constitute themselves as groups."

[529] Hall & Kepe 2017: 3-5; Department of Rural Development and Land Reform 2013a. The State Land Lease and Disposal Policy establishes a tenure system that allows black farming households and communities to obtain 30-year leases, renewable for a further 20 years, before landownership can be transferred to the leaseholder.

[530] Department of Rural Development and Land Reform 2013a.

[531] Branson 2016: 2-3.

[532] Department of Rural Development and Land Reform 2013b; Claassens 2014b: 770.

The content of the "institutional use rights" in land is vague, which renders these rights open to state interpretation and will likely see the state retain the substantive ownership rights, conferring weaker rights to the landholder. Curiously, the Department of Rural Development and Land Reform's Strategic Plan 2015–2020 merely describes "institutional use rights" as intended to "perpetuate the right in law" by allowing holders to "will the right", "use it as collateral" and offer "protection against land sharks".[533] The document gives no further content to this important property use right. Such ambiguous conceptualisations by the state lack coherence and legal certainty when viewed through the property and law-of-lease lens. In addition, landholding is unmistakably made conditional on the productive performance of land reform beneficiaries by requiring their "optimal land use".[534] Practically, this means that rural land tenancy and "institutional (statutory) use rights" are provided to land reform beneficiaries as a form of equitable redistribution,[535] yet their legal security of tenure is conditional and ambiguous.

The policy of granting weak, poorly formulated institutional use rights under what amounts to provisional security of tenure is not much different from the insecure conditional use rights granted during apartheid, in terms of which the state retained the substantive ownership rights in the land and excluded the masses from sharing

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[533] Department of Rural Development and Land Reform 2015: 6.

[534] Draft *Preservation and Development of Agricultural Land Framework Bill* 2014: 9. Optimal use is defined as "the maximum productivity per unit area and unit time achievable by the best suited/adapted farming enterprise in a sustainable manner with the least possible negative impact on the natural agricultural resources". Claassens 2014a: 23. "The government has chosen to elevate productivity over rights."

[535] Branson 2016: 3. "In 2014, a Communal Land Tenure Policy (CLTP) was prepared to address ongoing land tenure insecurity in the former Bantustans. The policy largely echoes CLARA [the *Communal Land Rights Act* 11/2004]. Rather than legally securing land rights based on custom, or allowing land to be vested in CPAs, with their ostensibly democratic structures, it proposed handing authority over land administration to traditional councils, which would be provided with legal title and award institutional use rights to individuals and families. Under the CLTP, traditional councils would also become responsible for overseeing local investment and development, as well as natural resources on communal land. The implicit bargain was that chiefs would benefit from greater authority over local mining, infrastructure, and forestry projects in return for delivering rural votes for the ANC by wielding, if necessary, their discretionary power over land distribution in their communities. This clientelist approach to governing was reminiscent of that adopted by the National Party in the Bantustans."

in the benefits of the central economy.[536] It is argued, therefore, that these policies emulate a state custodianship model in respect of land that perpetuates past practices of insecure tenancy and only serves to reinforce weak land tenure rights.[537]

Although the Department of Rural Development and Land Reform's Strategic Plan 2015–2020 was ambiguous as to the content of institutional use rights, it did manage to unambiguously assert that these rights are to be burdened by first rights of refusal in favour of the Rural Investment and Development Financing Facility and second right of refusal in favour of the state.[538] Even after many years of working the land optimally, the eventual transfer of ownership title is restricted in favour of the state[539] and provides the state with the option to repossess the land in the future. Onerous tenure conditions and title deed restrictions such as these could be detrimental to the testamentary succession of land reform claimants and beneficiaries and, consequently, the redistribution of wealth to their descendants.[540]

This strongly reminds of apartheid custodial land laws and policies, which also sought to maintain state control over group landholding structures. The majority of

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[536] Department of Rural Development and Land Reform 2015: 4. Communal tenure will necessarily entail the granting of "institutionalised use rights". Presidential Advisory Panel on Land Reform and Agriculture 2019: 54. "Apartheid laws were designed to dispossess black people of land and mineral rights, and exclude them from the central economy, the benefits of which were ring-fenced for the minority. Law was used to confine black people largely to 'conditional use rights'."

[537] Hall & Kepe 2017: 5: "The inability of beneficiaries to pay rent to the state has led officials to institute a practice of issuing 'caretakership' agreements in order to absolve beneficiaries of a need to pay for their land. Under such agreements, rather than being rights-holders, they are given a duty to look after state property for a limited period, with the state being able to give them 30 days' notice to vacate the property."

[538] Department of Rural Development and Land Reform 2015: 6.

[539] Hall & Kepe 2017: 7. "Conditional tenure under the authority of the state or traditional institutions is a key way in which black rural populations can be controlled, and their failure to use land in compliance with official designs forms, once again, the basis for them to lose land." Mograbi *et al*. "South Africa's land reform policies need to embrace social, economic and ecological sustainability" https://theconversation.com/south-africas-land-reform-policices-need-to-embrace-social-economic-and-ecological-sustainability-145571 (accessed on 9 September 2022). "Despite government policy and intention, the land reform process has been fraught with inefficiencies and corruption. It is estimated that to date only 9% of farmland has been transferred."

[540] Weinberg 2013: 28. "[T]o overcome the legacy of the Natives Land Act, it will require a government that is less *paternalistic*, and more *accountable* to rural people. For example, a main feature of apartheid Trust and Betterment policies was how a black person's property was administered when this person died, that upon death of the person occupying Trust land, the land reverted to the Administration which had the authority to reallocate it." (Own emphasis).

black property rights were state-regulated through a statutorily constructed customary tenure system that limited black landholding to occupation rights, which were feudal in nature, precariously insecure, and open to interpretation.[541] In doing so, apartheid land laws and policies imposed statutorily constructed identities based on cultural and racial assumptions to justify the restructuring of the property system, which effectively weakened black land rights.[542] The apartheid state failed to take into account the diversity in and between communities, cultures and social relationships that ultimately makes property functional and social.[543]

Evidently, the state now aims to secure its perpetual control and possession over land as a natural resource, not unlike its control under the MPRDA.[544] Institutionalising the regulation of access to and use of land, including the construct of property rights (statutory new-order rights), points to a state custodianship approach to land governance. Crucially, the state needs to draw on the valuable lessons from the past to avoid similar results in post-apartheid South Africa. If current land reform policies follow the same patterns as apartheid land laws, which served to promote the perpetual tenancy and restricted land rights of previously disadvantaged persons,[545] are they truly transformative?

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[541] Van der Walt 2001: 276. "In areas reserved for whites, land law was based on Roman Dutch property law, more specifically the paradigmatic position of private, individual ownership with all its accompanying entitlements: absoluteness, exclusivity, permanence, assessment according to market value, privacy, strong protection against state interference. In areas for other race groups, and especially blacks, land law was based on customary law, as amended and supplemented by legislation and various ordinances and proclamations, or precarious holding by the state, which was basically 'feudal' in nature based on liberal notions of 'paternalism' and fundamentally open to state manipulation and injustice … [B]lack property law was regarded as part of customary law or public law."

[542] Van der Walt 2001: 270. "The hierarchies of apartheid were upheld by suppressing rules or interpretations that did not fit in with the 'grand social experiment' of apartheid and by selecting and enforcing interpretations that did fit in."

[543] Pope 2010: 342. See also Claassens & Cousins 2008: 144. "The constitutional protection of cultural diversity manifests when living customary law is seen to be valid, acceptable and protected and when it is grounded in current social practice."

[544] Mostert 2013: 78. "The MPRDA heralded a policy shift that is distinguishable by its preference for broader state control over the granting, exercise, and retention of rights over South Africa's mineral and petroleum resources."

[545] Kloppers & Pienaar 2014: 679.

It is suggested that a state custodianship approach to rural land tenure and land redistribution cannot reap the rewards of real transformation unless the state discards its cloak of bureaucratic political ideology that institutionalises a state custodianship approach that:

- reinforces physical and identity divisions;[546]
- entrenches weaker property rights by affirming the exclusionary benefits of traditional leaders;[547]
- groups people according to socioeconomic class and tribal lines;[548] and
- discriminates against the poor and vulnerable by setting the bar too high for them to access the benefits of land reform.[549]

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[546] Walker *et al*. 2011: 340. "Tensions remain in the process of integrating 'tribal' leadership into a democratic government. The co-optation of the community allows the state to retain considerable power, and conflicts between the community and the state have resulted. While the state has a role to play in the post-restitution phase, government institutions should be prompted to facilitate 'the ongoing sustainable and dignified resettlement of land restored in the restitution process'."

[547] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 503-507. "Traditional leaders purporting to hold ownership authority over communal property have benefited from commercial dealings with no real benefit to the communities. During apartheid, community royalties were kept under custodianship of the Bantustan president as trustee, hundreds of millions of Rand were kept in development accounts and when the homelands were dismantled in 1994, these accounts worth hundreds of millions of Rands, had never been audited and millions had gone missing." Claassens & Matlala 2018: 122. "A key feature of the Bophuthatswana regime was that mining revenue was deposited into 'accounts' under the control of President Mangope, rather than distributed to the people whose land was mined. The North West Act preserves these state-controlled accounts for mining revenue under the supervision of the premier and they have been the subject of sustained interrogation and agitation by communities living on mining land for many years."

[548] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 54. "Apartheid attempted to aggregate black people into tribes. Unfortunately, after 1994 land reform initiatives have also tended to aggregate people into large groups. Group property was used to reach targets quickly and avoid the expense, complexity and delays of subdivision. But it has locked people into imposed group identities against which it has proved increasingly difficult to assert specific land rights to enforce accountability." Capps & Mnwana 2015: 606. "Conflicts over group boundaries and identities is articulating a potentially new yet contradictory rural 'class' politics."

[549] Branson 2016: 3; Walker & Cousins 2015: 8. See also Cousins 2017. "The Recapitalisation and Development Policy Programme ('Recap') of 2014 replaced all previous forms of funding for land reform, including settlement support grants for restitution beneficiaries. Recap beneficiaries must have partners recruited from the private sector, as mentors or 'co-managers', who write their business plans."

Other recent land reform policies that have been critiqued for being impractical and resulting in the kind of arbitrary limitations on land rights that could be declared unconstitutional[550] include the Agricultural Land Holdings Framework Policy,[551] which was followed by the *Regulation of Agricultural Land Holdings Bill*,[552] and the Strengthening the Relative Rights of People Working the Land Policy,[553] or the so-called 50/50 share equity proposal.

6.4.1.2 *Misconstructions of customary communal land tenure*

The state resorts to misconstructions of customary and communal land rights in its land policy that emulate apartheid-era thinking,[554] rather than facing the realities of modern-day land practices, which include collective decision-making in the everyday management of land separate from the state's statutory control.[555]

Landholding continues to evolve in the modern context, and for some rural landholders, this means acquiring ownership title, while still functioning under

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[550] Mabasa "Holding onto land: the Regulation of Agricultural Land Holdings Bill" https://www.werksmans.com/legal-updates-and-opinions/holding-onto-land-the-regulation-of-agricultural-land-holdings-bill/ (accessed on 21 July 2022); Hall "What are the alternatives to government's flawed policy on strengthening the relative rights of people working the land?" http://www.plaas.org.za/blog/what-are-alternatives-governments-flawed-policy-strengthening-relative-rights-people-working#sthash.0KG3U2EK.dpuf (accessed on 12 June 2022). See also Legal Resources Centre 2017. "A huge constitutional question mark hovers over this policy because the policy proposes a 'radical' idea, that farm workers have already paid for their 50% through years of exploitation and underpayment." Centre for Constitutional Rights 2014. "The proposal conflates issues of working conditions, labour rights and property ownership and questions the feasibility of the projected 50/50 share equity scheme." Cousins 2017: 2. "The 50/50 policy allows each farm owner to retain 50% ownership of the farm, ceding the other 50% to workers. While couched in 'radical' language, this in fact offers workers very little. It is unlikely that dividends will ever be paid, and wages will remain at the legal minimum at best. In contrast, farm owners will receive massive windfalls of public money to prop up their businesses."

[551] Department of Rural Development and Land Reform 2013c.

[552] Department of Rural Development and Land Reform 2017. See also Midgley "Regulation of Agricultural Land Holdings Bill published for comment" https://www.cliffedekkerhofmeyr.com/en/news/publications/2017/real/real-easte-alert-7-april-regulation-of-agricultural-land-holdings-bill-published-for-comment-.html (accessed on 9 September 2022). "The Bill, if enacted in its present form, will have far reaching consequences on the agricultural sector, affecting all owners of agricultural land and in particular, foreign nationals and owners of agricultural land holdings determined to be in excess of 'ceilings' for land ownership, which excess will be available for redistribution, with or without expropriation."

[553] Department of Rural Development and Land Reform 2013d.

[554] Pope 2010: 337.

[555] Claassens & Cousins 2008:15, 39-40.

customary law. Therefore, the existence of the one does not automatically exclude the other, and the developmental nature of living customary law is extensively recognised by the courts.[556]

Ownership is but one form of tenure, although it is highly valued, largely because of the prevailing insecurity of land tenure, and the property system that prefers ownership title as security for investments. Nonetheless, living customary law is capable of adapting to modern-day land practices, with some freeholders possessing ownership title in order to meet their unique needs, while continuing to apply norms based on shared communal value systems and customary principles of land management.[557] Indeed, the essential function of such communities is to pursue such common values or objectives. Communities define their own values, which, in turn, define the community.[558] In *Tongoane v National Minister for Agriculture and Land Affairs* ("*Tongoane*"),[559] the Constitutional Court held that the *Communal Land Rights Act*,[560] which was promulgated to give effect to section 25(6) of the Constitution, seemed to be stepping back into a space already regulated by (living) customary law.[561]

A developmental custodial state treads a thin line in the implementation of its interferences through statute so as not to overstep the boundaries of existing land rights already operating under a living customary law system. This necessitates active participation and consultation on any proposed legislation and other measures

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[556] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 489. "The judiciary has established an understanding of customary law as a 'living system of law' that develops as it is lived by the community, taking care to give effect to an understanding of customary law not as mere cultural practice, but as law. It recognised customary property rights, customary land and resource governance and customary rules of evidence. The legislature, on the other hand, focused on the institution of traditional leadership. This de-recognition of customary law by the legislature has far-reaching consequences for communities who live by customary law. Their customary land rights continue to be denied while the powers of traditional leaders are bolstered through laws such as the TLGFA and MPRDA."

[557] Pope 2010: 338; Claassens 2014b: 768. See also Constitution: sec. 211(1). "The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution."

[558] Bull 1995: 51; Barnes 2009: 70.

[559] 2010 6 SA 214 CC.

[560] 11/2004, which has since been declared unconstitutional.

[561] *Tongoane*: par. 79; Wicomb 2014:131.

that directly affect the land rights of communities and their interests. It is only through public participation and consultation with communities that the reasonableness of interventionist legislation and measures can be accurately assessed and determined.[562] A failure to consult would create a high risk of inadvertently infringing on the human dignity of communities and individuals, as well as on their sense of self-determination as contributing members of society.[563] It would also have a detrimental impact on democracy.[564] Conversely, research and real-world experience have shown that economic progress for marginalised groups emerges in contexts where the law permits individual liberty in the broadest possible sense.[565] For example, not all land occupants and members of society wish to be commercial irrigation farmers; land can have multiple other uses that are equally productive and valuable to the economy and environmental sustainability.[566]

Space must be created for all South Africans to participate in the economy to enable inclusive growth in various ways. In so doing, the state should avoid creating a hierarchy of land rights holders that prioritises and prefers commercial farmers over

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[562] Van Dijk & Croucamp 2007: 666. "Modern society, and the involvement of civil society in South Africa, has called for a new type of state, namely one that is both democratic as well as developmental in both content and character. Olayode maintains that the centrality of the state in nation-building and socioeconomic development is reaffirmed, while also asserting participatory democracy and a culture of human rights as key features of the developmental state."

[563] Hegel 1991: 46; Drahos 1996: 73-94; Mostert & Lei 2010: 378.

[564] Van Dijk & Croucamp 2007: 664. "Democracy provides a voice for the poor and marginalised, protects and accrues the rights of citizens, promotes institutional separation of powers and functions, transparent decision making, accountability and effective monitoring and control."

[565] Njoya 2021: 192.

[566] Mograbi *et al*. "South Africa's land reform policies need to embrace social, economic and ecological sustainability" https://theconversation.com/south-africas-land-reform-policies-need-to-embrace-social-economic-and-ecological-sustainability-145571 (accessed on 9 September 2022). "They [land reform discussions] haven't included the multiple functions that land offers humans, beyond its agricultural potential. The success (or failure) of many land reform programmes is measured in hectares of farmland transferred. This approach portrays the land as uniform, static, independent from its social-environmental context and disconnected from future beneficiaries and broader society … [T]his narrow focus undermines the goals of equitable and sustainable land reform … Land provides more than just food … The multiple possible benefits derived from land suggest multiple possible uses. Beneficiaries of a land reform programme may be able to use land in various ways other than farming. The state has explicitly emphasised maintaining agricultural productivity and food security during the land reform process. This limits the function land should provide, especially in the land redistribution models. The state should support a variety of livelihood options, especially on land with low agricultural potential."

all other land users. In addition, the state, as steward, must regulate the natural resource through land policy that seeks to achieve the reform objectives, without encroaching on spaces already regulated by customary and communal law systems.[567] Otherwise, the state runs the risk of replacing existing land rights already operating under established living customary law with regulatory measures that are politically motivated and unable to meet communal landholders' particular needs.

Yet this appears to be exactly what is transpiring under recent land reform laws and policies. The unfortunate phrasing of sections 211(2) and 211(3) of the Constitution only muddies the status of living customary law in respect of traditional authorities.

> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.[568]

These two provisions provide the loophole needed for the statutory regulation of communal land by the state: The phrasing is wide enough to be understood to allow traditional leaders control over the narrative and interpretation of what is custom, making the functioning of traditional authority subject not only to the Constitution (as it should be), but to "any legislation that specifically deals with customary law".[569]

A steady stream of state land reform laws, policies and plans continue to be churned out.[570] These laws and policies often perpetuate paternalistic misconstructions of

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[567] In general Van der Walt 2003: ch. 1 that discusses the hierarchy of the sources of law. See also Pienaar & Van der Schyff 2007: 189, partly citing Van der Walt. "'[P]roperty has a … 'propriety' aspect to it that transcends individual economic interests and that involves interdependency and the common obligations that result from it.' Individual and public interests are the weights that must balance the scale of property as a social construct." Mostert & Lei 2010: 384-385. "[T]he individual freedom to exercise property rights is protected to the same extent as the public interest in individual property."

[568] Constitution: sec. 211(2)-(3).

[569] Constitution: sec. 211(2)-(3).

[570] Including the Communal Land Tenure Policy 2014, *Communal Land Rights Act* 11/2004 (declared unconstitutional in 2010), *Traditional Leadership and Governance Framework Act* 41/2003, *Traditional Leadership and Khoi-San Leadership Act* 3/2019, *Traditional Courts Bill* B1-2017, *Restitution of Land Rights Amendment Bill* B19B-2017, Recapitalisation and Development Policy Programme, Green Paper on Land Reform 2011, Rural Development and Land Reform Strategic Plan 2010-2013 and its accompanying Comprehensive Rural Development Programme 2013, Recapitalisation and Development Programme 2010, Land Tenure Security Policy and draft *Land Tenure Security Bill* 2011.

customary communal land tenure and have disempowering outcomes, establishing a dual landholding system by eliminating privately controlled means of production on the assumption that individual forms of production do not exist within customary and communal landholding structures.[571] This is despite the fact that the Constitutional Court has found that customary law provides for ownership of land; that people in rural areas are entitled to the same rights as all South Africans, including the recognition of their customary ownership of land, and that Parliament must ensure that no laws or policies abrogate these rights.[572] Disempowering outcomes are a consequence of land reform laws and policies that rely on the same ideological assumptions that were used to justify the denial of black land rights during apartheid.[573] The rigid regulation of land is not conducive to the socially transformative character of indigenous land law, which inherently includes collective decision-making to deal with the infrastructural needs that would enable

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[571] Greffrath "Land reform, political instability and commercial agriculture in South Africa: An assessment" https://www.academia.edu/37320502/Land_reform_political_instability_and_commercial_agriculture_in_South_Africa_An_assessment (accessed on 12 July 2022).

[572] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 39; *Bhe v Khayelitsha Magistrate* 2005 1 BCLR 1 CC: par. 11, 87. See also *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 CC: fn. 51: "The Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system." Claassens & Matlala 2018: 121; Claassens 2009: 10. See also Mnwana "Why giving South Africa's chiefs more power adds to land dispossession" https://theconversation.com/why-giving-south-africas-chiefs-more-power-adds-to-land-dispossession-93958 (accessed on 14 September 2022). "Distributive power over land doesn't rest exclusively with chiefs. There are multiple layers of power that rests in different social units, families (and individuals within them). Most importantly, chiefs have never had powers to alienate land rights from ordinary residents. African land rights are acquired through membership to a group – a productive and social unit such as a family or clan. Once allocated, land rights were passed from one generation to the next. It is at the level of this unit that, by and large, decisions about distribution of such rights were taken in precolonial times ... The assumption that chiefs are custodians of rural land and mineral wealth – and as such can distribute and alienate land rights and sign complex mining deals on behalf of rural residents – has no precolonial precedent. It's no surprise that ordinary people are resisting chiefly power over their property. It's even more crucial to closely examine and understand the character of power over land and land resources as rural land increasingly becomes a target for large scale resource extraction."

[573] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 54; Claassens 2014b: 772; Okoth-Ogendo 2008: 95, who refers to "'juridical fallacies' imposed by the colonial state and subsequently internalized by postcolonial governments", with the "central fallacy" being that indigenous law "confers no property rights in land". See also in general Bennett 2004 Chanock 2001 and their discussions of apartheid ideological assumptions made in regard to black land rights.

socioeconomic development.[574] For example, customary communal landholders are expected to comply with unnecessarily procedural statutory requirements, even though this is challenging given their rural conditions and the limited support they receive from the state. Uneducated and poorer land claimants or beneficiaries are inevitably regarded as non-compliant.[575] This 'non-compliance' results in the skewed perception that they make no real contribution to local agrarian markets and food security. Moreover, an excessive regulatory approach to communal land tenure merely adds to state officials' administrative burden and is impractical given their lack of capacity and resources and their struggles with corruption.[576]

6.4.1.2.1 *Traditional leadership and state custodianship of communal land*

Central to the political ideology found in recent land policy is the significant administrative and political role that traditional leaders are positioned to play in the management of communal land. This is a noticeable shift in national land policy

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[574] Pope 2010: 353.

[575] Weeks 2011: 147, who comments that "while customary norms exist to be invoked, they should not be thought to be either strictly dictated by a sovereign or by 'rules, compliance or non-compliance' which determine dispute resolution outcomes". Department of Agriculture, Rural Development and Land Reform "Communal Property Associations Annual Report 2020/2021" https://www.dalrrd.gov.za/Portals/0/Annual%20Report/Communal%20Property%20Associations%20Annual%20Report%202020%20-%202021.pdf (accessed on 10 August 2022). "The use of Community Property Associations (CPA) as the land holding entity for communities that benefit from land reform program (*sic*) such as Restitution of Land Rights and Land Redistribution continue (*sic*) to pose serious challenges. Most of the CPAs are not compliant to the CPA Act, and this poses serious problems and threatens the sustainability of the land reform program. There are serious conflicts amongst the members which are associated with power struggle, abuse of resources, selling of land, infringement of their constitution and lack of transparency in running the affairs of the CPA." Moreover, at Agriculture, Rural Development and Land Reform Minister Thoko Didiza's ministerial oversight visit in April 2022 at Ilanga Estate, Free State, most CPAs voiced concern about the lack of support received from government, and the fact that they were still awaiting their ownership title deeds.

[576] Engelbrecht "The ANC's two-state South African state: Its own colonialism and affinity for monopoly capital in the era of the Capitalocene" http://academia.edu/39392895/The_ANCs_Two_state_South_African_State (accessed on 10 August 2022); Swanepoel "The slippery slope to state capture: Cadre deployment as an enabler of corruption and contributor to blurred party-state lines" http://dx.doi.org/10.17159/2077-4907/2021/ldd.v25.15 (accessed on 15 August 2022); Siboto "The betrayal of the struggle: ANC, EFF and VBS Bank" https://www.m.news24.com/Columnist/GuestColumn/anc-eff-have-failed-black-people-20181012 (accessed on 9 July 2022); Cronin "'We've been structured to be looted' – some reflections on the systemic underpinnings of corruption in contemporary South Africa" https://works.bepress.com/jeremy_cronin/2/2 (accessed on 1 October 2022).

away from the earlier stance, which demonstrated a sensitivity to the controversial history of 'tribal' or traditional authorities.[577] Earlier ANC land policies aligned with the Constitutional Court's declarations that traditional leadership derived their authority from (living) customary law, and not the other way around.[578]

However, a definitive shift in political ideology was made plain through the enactment of the *Traditional Leadership and Governance Framework Act* 41 of 2003 (TLGFA) and, subsequently, the *Traditional and Khoi-San Leadership Act* 3 of 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.[579]

Land reform experts have voiced their concern as to the dangers of changing or overregulating custom and community decision-making structures through statutory interventions. Nonetheless, communal land tenure has been the target of several statutory interventions that have placed large tracts of communal land under the control of traditional councils, who, in turn, report to the state. This in effect removes the legitimacy of the customary reporting structure of traditional leaders to their communities and *vice versa*, and undermines the community's authority by silencing

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[577] Land & Accountability Research Centre 2017: 2. "Tribal authorities were fiercely contested by many ordinary people and political activists, who recognised their role in the oppressive apartheid state machinery." See also Wicomb 2014: 132-133. "The customary structures of governance of traditional leadership were put aside or transformed by the colonial and apartheid governments."

[578] *Alexcor Ltd v The Richtersveld Community* 2004 5 SA 469 CC; *Shilubana v Nwamitwa* 2009 2 SA 66 CC; *Gumede v President of the Republic of South Africa* 2009 3 SA 152 CC; Du Plessis & Frantz 2013: 2. "African Customary Land Rights in a Private Ownership Paradigm". https://ssrn.com/abstract=2381922 or http://dx.doi.org/10.2139/ssrn.2381922 (accessed 11 August 2022); Wicomb 2014: 128; Claassens 2014b: 769; Lund & Boone 2013: 1-13. See also High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 486. "The Constitution of South Africa recognises customary law as a part of the South African legal system equal to the common law. As such, the Constitution presents a radical departure from the pre-constitutional position that recognised customary law rules only where no rules could be sourced from the common law or statute law."

[579] Wicomb 2014: 132-133.

the voices of the collective. It creates the impression that the community is no longer a stakeholder in rural development and decision-making.[580]

State custodianship has similarly resulted in the silencing of landholding communities under the MPRDA.[581] While communal land tenure is customarily ruled by inclusive, collective majority decision under living customary law, the state custodianship approach as applied to land ostensibly has little regard for the unique customs and diversity of communal landholders. In reality, the statutory authority granted to traditional leaders could very well reduce the customary communities' ability to hold their traditional leaders accountable.[582] The statute supplants living customary law practices, rendering shared values such as informed collective decision-making subordinate to the authority of traditional leaders and the state. It assumes that traditional leaders have the majority's support based on their status as representatives, and that consultation with representatives absolves the state from its responsibility to consult the community personally on partnerships and

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[580] Parliament of RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (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 high-level meetings will be underpinned by more focused stakeholder engagements … intended to find solutions to specific challenges." It is not clear whether the engagements will involve rural communities as well, or whether only traditional leaders will be included.

[581] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 503-507. "[T]he MPRDA abolished landowners' rights to say no to mining on their land. While intended to advance transformation, this change has had devastating impacts for members of rural and customary communities, who have borne the brunt of the removal of the express right to say no. With much of mining's expansion taking place on 'communal land', communities have faced land dispossession, displacement and loss of traditional agrarian livelihoods." Pope 2010: 352, citing Claasens & Cousins 2008. "[T]he law should not be permitted to impose mechanisms that stifle 'democratic possibilities inherent in the development of a living customary law that reflects all the voices currently engaged in negotiating transformative social change in rural areas'."

[582] Pope 2010: 339-340; Claassens & Cousins 2008: 98-100. See also Okoth-Ogendo 2008: ch. 4. that argues that indigenous or living customary law cannot be summarised in its entirety as communal in nature. Instead, the social order creates reciprocal rights and obligations that bind members together and vest power in community members over the land. It is the continuous performance of rights and obligations that determine who may have access to or exercise control over land and associated resources. Access to land is a function of membership of a group, and it is the group that is self-limiting rather than artificial bureaucracy.

agreements with regard to their land.[583] The state places the (patriarchal) status of traditional leaders as "functionaries"[584] or state agents above that of the community, which enables the ongoing entrenchment of untransformed colonial-apartheid structures in the form of tribal authorities, first established in terms of the *Black Authorities Act* 68 of 1951.[585] These tribal authorities have now been transformed into traditional councils for the purposes of section 28(4) of the TLGFA.[586] Although the state, as custodian of all land, has the fiduciary duty to ensure the security of tenure of land claimants and beneficiaries, it has opted through statute to delegate or 'outsource' its fiduciary duty to traditional leaders.[587]

The delegation of authority is problematic, as it inevitably blurs the lines of accountability. This is particularly problematic in the event of mismanagement of agricultural land and associated resources. It also raises questions as to who is the

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[583] TKLA: sec. 24(3)(c)(i). The TKLA does not provide for community consent for any partnerships or agreements regarding communal land entered into by traditional leaders. In addition, the phrasing pertaining to consultation is unclear, stating that such agreements are subject to "a prior consultation with the relevant community represented by such traditional council". This implies that consultation with the community is considered to have taken place if the traditional council, as representative of the larger community, is consulted. See also Land and Accountability Research Centre 2017: 6. "[C]lause 24 of the Traditional and Khoi-San Leadership Bill of 2015 now proposes to cement this reality [of traditional authorities negotiating mining deals without consulting communities] into law by giving traditional councils the power to conclude contracts with any institutions with no corresponding duty to consult or obtain the consent of persons living within their jurisdiction." Therefore, by enabling the enactment of legislation that contravenes its fiduciary duties owed to communal land beneficiaries, the state has failed to protect land as a natural resource for the public good.

[584] Land and Accountability Research Centre 2017: 1-2, where it was submitted that the TLGFA failed to provide clarity regarding the status of traditional councils. TKLA: sec. 20. The administrative functions of traditional councils include supporting municipalities in the identification of community needs, participating in the development of policy and legislation at a municipal level, participating in development programmes of the local, provincial and national spheres of government, and performing the functions conferred by customary law, customs and statutory law consistent with the Constitution. Atkinson 2009: 271-272. "This paternalistic approach was nothing new. The Native Affairs Department had, since its re-organisation in 1910, prided itself on its benign, sympathetic attitude towards the needs of blacks. This approach had evolved from early forms of colonial administration, and it flourished where administration involved personal contact between rulers and ruled ... According to Dubow, 'The administrator's [functionary's] role was portrayed in terms reminiscent at once of a chief in traditional society, and a Victorian patriarch'."

[585] The *Black Authorities Act* 68/1951 authorised the state president to establish tribal authorities for African 'tribes', as the basic unit of administration.

[586] *Tongoane*: par. 24.

[587] Von Benda-Beckmann *et al.* 2009: 2, who list examples of outsourcing demonstrated over time, including colonial regimes relying on indirect rules, and social and economic corporations and private agencies that are put in charge of security and justice in specific areas. See also Claassens 2009: 20.

true trustee or custodian of communal land: Is it the state or the traditional authority? For example, in the event of corruption or unscrupulous decision-making that places communal land and other natural resources at risk, does the community to whom the stewardship duty of care is owed hold the state, as custodian, accountable? Or should the state hold traditional leaders accountable? Moreover, in the event of collusion between the state and traditional leaders, accountability would be virtually impossible and would necessitate collective court action by the community to safeguard their rights. The chance that this is feasible in light of the poverty of the community members and the high cost of litigation, does not make this a realistic option.

Ordinarily, in terms of living customary law, communities would have decisively removed corrupt traditional leaders by way of majority decision. However, because of the commanding role of traditional leaders in land governance statutes, their removal may carry political implications, which complicates matters. In fact, according to the provisions of the TKLA, the withdrawal of the recognition of headmanship or headwomanship may only be considered where the relevant traditional council (not the community) requests the premier concerned to withdraw such recognition, unless done through a court order.[588] Furthermore, the recognition, establishment and constituency of traditional communities and traditional councils are made expressly subject to determinations by the state,[589] rendering traditional leaders' position highly political and susceptible to exploitation.

By retaining tribal structures as the foundation for traditional councils, the TLGFA preserves the obsolete boundaries of the former homelands and the undemocratic power relations that existed between traditional leaders and their 'subjects' under the indirect rule policies of the colonial and apartheid governments.[590] In so doing, it is

[588] TKLA: sec. 4(8)(a).
[589] TKLA: sec. 3, 16.
[590] Land and Accountability Research Centre 2017: 3; Law, Race and Gender Research Unit "Custom, citizenship and rights: Community voices on the repeal of the Black Authorities Act July 2010" http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LRG_BOOK_

made clear that the state, through its regulatory powers, will control traditional councils and hold traditional leaders accountable – it is not up to the community these councils and leaders represent.[591] The present trajectory of land reform laws in the form of the TLGFA, the TLKA, and the 2017 *Traditional Courts Bill* (TCB)[592] makes the erroneous assumption that individuals and groups living and farming on communally held land automatically ascribe to 'tribal' and 'traditional' constructs as their way of life. This discriminatory assumption is reminiscent of apartheid ideology in that it does not take account of the diversity of South Africa's people.

The state's abdication of its fiduciary responsibility to traditional leaders by way of statute conflicts with the public trust that informs the state's role as trustee of the environment.[593] Traditional leadership should exist to further the interests of the community through modern-day communal landholding practices that the community develop collectively over time. Instead, the state has statutorily positioned traditional leaders above living customary law by essentially removing their obligation to

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COMBINED%2C_DEC_2010_-_FINAL%2C_AMENDED.pdf (accessed on 2 May 2022); Capps & Mnwana 2015: 611.

[591] TKLA: sec. 22(1). "A kingship or queenship council, principal traditional council, traditional council, traditional sub-council and a Khoi-San council (in this section jointly referred to as a council) must endeavour to perform its statutory, financial and customary obligations in the best interest of its community and is accountable to the Premier concerned for the efficient and effective performance of such obligations".

[592] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 54. The panel reported on the status of the *Traditional Courts Bill* 2017 (TCB) and that the National Assembly was seeking legal advice on the constitutionality of not allowing people to opt out of the proceedings in the traditional courts. The underlying assumption made by the TCB appeared to be that people in the former homelands were more appropriately governed by traditional leaders than elected local government, and its limitation on access to other courts and the inclination towards the sole jurisdiction of traditional courts was concerning.

[593] Brown 2006: 12. "The state was neither free to alienate its navigable waters nor abdicate its public trust responsibilities over such waters in a manner inconsistent with its public trust duties." See also High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 482. It is at odds with the duty to ensure that "individual families should have secure rights legally equivalent to ownership…along with defined rights to grazing and natural resources held in common." According to Pienaar & Van der Schyff 2007: 184, "[t]he public trust doctrine is the legal tool that encapsulates the state's fiduciary responsibility towards its people and bridges the gap between the Roman-Dutch based property concept and the notion that water as a natural resource 'belongs to all people'".

acquire consent from the community, and making the exercise of community decisions subject to the consent of the state.[594]

The state's custodial land policy does not mean that the state acquires the communal land as its private property. Yet the state does hold ownership-like entitlements as custodian and regulates the use of the communal land through its statutory establishment of, and authority over, traditional councils. This is an overregulation of communal land rights that subjugates the exercise of customary communal land rights by adopting the paternalistic notion that 'native' land rights cannot contribute to modern agrarian development without supervision.[595] And it smacks of the colonial-apartheid action of vesting ownership of land in the state and using traditional leaders as "state employees",[596] which gave traditional leaders the same kind of power to the detriment of the communities they served.

6.4.1.2.2 *Political misinterpretation of constitutional objectives*

Economic wealth redistribution and legally secure tenure are interdependent, and as such, the state must apply mechanisms that achieve just outcomes. Land reform is, for the most part, a process embodied in the state, and its policies must allocate funds to the development of land in a way that promotes wider access to the resource, though *without* undermining the property rights of land reform claimants and beneficiaries. The constitutional land reform objectives require colonial-apartheid legacies to be reversed, land to be restored to those dispossessed, and either people's tenure to be made legally secure or comparable redress to be provided in respect of land unlawfully taken.[597] Ngcobo CJ has emphasised just how important it

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[594] TKLA: sec 24(3)(d). Traditional councils may enter into partnerships and agreements with one another and with municipalities, government departments and any other person, body or institution, but such partnership or agreement is subject to "ratification by the Premier of the province in which the relevant council is situated and will have no effect until such ratification has been obtained".
[595] Pope 2010: 339-340.
[596] Pope 2010: 345.
[597] Constitution: sec. 25(6).

is for legislation to do precisely this.[598] Why, then, do recent land reform laws and policies seemingly run counter to these foundational objectives?

It is proposed that, in the context of land reform, the political interpretation of legally secure tenure and redistribution for equitable access has changed. It would appear that the state has reviewed its role according to a different political interpretation of security of tenure and redistribution, which interpretation necessitates the state to have authority as custodian of all agricultural land. For now, this occurs through its implicit state custodianship approach to rural land by way of land reform policies. If, however, state custodianship was to be expressly enacted by statute on the same basis as in the MPRDA, it would facilitate a property regime change that eliminates the need to pay compensation.

Whereas expropriation is procedural law and is not applied along racial lines, and even though expropriation would inevitably affect predominantly white agricultural landowners, a handful of black elite landowners would likely also be affected and expect commensurate compensation. As such, without a credible threat of expropriation, the (underperforming) status quo of land reform will likely continue.[599] In addition, the regular utilisation of expropriation ultimately depends on the political will of the state. Therefore, the positioning of the state as custodian of land by way of policy and not statute could be a political preference that protects the private capitalist interests of both groups, although at the "institutionalised material disadvantage of all South Africans".[600]

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[598] *Tongoane*: par. 2.

[599] Du Plessis 2014: 805. See also Lahiff 2007: 1577. "One of the reasons why land reform failed is that the farms are too big to make it suitable for new entrants to the agricultural sector. Farmers seem to be hesitant to sell off only small portions of land, and there seems to be resistance against the *Subdivision of Agricultural Land* Act 70 of 1970."

[600] Engelbrecht "The ANC's two-state South African state: Its own colonialism and affinity for monopoly capital in the era of the Capitalocene" http://academia.edu/39392895/The_ANCs_Two_state_South_African_State (accessed on 10 August 2022). [Extracts] "[The] institutionalised self-enrichment at the material disadvantage of all South Africans…It stems from the party's ideological limitations. Privilege, of some black and white people, capital, in the hands of some black and white people, and corruption, perpetuated by some black and white people, did not just one morning appear from nowhere – they are all human creations and

It runs counter to living customary law to confer proprietary powers of alienation and control on individuals without obtaining the community's consent.[601] The result is out of keeping with the state's role as trustee, in terms of which the state must safeguard natural resources for both present and future generations. The state must act as steward in the public interest and cannot directly or indirectly dispose of or alienate natural resources held in its trust. The public trustee role of the state with regard to land implies an overarching, holistic, facilitative, developmental role, and not the interventionist and prescriptive state custodianship approach identified in recent land reform laws and policies.[602]

Through state custodianship land policies, traditional leaders have been granted powers that are essentially an extension of the state's authority (indirect rule).[603] These extensive powers in the hands of traditional leaders strengthens the 'custodial' governance over communal land, allowing for the disposal of communal land and related resources through various types of agreements without requiring the consent of, or accountability to, the community.[604]

The combined effect of the TLGFA, TKLA and TCB (the 'traditional custodianship laws') is the centralisation of control over communal land and its resources in the

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colour blind…The ANC has systematically colonised the country depriving all South Africans of its material wealth…In this process, the ANC's bourgeois elite's new-found 'wealth' was 'purchased at a dehumanizing cost', meaning at the expense of everyone else in society."

[601] Mailula 2011: 80. "As du Plessis puts it: 'African indigenous law in property was more concerned with relationship status and people's obligation towards one another in respect of the property rather than the rights to people's ownership of the property.' … In African customary law, although a measure of individual control over the broad interests that were embedded in land is recognised, the paramount title to land is 'perceived as vested above society and whatever rights any one person had to the land were subordinate to the entire community's rights'."

[602] Pope 2010: 341. "[T]he Minister's statutory power to prescribe 'standard rules' makes the land administration system one of public administration rather than community-based ... [T]he basis of indigenous land rights is changed to the extent that the self-regulating aspects of a well-functioning social organisation are undermined. The flexible and socially transformative character of indigenous land law becomes calcified and linked to the inevitably slow pace possible with legislative changes."

[603] Delius 2008: 211-237.

[604] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 479. "Land owned collectively through title deeds held by Traditional Councils, Trusts and Communal Property Associations is highly susceptible to abuse by leaders of these collectives, who claim ownership when their role should be that of trusteeship or custodianship on behalf of the members of the collective." See also Claassens & Matlala 2018: 113-135.

hands of traditional authorities, who are simultaneously subject to and agents of the state. This makes it possible to deprive community members of their benefits in land and resources should they be found to be in contravention of their version of customary law or custom, as a possible means of competing for resources.[605] These traditional custodianship laws foster an indifference to the self-determination of the very community members who are to benefit from the land – an attitude that makes one think of the kind of 'trusteeship' employed during the apartheid regime.

In addition, the traditional custodianship laws pay mere lip service to gender equity in the transition from colonial-apartheid traditional authorities to traditional councils. The statutes do little to compel the transformation of traditional authority structures that are innately patriarchal and exclusionary towards women. By not making gender representation compulsory without exception, these laws fail to safeguard the unique position of women in rural areas, leaving their security of tenure vulnerable to patriarchal structures,[606] and then go even further by limiting their ability to seek recourse outside of the same patriarchal structures to defend their rights.[607]

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[605] Roberts 1994: 962-982, 972; Thipe 2013: 483-510. See also TCB: sec. 10(2)(i), 11(c), 11(8)-(11), 20(c). Read together, the TCB provisions force people to use the traditional courts, blocking the use of magistrate's courts, and enable traditional leaders to unilaterally interpret custom. Sec. 20(c) makes it a criminal offence for people not to appear before a traditional leader if called, while sec. 10(2)(i) allows traditional leaders to issue an order "depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom. Customary entitlements include land and community membership".

[606] Thipe 2013: 483-510. In denying women control over land, traditional leaders not only assert their existing authority, but also (re)declare land as a solely masculine entitlement. In this way, traditional leaders are able to consolidate their institutional power as well as the power associated with gendered identities. Marks 1989: 215-234; Williams 2012; TLGFA: sec. 3(b). See also Bentley *et al*. 2016: 9-16, who single out the TLGFA as one of the main concerns. While the law requires at least 30% or a third women representation on traditional councils, the drafters have left the wording open to interpretation. This makes women's accession to traditional councils uncertain because the provision in the act allows for the premier to establish a lower threshold if insufficient women are available to participate.

[607] Custom Contested "Traditional Courts Bill" https://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/ (accessed on 23 August 2022). "On 2 December 2020 the Traditional Courts Bill (TCB) was passed by a plenary of the National Council of Provinces (NCOP) – the version passed by the NCOP does not provide for opting out, which gives people the choice of where to take their matters, between traditional courts and Magistrates' courts ... The Traditional Courts Bill has a long legislative history spanning more than 10 years since the introduction of the first version of the Bill in 2008. Attempts to pass the initial version and subsequent versions of the Bill have all been met with strong public outcry, especially from rural communities and rural women concerned with what the Bill will mean for them and how it distorts customary law. Although an

As an asset, land takes on added importance, since customary institutions may either permit or deny women access and rights, and thereby permit or deny them their livelihoods. Women's rights are also rendered uncertain by customary institutions' own interests in their pursuit of power and authority, making claims on land that are similar to, or compete with, claims made by women.[608] This approach negates the realities of women living in rural areas and the multiple roles they play in society, including their occupation of, and farming on, agricultural land. Security of land tenure affords one the legal and practical ability to defend your ownership, occupation, use of and access to land from interference.[609] This includes the right to access courts of one's own choosing.[610] Laws and policies must seek to do more than merely regulate formalistically, without proper regard for the unique circumstances of the lives that are being affected, and should not assume that laws and policies affect everyone in the same way. To follow such a neoliberal notion of equality based on sameness would be a setback to constitutional jurisprudence and would fail to achieve substantive equality for marginalised groups such as women.

According to Albertyn, this is precisely why transformative substantive equality is concerned with complex, structural, intersectional and relational inequalities. At a broad level, these relate to structures of capitalism[611] and patriarchy that create and

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improved version of the Bill that included the opt out clause was introduced to Parliament during 2017, this provision was removed by the Portfolio Committee in 2018. The Bill almost entirely removes reference to the consensual and voluntary nature of customary law and creates a parallel legal system for rural citizens in South Africa, compared to people living in urban areas."

[608] Weeks 2011: 145.

[609] Weinberg 2013: 30.

[610] Constitution: sec. 34: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[611] Van der Waldt 2015: 37. "In this regard Kropotkin and Woodcock … argue that government intervention is a prominent feature of capitalism. According to them, 'Nowhere has the system of 'non-intervention of the state' ever existed. Everywhere the state has been, and still is, the main pillar and the creator, direct and indirect, of Capitalism and its powers over the masses. The state has always interfered in the economic life in favour of the capitalist exploiter'. Kropotkin and Woodcock … further insist that even in a truly laissez-faire capitalist system, the state would still be protecting capitalist property rights as well as hierarchical social relationships." See also Kropotkin & Woodcock 1996: 38.

reproduce inequalities that affect particular groups and individuals.[612] The legislature is enjoined to ensure that laws and policies promote women's participation in social, economic and political spheres, while also advancing the spirit, purport and objects of the Constitution.[613] This is yet another land policy shift away from earlier socialist policies, which understood that land reform intrinsically included elements such as gender equity as one of the contributing factors needed for its success.[614] It also points to the recurring theme of 'disconnect' or disassociation between recent land reform laws and policies, and the lived realities of rural people on communal land.

It is contended, therefore, that this 'disconnect' has implications for the stewardship ethic, particularly so for African countries who place social justice at the core of the stewardship ethic expected of their governments. As such, their (stewardship) ethical systems should naturally include a keen understanding of the mutual normative constitution of individuals who operate within a shared conception of ethical life, which is vastly different from the unilateral imposition of ideologies through laws and policy. The former translates into shared conceptions of the appropriate allocation of rights and obligations,[615] while the latter may struggle to achieve social cohesion, which, in turn, could impair inclusive economic development.

By enacting the Constitution, the South African nation has committed to reforms in property so as to bring about equitable access to all the country's natural resources, and land is expressly included in this public interest.[616] This primary commitment is clear from the prescript that no provision in the property clause may impede the state from taking legislative and other measures to achieve land, water and related

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[612] Albertyn 2018: 464-465. "Substantive equality should not only focus on substantive outcomes and concrete effects but also on the 'structures, processes, relationships and norms' that reproduce hierarchy, marginalisation, exclusion and inequality in everyday life (context)." See also Sheppard 2010: 33.; Boone 2007: 557-586.
[613] *Rahube v Rahube* 2019 2 SA 54 CC: par. 2.
[614] Pienaar 2011: 34; Badenhorst *et al.* 2006: 593.
[615] Atkinson 2009: 77.
[616] Constitution: sec. 25(4)(a).

reforms to redress the results of past racial discrimination.[617] This is qualified by the understanding that any limitation on existing property rights to achieve redistribution can only take place in terms of a law of general application, and the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[618] In addition, the Constitution demands that the exercise of administrative and, consequently, regulatory powers by the state be lawful, reasonable and procedurally fair.[619]

These constraints within which state regulation is intended to operate are necessary to hold the state accountable for arbitrary actions and decisions that are contrary to the fiduciary duties of public trusteeship, while also safeguarding the stewardship ethic. Parliament and the legislature should be careful not to enact regulatory laws and policies such as the TCB that can be used to circumvent constitutional constraints and protections by creating separate spaces for the exercise and adjudication of socioeconomic justice outside of, and to the exclusion of, constitutional protections.

6.4.1.3 *Commercialising land as a 'national asset'*

An investigation into customary communal landholding practices shows that land is regarded as more than a mere asset of economic value to be owned. Instead, indigenous people's rights in land and natural resources exceed mere possession.[620] To African landholders, land is "a material productive resource that enables survival, livelihoods, and agricultural production".[621] Therefore, statutorily imposed restrictions

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[617] Constitution: sec. 25(8). See also Mostert & Lei 2010: 398, who say that sec. 25(8) "enables the state to deviate from those aspects in the property clause which protect vested individual property interests where land and related reform initiatives may be hampered by their protection".
[618] Constitution: sec. 36(1) (Bill of Rights limitation test).
[619] Constitution: sec. 33(1)-(3). "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote efficient administration."
[620] Mailula 2011: 74-75.
[621] Mailula 2011: 74.

on communal land tenure not only limit economically valuable communal property rights, but also other rights to social, cultural, and ontological resources that are embodied in the spirituality of African society.

As such, the commoditisation of land is not the primary driving force behind most customary landholding communities' access to or use of land, even though the land is productively used. The broader conceptualisation of land beyond the economic aligns with modern property law commentary on the social or proprietary function of property. Therefore, earlier documents such as the White Paper on Land Policy[622] focused specifically on eliminating unequal landownership, addressing historical injustices caused by land dispossessions, and financing market-led redistribution without government becoming the landowner. Hence, the original purpose of redistribution was to provide the poor with land to improve their income and quality of life.[623] Clearly, therefore, the retention of ownership rights by the state in perpetuity is contrary to the initial intent of the country's land policy.

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, provided it is consistent with the constitutional principles of democracy, equality and due process.[624] Implied here is that the choice of tenure system cannot be imposed on land reform claimants or beneficiaries. The transformation of landownership in South Africa was key to the ANC's ideological goals of national development,[625] and ANC land policies recognised established occupants as the "rightful owners" of communal land.[626]

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[622] Department of Land Affairs, White Paper on Land Policy 1997.

[623] Kloppers & Pienaar 2014: 690-693.

[624] Pope 2010: 336.

[625] Greffrath "Land reform, political instability and commercial agriculture in South Africa: An assessment" https://www.academia.edu/37320502/Land_reform_political_instability_and_commercial_agriculture_in_South_Africa_An_assessment (accessed on 15 July 2022). For the ANC, the transformation of the nature of landownership in South Africa is a key conduit towards achieving the ideological goals of the National Democratic Revolution.

[626] Claassens 2014b: 771.

Likewise, as early in the South African democracy as 1994, the Reconstruction and Development Programme (RDP) introduced an integrated socioeconomic 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 *needed* it, but could not afford it. In other words, ensuring security of tenure for the poor and most vulnerable in rural areas was paramount in earlier land policy. Moreover, the provision of ownership to those previously denied the possibility or option was considered one of the most important means of raising income levels and eradicating poverty.[627]

The commercialisation of agricultural land was secondary to securing tenure; instead, commercialisation and agricultural production were regarded as a by-product of security of tenure. In a clear ideological shift, current land policy sets agricultural production for the purpose of commercialisation as a prerequisite for secure land tenure.

The Department of Rural Development and Land Reform's Policy for the Recapitalisation and Development Programme ("Recapitalisation Policy")[628] was formulated as part of the state's review and reformulation of land policies and may be read in tandem with the Green Paper on Land Reform.[629] The Recapitalisation Policy expresses the change in political rhetoric in ANC land policy by placing "participation in the optimal utilisation of land" alongside the land reform objectives of addressing historical exclusion and equitable access to land. It further explains the state's interpretation of section 25(4) of the Constitution 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.

[627] Kloppers & Pienaar 2014: 688-691; See also in general Carey Miller 1986 that discusses land policy at the advent of democracy.
[628] Department of Rural Development and Land Reform 2013e.
[629] Department of Rural Development and Land Reform 2011a.

> 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*.[630]

The Recapitalisation Policy focuses on black emerging farmers and on supporting this group of previously disadvantaged persons to run successful agribusinesses.[631] The overarching strategy for the Recapitalisation Policy is found in the Comprehensive Rural Development Programme (CRDP),[632] 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".[633] The structural transformation of all rural land held by communities is, according to the state's interpretation of section 25(4) of the Constitution, in the national interest. Further, according to the Green Paper on Land Reform of 2013, the state, as custodian, will manage rural land tenure,[634] which will be predominantly leasehold.[635] It is important to note here that the NDP 2030 followed a year after the Green Paper on Land Reform was published.

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. The shift in land policy is supported by undertones and, in certain respects, outright expressions of a custodianship approach. For example, the state's right to withdraw redistributed land from previously disadvantaged persons (at will) if not productively used[636]

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[630] Department of Rural Development and Land Reform 2013e: 6-7 (own emphasis).
[631] Department of Rural Development and Land Reform 2013e: 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."
[632] Department of Rural Development and Land Reform 2009a.
[633] Department of Rural Development and Land Reform 2009a: 3, 13.
[634] Pienaar 2014: 655; Department of Rural Development and Land Reform 2011a: clause 6.5.2; Erlank 2014: 0628.
[635] 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.
[636] Kloppers & Pienaar 2014: 677-706; 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

demonstrates its interventionist approach to land 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. As the modern school of South African historians acknowledge, the deprivation of black people and the emergence of a materially successful white "capitalist class" are the separately identifiable consequences of a single set of policy priorities.[637] 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.[638]

What is observed instead is the state's regulatory retention of substantive entitlements on the basis of its custodianship approach. This implies an ongoing involvement, which creates the impression that land reform beneficiaries are somehow incapable of responsible decision-making, ownership title or ownership-like entitlements – simply continuing the colonial-apartheid belief that the most appropriate form of rights for indigenous people is long-term tenancy.[639] Therefore, the state, as their guardian, feels compelled to retain ownership to regulate their access to and use of land, on their behalf, in perpetuity. This state custodial approach to land smacks of discrimination, as some persons are entitled and able to retain ownership, yet others are, in effect, not.

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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."

[637] Carey Miller & Pope 2000: 27.

[638] 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."

[639] Department of Rural Development and Land Reform 2011a. See also Hall & Kepe 2017: 4, whose case studies found a "stark contrast between proclaimed policy aims and realities on the ground". They state: "Although 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."

Therefore, it did not come as a surprise 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.[640] According to that 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 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".[641]

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 state custodianship of land ignores the reality that land taken during apartheid was transferred to the democratic state for it to redress the past injustice of large-scale dispossessions.[642] Therefore, any reconfiguration of landholding structures requires *both* consultation with and the consent of the land rights holders.[643] 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,[644] which was justified as

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[640] Department of Rural Development and Land Reform 2012: 2.

[641] 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."

[642] 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.

[643] 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'."

[644] 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 immoveable property by prohibiting ownership and

being in the "national interest".[645] It now appears that the same model is to be extended to all rural land made available through restitution and redistribution.[646]

The commoditisation and commercialisation of land played a key role in the colonial-apartheid eras. Land was seen 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 to secure state control over mineral resources for the national interest,[647] and to protect white commercial irrigation farmers' water rights. Recent land policy reveals nuances of a similar default to the prioritisation of commercial farming ventures.[648] 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.

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. As such, instead of challenging the supremacy of private property, it is becoming a significant player in the land market. The capitalist logic of land reform has gone from market

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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.

[645] 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."

[646] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 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."

[647] Ngcukaitobi 2021: 21-33.

[648] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 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].

participation (to acquire land) to expectations of commercial production (to use the land) in ways that militate against secure land access for the poor.[649]

It is the state's constitutional mandate to carry out effective redistribution and provide secure land rights to previously disadvantaged persons. Therefore, the treatment of communal land as a commodity that is solely purposed for commercialisation is contrary to the constitutional objectives of section 25 and the state's fiduciary responsibility. Recent laws and policies indicate that the state's approach to achieving land reform has become "functionally and discursively" disconnected from the sociopolitical context of dispossession it was intended to redress.[650] In essence, land is treated more as a commodity than something that carries different meanings for different segments of society.[651] Yet the state calls its new approach to land reform "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 to be full economic and social participants in the South African Project".[652]

The treatment of land as a commodity for commercialisation is one effect of the gradual institutionalisation of state custodianship in land reform laws and policies. It is an approach that prioritises statutory control over access to agricultural land and its optimal productive and commercial use, and institutes restrictive landholding constructs that are highly administrative and dependent on the state's

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[649] Hall & Kepe 2017: 8.
[650] Pope 2010: 339-340, who cites Okoth-Ogende 2008: ch. 4, in stating 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'."
[651] 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."
[652] Department of Rural Development and Land Reform 2012: 3.

custodianship.[653] This is a far cry from the initial approach in the White Paper on Land Reform,[654] which promised access to land as a "basic human need", and proposed private ownership as the solution.[655]

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".[656] This is not to say that earlier land policy did not recognise land as a national asset and resource for economic activity – because it did. The difference is that the economic wealth was concentrated on funding social programmes and the attainment of human dignity for all South Africans;[657] the ultimate aim was not the commercialisation of all agricultural land.

The Department of Agriculture, Land Reform and Rural Development is the government department tasked to execute the land reform agenda, and it must discharge its fiduciary duties with the care expected of a steward of the nation's natural resources. All South Africa's natural resources are subject to lawful regulation by the state, as the trustee of the environment. Therefore, the state must manage South Africa's land resources on behalf of all citizens, and within the available resources. The state's function as trustee or custodian of all South Africa's natural resources as part of the environment is informed by the Constitution,

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653 Pope 2010: 337.
654 RSA 1991.
655 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."
656 Greffrath "Land reform, political instability and commercial agriculture in South Africa: An assessment" https://www.academia.edu/37320502/Land_reform_political_instability_and_commercial_agriculture_in_South_Africa_An_assessment (accessed on 12 July 2022).
657 Greffrath "Land reform, political instability and commercial agriculture in South Africa: An assessment" https://www.academia.edu/37320502/Land_reform_political_instability_and_commercial_agriculture_in_South_Africa_An_assessment (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).

individual pieces of legislation and national land policy, and is also broadly influenced by international environmental law principles.

6.4.1.3.1 *A new policy direction of state custodianship of land*

The state's role in respect of land has been fairly predictable and conventional, namely that of 'trustee' of the environment as a whole. As trustee, it is responsible for preserving, conserving and protecting all the country's natural resources. In other words, the state has been a trustee of land in its sovereign capacity, but not in a capacity expressly legislated for land, as the NWA does for water. It is argued, however, that recently proposed land reform laws and policies that seek to introduce references to "state custodianship of all agricultural land" as part of the state's sovereignty over land as a "national asset"[658] and as the "common heritage of all the people of South Africa" are cut from the same cloth as the MPRDA. The state custodianship of land these laws and policies propose is different from conventional trusteeship. The proposals are intentional and carry legal implications that provide insight into the state's new policy direction and its understanding of its role in relation to land as a natural resource.

State custodianship of land has not yet been enacted on the same basis as custodianship of mineral resources in the MPRDA. However, the inclusion of the notion of state custodianship in proposed land reform legislation,[659] alongside ideological nuances of a custodianship approach to land, has real implications for redistribution and security of tenure. The hesitancy to codify it in land reform statutes is likely because of the complex nature of land rights, and the deeply social function of land that transcends pure economics. If viewed comprehensively, the current land

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[658] Department of Rural Development and Land Reform 2011a: 1.

[659] Greffrath "Land reform, political instability and commercial agriculture in South Africa: An assessment" https://www.academia.edu/37320502/Land_reform_political_instability_and_commercial_agriculture_in_South_Africa_An_assessment (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.

policy approach points to custodianship of land, but its presence in policy alone cannot result in a statutory regime change.[660]

For example, the Preservation and Development of Agricultural Land Framework Policy ("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 ("DAFF") 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.[661] It further states that agricultural matters relating to the "use of agricultural land" is a matter that falls in the national sphere of government.[662] The Agricultural Land Framework Policy contains strong paternalist rhetoric in its overarching principles so as to justify a state custodianship approach to land, in ways that are conceptually similar to the notion of custodianship codified in the MPRDA.[663]

Having this insight into these overarching principles is useful for understanding the way in which state custodianship of land is framed in proposed land policy. Agricultural land is contextualised as an integral part of the environment. General environmental degradation and the unsustainable exploitation of natural resources are highlighted as phenomena that are common to all natural resources, but pose a particular threat to the future productivity of agricultural land. The occurrence of these phenomena is said to be "evidence of the weak rights of farmers to protect and manage agricultural land and a lack of accountability for land use decisions that affect the availability and viability of agricultural land",[664] exacerbated by the fact that agricultural land is finite and irreplaceable.[665] These are paternalist statements

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[660] Department of Agriculture, Land Reform and Rural Development 2011: 1-4.
[661] Department of Rural Development and Land Reform 2014: 26.
[662] Department of Rural Development and Land Reform 2014: 40.
[663] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 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."
[664] Department of Rural Development and Land Reform 2014: 22-23.
[665] Department of Rural Development and Land Reform 2014: 15.

framed as strongly protective, creating the impression that because of farmers' inability to "protect and manage agricultural land", the state has no choice but to step in and save the resource.[666]

Therefore, according to the Agricultural Land Framework Policy, it is the responsibility of the state, as custodian of all agricultural land, including land used for commercial, smallholder and subsistence farming, 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 agricultural use, while promoting justifiable economic and social development.[667] The core principles of the policy are based on the primacy of the agricultural use of land, and the management of both ownership and user rights in common areas, state land and protected areas.[668]

The kind of "environmental stewardship"[669] envisaged by the state has been directly linked to agricultural production. The policy also strongly protects existing landownership patterns by criticising certain state officials' incorrect application of the *Subdivision of Agricultural Land Act* 70 of 1970, which endangers food security by allowing further subdivision of agricultural land.[670] It stands to reason that this is an attempt by the DAFF to halt the possible subdivision of privately owned commercial farms into smaller farming units for redistribution.[671] DAFF's primary concern is to

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[666] 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'."
[667] Department of Rural Development and Land Reform 2014: 40
[668] Department of Rural Development and Land Reform 2014: 31.
[669] 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."
[670] 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."
[671] 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

safeguard agricultural production and food security at all costs, and the Agricultural Land Framework Policy merely entrenches apartheid property ownership structures. It is worth noting that, subsequent to the conception of the Agricultural Land Framework Policy, DAFF merged with the Department of Land Reform and Rural Development to form the Department of Agriculture, Land Reform and Rural Development – a move intended to improve land governance by integrating rural development, and to accelerate land reform.

6.5 TRANSFORMING THE RURAL LAND ECONOMY

6.5.1 Transformative constitutionalism in the South African economic context

Like many other economies on the continent, the South African economy has had to overcome the aftermath of colonialism and the transition to independence. As part of their transition to independence, African countries adopted constitutions to entrench fundamental human rights and prevent abuse of power by government. Most of the content incorporated into these constitutions was taken from Western jurisdictions. However, in more recent years, there are scholars that have become ever more convinced of the inadequacies of the Western liberal constitutional model when applied to the prevailing sociopolitical realities in Africa.

The *Constitution of the Republic of South Africa* was one of the many African constitutions influenced by the *Basic Law for the Federal Republic of Germany*.[672] Like the German statute, the South African one is a modern and transformative instrument that acknowledges more than just civil and political rights. Being a third-generation statute (post-Berlin Wall), however, the South African Constitution goes even further by enumerating specific social and economic rights as positive

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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."

[672] Mostert & Lei 2010: 380.

constitutional rights, making it liberationist rather than libertarian.[673] 'Constitutionalism', as introduced shortly after liberation, was simply understood as limited government power – an idea transplanted into African constitutional thought mainly through the agency of European colonial powers who acted as patrons of the decolonisation process.[674]

However, when examined within their adoptive African settings, many believe these constitutions – so clearly fashioned after Western liberal ideology – have failed to meet the unique needs of the continent, which include dealing with widespread poverty and underdevelopment, wide ethnic and cultural diversity, as well as the African communitarian orientation.[675] Having said this, constitutions are not meant to stagnate and can be amended progressively to meet the changing needs of society. As such, South Africa has moved from its initial Western understanding of constitutionalism, which was needed for liberation, to the systemic transformation of social, economic and political structures to correspond with the rise in social democracy or liberal egalitarianism.[676] For this reason, many scholars have taken the position that transformative constitutionalism is the best interpretative tool for the constitutions of African nations such as South Africa.[677]

Klare offers the following definition of transformative constitutionalism:

> [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.[678]

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[673] Mostert & Lei 2010: 380; Russell 2002: 11-21.
[674] Kibet & Fombad 2017: 349.
[675] Bohler-Muller 2007: 1.
[676] Njoya 2021: 1. **"**Egalitarians claim that the ideal of justice demands the equalisation of economic opportunities and the construction of equal economic outcomes between races and other diverse identity-based groups."

[677] Kibet & Fombad 2017: 341.
[678] Klare 1998: 150.

As mentioned above, the South African Constitution can be characterised as a third-generation constitutional document, in other words one that focuses not only on participatory and political rights, but also on citizens' social rights and responsibilities, and supports actionable socioeconomic rights.[679] Accordingly, when applying a transformative constitutional approach to the enactment, interpretation and enforcement of regulatory laws and policies, the protection of socioeconomic rights and substantively just outcomes must be properly considered, with due regard to the historical context.

Therefore, the state, through the Department of Agriculture, Land Reform and Rural Development, must interpret sections 25(5) and 25(6) of the Constitution in a manner that will best achieve 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,[680] and to provide legally secure tenure to those with legally insecure tenure as a result of past apartheid laws or practices.[681]

To realise the vision of the Constitution, South Africa needs transformation that paves the way for inclusive economic growth and development. Growth without transformation would only reinforce the inequitable patterns of wealth inherited from the past.[682] 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 socioeconomic 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.[683]

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[679] Mostert & Lei 2010: 403-404.
[680] Constitution: sec. 25(5); Kloppers & Pienaar 2014: 677-678.
[681] Constitution: sec. 25(6); Kloppers & Pienaar 677-678.
[682] National Treasury 2017: 1.
[683] Kibet & Fombad 2017: 353; Phooko & Radebe 2016: 307; Fraser & Honneth 2003: 7-70.

Transformative constitutionalism has been critiqued for obscuring the law–politics divide.[684] Yet its proponents believe that the objective of attaining social or substantive justice through law inevitably compels courts to engage in policy decision-making, or to issue court orders that have significant budgetary implications for the enforcement of socioeconomic rights. This is bound to create points of conflict with the political arms of government, who largely retain the power over policy and government expenditure.[685] The alternative would be to do what many other Southern African countries have done, namely, to default to ideologies of exaggerated state custodianship, which in practice benefits only a select few.[686]

6.5.1.1 *South Africa's National Development Plan 2030*

The NDP 2030[687] was released in 2011 following the appointment of the National Planning Commission (NPC) in May 2010. The document, which is positioned as a blueprint for tackling South Africa's challenges, was adopted by Cabinet in 2012.[688] The NDP 2030 offers a long-term strategic plan that identifies the role of different sectors in what is intended to be a national guideline or vision, which requires the participation and cooperation of civil society as a whole[689] to succeed and reap the benefits that are theoretically to follow.

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[684] Roux 2009: 260; See also in general Brand 2009 that discusses transformative politics.
[685] Kibet & Fombad 2017: 353; Pillay 2002: 255-277.
[686] Adams 2013: 91-97; Hwedi 2001: 19-31.
[687] NPC 2012.
[688] 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).
[689] Parliament of RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (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."

The general aim of the NDP 2030 is that each sector must ensure that all South Africans attain a decent standard of living through the elimination of poverty and reduction of inequality. Therefore, each sector must have clear overarching goals to reach this general aim, consensus on key obstacles to this aim, and a basis for decision-making on how best to use the sector's limited resources to achieve the aim.[690] The NDP 2030 recognises the role of leadership and accountability, stating that "[p]olitical leadership is critical for effective implementation", which is why the president and deputy president are the lead champions of the NDP 2030 in Cabinet, in government and throughout the country.[691] South Africa has now reached the implementation stage of the NDP 2030, requiring a process of breaking down the plan into key outputs and activities to be implemented by individual departments.

6.5.1.2 *Creating an integrated and inclusive rural economy*

In terms of land, chapter 6 of the NDP 2030, "An integrated and inclusive rural economy", is offered as a guideline to the Department of Agriculture, Land Reform and Rural Development. A state custodianship undercurrent in relation to land is immediately noticeable in the language of not only chapter 6, but also the NDP vision, with references to "South Africa, our country, is our land" and "preserving it for future generations",[692] all woven together with a golden thread of social cohesion.[693] Land has more than just an economic function; it fulfils an important social function as well. Social cohesion, just like development, is a direct function of access to

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[690] Parliament of RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed on 25 July 2022).

[691] Parliament of RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed on 25 July 2022).

[692] NPC 2012: 21.

[693] Pienaar 2014: 657-663.

land.[694] The vision for land is described as the "better integration of the country's rural areas, achieved through successful land reform, infrastructure development, job creation and poverty alleviation".[695] The "expansion of irrigated agriculture" is noted as the driving force behind the envisaged transformation of the rural land economy,[696] which will contribute to the general cross-sectoral aim of ensuring that all South Africans attain a decent standard of living through the elimination of poverty and reduction of inequality.

To do its bit for the NDP 2030 vision, the Department of Agriculture, Land Reform and Rural Development has initiated the enactment of land reform laws, policies, programmes and strategic plans that target rural communities for economic development. The NDP 2030 is intended to be groundbreaking for South Africa's agricultural economy, transforming the rural economic 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 and the demand for transformative constitutionalism, the increased state regulation of all natural resources through the mechanisms of public trusteeship or state custodianship may be understood as legal-political devices used to minimise the unwanted systemic effects of inequality and to promote the transformative objectives of the Constitution in the public or national interest.[697] For the state to undo the systemic effects of the apartheid exclusionary property structure, both public and private-sector participation is essential. This is particularly so for the transformation of the rural landscape, as the bulk of agrarian land still remains privately or state-owned.[698]

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[694] Department of Rural Development and Land Reform 2011a: 2.
[695] NPC 2012: 218.
[696] NPC 2012: 218.
[697] Singer 2000: 142-144, 208; Van der Sijde 2015: 282.
[698] 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 RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-

The NDP 2030 proposes a very clear approach to rural land development that centres on agribusiness. While referred to as a "differentiated rural development strategy", it mostly entails irrigated agriculture, dry land production, and industries such as agro-processing, tourism and small enterprise development.[699] Therefore, through the optimal utilisation of rural (communal) land for agricultural business, local communities will benefit from the localised generation of capital, which can be used for quality basic services such as education, health care and public transport, and will enable people to develop the capabilities to seek economic opportunities.[700]

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.[701] It acknowledges that institutional capacity is integral to the success of this approach to rural land,[702] especially in respect of the land reforms required to resolve contested relationships between indigenous (customary) and "constitutional institutions".[703]

However, it is obvious that the level of public and community participation will largely depend on the state and the statutory and policy structures created by the state. The NDP 2030 foresees high-level meetings between government, business, labour and civil society that will be underpinned by more "focused stakeholder" engagements. It is during these "focused" engagements that solutions to challenges will be

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Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (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.

[699] NPC 2012: 219.

[700] NPC 2012: 219.

[701] NPC 2012: 227; Weinberg 2015: 19

[702] Edigheji 2010:1. See also Van Eck "Social democracy and the 'developmental state' as development alternatives for South Africa" https://www.researchgate.net/publication/241751613_Social_Democracy_and_the_Developmental_State_as_Development_Alternatives_for_South_Africa (accessed on 19 April 2022). "There seems to be a realisation by governments worldwide that state interventions to drive development are vital for 'well-being and even for the sustenance of market economies. … Before the crisis, and particularly before GEAR, the ANC and the government realised this, and that in order to eradicate poverty and inequality, a state with the capacity to intervene would be required ..."

[703] NPC 2012: 219.

constructed.[704] The question is whether rural communities will form part of these engagements, or whether only traditional leaders, the state and their private-sector business partners will be around the table. According to Fine,[705] 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. Fostering a purely exclusive relationship between business and the state in South Africa will in all likelihood simply lead to cronyism between political and business elites.[706]

Given the increasingly regulatory model of natural resources governance, it is imperative that rural communities take on an active role in all discussions that involve their land rights.[707] This is the only way for communities to be certain that decisions align with their transforming realities and efficiently address their real-world challenges. The NDP 2030 very clearly represents a shift away from earlier state grant-based policies,[708] and for this reason, the voices of land reform claimants and beneficiaries will need to be strengthened, particularly during the implementation phase of new land laws and policies. It is recognised, therefore, that transformative statutes and policies are vehicles for state regulation, whether through public

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[704] Parliament of RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed on 25 July 2022).

[705] 2010: 175.

[706] Fine 2010: 175; Liebenberg 2012: 1-29.

[707] NPC 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.

[708] NPC 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 RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed on 25 July 2022). "The Plan [NDP 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."

trusteeship or state custodianship. Policy consistency is one of the core implementation principles of the NDP 2030 for all sectors, and the plan is designed to bring about change over a period of nearly two decades. Therefore, any changes to land policies during this period will be approached cautiously by the state, as 'custodian' of the NDP, and will likely only be made if based on experience and evidence so that the country does not lose sight of its long-term goals.[709]

Rural communities must be consulted and be afforded the opportunity to provide evidence so as to ensure that the necessary amendments are made to land laws and policies that are inconsistent with their experiences and negatively affect their socioeconomic rights. Since democracy requires the protection of socioeconomic rights, all land reform laws and policies must provide for and stipulate the imposition of positive (fiduciary) duties on the state (as trustee of the environment) to ensure the enjoyment of human rights and the horizontal application of the Constitution[710] with regard to land as a natural resource. The state's fiduciary duty also forms an important part of the state's accountability towards landholding communities to provide the necessary oversight and monitoring mechanisms. In light of this role, it is suggested that the extensive allocation of powers to traditional leaders be seriously reconsidered.[711]

In addition, the newfound political focus on rural development and 'agrarian reform' creates a dual landholding system between commercial irrigation farmers and

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[709] Parliament of RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed on 25 July 2022).

[710] Klare 1998: 153.

[711] Parliament of RSA "The National Development Plan unpacked" https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed on 25 July 2022). In terms of clarity of responsibility and accountability, the NDP 2030 calls for the tightening of the accountability chain. An important step toward this would be oversight and monitoring mechanisms.

customary communal landholders under the control of traditional authorities.[712] This dualistic approach is supported by the NDP 2030, which 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".[713] Overall, the envisaged rural land tenure system is one of national land tenure management that will operate within both freehold and communal land tenure areas. In other words, the state will regulate all agricultural land as custodian[714] of the national (economic) development plan. As a transforming institution, property – including natural resources – is central to market economies,[715] which locates it within the regulatory ambit of the state, subject to constitutional provisions.

It is proposed here that if the state through its land reform laws and policies is attempting to break away from the institutionalised effects of the property hierarchy[716] by moving from the dominant private property paradigm to an alternative use rights paradigm, it should be focusing on strengthening statutory use rights to be equally competitive. Instead, however, it continues to rely heavily on the private property paradigm, allowing it to operate alongside and in competition with statutory use rights. Meanwhile, the statutory use rights remain comparatively undefined and dangerously open to interpretation. Existing ownership structures are left unaltered

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[712] Cousins & Hall 2011: 18.
[713] NPC 2012: 222.
[714] Department of Rural Development and Land Reform 2013f: 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)."
[715] Micklitz 2016: 243.
[716] 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." Pienaar 2015: 1480-1500.

and unchallenged, with a long-term intent to amalgamate newly created (statutory) use rights into the private rights system.[717]

Thus, the interim status quo of essentially insecure tenure rights will persist, which is justified as an inconvenient yet temporary measure to allow time to sift out the productive farmers, who are entitled to secure tenure, from the unproductive ones. Interestingly, apartheid land laws and policies too were largely future and goal-orientated as well as justificatory, explaining the injustices that arose as "inconvenient", but "temporary", "transitional" measures to reach the goal.[718] As seen from past experience, this approach creates a long-term dual rights system that gives rise to discrimination and disempowerment. It can also spawn further inequitable socioeconomic outcomes, with certain persons entitled to legally secure tenure and the accompanying state support, while others simply are not, and may never perform well enough to become eligible. This approach fails to recognise that rights are interdependent and interconnected.[719]

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 common law property system. This argument presupposes that a system based in ownership (such as our civil law system) 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, while a system based on recognised and protected use rights will produce a range of land rights that are intrinsically incapable of being classified as weaker or stronger. At the same time, a stronger focus on a use rights system will inevitably weaken or restrict the scope of ownership rights, thereby providing real possibilities for the redistribution of wealth and power.[720]

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[717] NPC 2012: 226-227.
[718] Van der Walt 2001: 269
[719] Liebenberg & Goldblatt 2007: 335-361; Allsobrook 2019: 408-418.
[720] Van der Walt 1999: 267.

In the meantime, though, what one is left with is a dualistic land tenure system with conditional rural land tenure with statutory use rights on the one hand and communal land tenure under traditional leadership on the other. The former is characterised by long-term lease contracts that may one day be converted to ownership, subject to commercialisation and production performance. Yet ownership is unlikely given the protracted lease period, the conditional basis, and the state custodianship approach. To Werner, this amounts to *de facto* privatisation, as in both instances, the state holds the substantive rights in the land, which establishes a first and second-class system of land tenure.[721] As a result, land reform experts believe that recent developments in land reform law and policy have drifted away from the initial pro-poor stance, lack a vision of inclusive agrarian reform, carry signs of elite capture, and contain significant gaps in terms of security of tenure where legislation has not been passed.[722] Moreover, it is believed that the state's interpretation of customary law as centering on traditional leadership as opposed to living customary practices and values adds to the insecurity of communal tenure.[723]

6.6 CONCLUSION

A state custodianship approach to land as a natural resource or national asset can have outcomes that run counter to the primary objectives of land reform. A state may apply state custodianship explicitly by way of statute, thereby altering the property rights regime. Alternatively, state custodianship may be implicitly institutionalised through land policy. While the former results in the legal implications highlighted earlier,[724] the latter takes a more nuanced form with ideological expressions.[725]

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[721] Werner 2015: 77-78.
[722] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 37.
[723] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 32.
[724] See detailed discussion under par. 4.2.
[725] See par. 6.4.1.1 to 6.4.1.3.1.

The custodianship model was used during apartheid as a means to validate and rationalise the enactment of interventionist land laws and policies[726] that enabled frequent statutory interventions in landholding based on the national interest. In this chapter, similar ideological justifications have been identified in recent land reform laws and policies. Although apartheid land laws and policies were premised on the 'national interest', they had discriminatory outcomes that are considered unconstitutional in a democratic state. Similarly, it has been illustrated that transformative land reform laws and policies can be conduits for state custodianship and can inadvertently reproduce colonial-apartheid ideology – something that has been surfacing ever more frequently and strongly in recent land reform policy. Affording traditional leaders extensive powers simply reinforces dictatorial hierarchies in land governance and tenure that resemble the modus operandi of the colonial-apartheid era, stifling people's agency and self-determination. Furthermore, land reform laws and other natural resources appear to remain firmly entrenched in the hierarchy of common law land rights. It is contended that this is a situation of default that has arisen from the state's failure either to hand over ownership where appropriate or to create strong alternative tenures in consultation with landholders or communities.

Until recently, the ANC, despite its rhetoric, has chosen less 'radical' land policy options that involve incremental moves towards a broader welfare state to address persistent poverty, inequality and unemployment.[727] The ruling party has favoured 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 capitalist economic transformation. The NDP 2030 and recent land reform laws and policies have taken up the latter option, which invariably involves a

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[726] 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'. That 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."

[727] Russell 2013: 2.

concentration of state interventions in the development of the rural economy. The role of the state is framed as "lay[ing] the foundation and framework upon which private economic activities can flourish".[728] .

It is argued, therefore, that the state's current approach to land reform represents a decisive shift away from the ANC's earlier, socialist approach to land reform as trustee of the environment. The new approach is one of institutional economic capitalism as custodian of all agricultural land, in which the commercialisation and productive use of the country's scarce natural resources is the primary concern,[729] and the improvement of the material conditions of the poor and vulnerable in society is secondary. As such, recent land laws and policies indicate a disconnect or failure to engage with the actual landholding realities of rural communities. This disconnect may be further driven by opportunities for political alliances and elite enrichment rather than focusing on the enduring structural inequality in ownership and control over land. Therefore, while the Constitution may mandate land reform, its interpretation and formulation in land reform laws and policies remains subject to the political ideology of the day. This is problematic and can hinder redistribution and security of tenure, and lead to the abuse of custodianship for political and private economic interests.[730]

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[728] Werner 2015: 77; Angula 1997: 51.

[729] Weinberg 2013: 35. "Furthermore, under the new restitution process set in motion by the Restitution Amendment Bill and complemented by the Recapitalisation and Development Policy, land restoration awards will be explicitly dependent on the feasibility and cost of the land transfer and the claimants' ability to use the land 'productively'."

[730] 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://www.academia.edu/37320502/Land_reform_political_instability_and_commercial_agriculture_in_South_Africa_An_assessment (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.

This disconnect is arguably also why the Constitutional Court is increasingly having to contextualise and interpret statutory provisions to circumvent exclusionary outcomes. Ultimately, statutes that are devoid of contextual considerations fail to take into account people's lived realities, which can have discriminatory and unconstitutional results.[731]

Regardless, however, the slow pace of transformation and the failure of earlier land policies of the socialist developmental state has motivated the state to assume a much more interventionist role, and the present political climate is proving ideal for more progressive and radical forces to influence transformative land laws and policies. The ANC's failure to meet rural people's socioeconomic needs has created an urgency to effect real productive change to the rural economy and to conserve the rural vote,[732] which would explain the policy shift with regard to traditional leaders' prominent role in recent land reform laws.

It is concerning that Parliament currently appears overly dependent on state departments to develop bills, which reinforces the problem of siloed statutory interventions. This would mean that the custodial shifts in recent land laws and policies are influenced by strong political motivations, which is not ideal.[733] As such, the challenge of interpreting and implementing custodial land reform laws and policies is also tied up with the capabilities and values embodied by key political

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[731] *Rahube v Rahube* 2019 2 SA 54 CC: par. 22. See also Kibet & Fombad 2017: 354. "Judicial activism that sometimes goes with transformative constitutionalism is undefined or amorphous. This facet of transformative constitutionalism could mean judicial pragmatism in bringing about socio-political change. It could also sound the death knell for the legitimacy of the judiciary since it may bring it into direct collision with political players who feel more entitled to drive the political agenda." Budlender 2005: 449; Vhumbunu "The July 2021 protests and socio-political unrest in South Africa: Reflecting on the causes, consequences and future lessons." https://www.accord.org.za/conflict-trends/the-july-2021-protests-and-socio-political-unrest-in-south-africa/ (accessed on 18 February 2022).

[732] Weinberg 2013: 36; Weinberg 2015: 20; Ntsebeza 2008: 238-261; Oomen 2005: 104.

[733] Pope 2010: 337. "If land management and control are bureaucratic and politically motivated, there is little chance for rural people to be part of discussions and decision-making. And, if individual community members are unable to be heard, there is little hope for real social development; rather, the oppressive patterns of the past are likely to continue, leaving the poor and vulnerable no better off than before."

leaders at state institutions.[734] A constitutional interpretation of state custodianship is crucial and should not be left open to siloed political interpretation.

Laws and policies that entrench apartheid categories and divisions as well as paternalistic notions are being interpreted and implemented to reinforce the power imbalance in society. Living customary law systems are being replaced with statutes that incorporate a strong state custodianship attitude towards rural communities' land rights, undermining and disempowering them. The state regulation of land requires land interests to be reliably protected from this kind of arbitrary or involuntary deprivation.[735] 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 or use justified it, and establish more suitable land rights for those who needed it.[736]

Yet if the increased reliance on a state custodianship model in land reform policy continues to be applied in ways that echo apartheid ideology, this brings into question the effectiveness of the state's land governance. It also casts doubt on existing accountability mechanisms and the ability of Parliament and the legislature to scrutinise proposed land laws and policies to circumvent any detrimental and unconstitutional implications for landholders' rights.

The next and final chapter concludes this thesis by summarising the key research findings, conclusions, recommendations and future research prospects that have emerged from the analyses conducted in the previous sections. In so doing, it reflects on the democratic developmental role of the state, and how this conceptual understanding affects the state's regulation of natural resources.

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[734] High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 2017: 40.
[735] Mostert "Customary and statutory perceptions of tenure security in South Africa" https://ssrn.com/abstract=2277498 (accessed on 5 September 2022); Durand-Lasserve & Royston 2002: 8-9; See also in general Place *et al*. 1994 discussion on the protection of land tenure security in Africa.
[736] Van der Walt 2001: 287.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 INTRODUCTION

Renewed calls for an interventionist and distributive state in respect of South Africa's natural resources are being made at a critical time in the country's constitutional democracy. The South African government has embarked on the journey of becoming a developmental state as its solution to restoring economic stability, and the developmental goals are set out in the NDP 2030 vision.[737] The democratic developmental state model inevitably affects the laws and policies that must transform South Africa's economy.[738] The regulation of the public's access to and use of natural resources is critical to achieving the state's developmental goals. As such, South Africa must strike a balance between "developmentalism" through statutory and policy interventions, and the maintenance of democratic governance.[739]

This thesis posed critical questions with regard to the notion of state custodianship as an interventionist regulatory legal construct and examined the way in which it manifests in the MPRDA within South Africa's unique socioeconomic context. One of the central themes of this research has been the legal-political context[740] and its continued impact on access to and use of natural resources, including land.

The following main research questions have been explored:

- What is state custodianship, and is it recognised in South African law?
- Does state custodianship manifest in apartheid land law and constitutional land reform law and policy?

[737] Refer par. 6.5.1.1 for a detailed discussion.
[738] Refer to par. 1.3.4, 2.1.1, 3.2.1.1, 5.1.2 and 6.3.1 for a discussion of the developmental state.
[739] Van Dijk & Croukamp 2007: 664; Singer 2014: 1287-1335; Du Plessis 2011: 92-102.
[740] See par. 2.1 for more on the legal-political context.

- Are radical transformative statutes and policies a vehicle for state custodianship of land?
- Why should land be treated differently, and not be subject to state custodianship?
- Does state custodianship compel a property regime change?

In answering these questions, it becomes clear that the control and regulation of land and other natural resources is central to the political agenda. A developmental state is defined as a state where politics have assured that power, autonomy and capacity is centralised to achieve the state's explicit developmental goals. The focus of the developmental state, therefore, is to direct or enable economic growth.[741] Thus, under this model, it is incumbent on the state to take up an increasingly interventionist (regulatory) role in respect of the nation's natural resources to facilitate and promote the national interest. In light of global resource property dynamics, research on the state's developing role in managing the country's resources for the benefit of all citizens is imperative for constitutionalism, democracy and accountability.[742]

7.2 CONCLUSIONS

7.2.1 The recognition of state custodianship and its transformative value

In this thesis, an exploration of radical transformative statutes such as the MPRDA and NWA has confirmed the progressive expansion of the state's role in relation to natural resources. This expansion has come in the form of regulatory mechanisms known as state custodianship and public trusteeship.[743] These regulatory mechanisms are deployed by Parliament and the legislature to transform existing

[741] Taylor "Comparative developmental states in Africa" http://www.ossrea.net/publications/newsletter/feb06/article7.htm (accessed on 8 June 2022); Van Dijk & Croukamp 2007: 665.
[742] Refer to par. 3.2.1.3 for the discussion on global resource property dynamics.
[743] See chapter 3.

property structures.[744] However, water and mineral resources are not the only natural resources undergoing structural change as a result of increased regulation of access and use. This research has shown that recent land reform laws and policies signal a political shift in the state's interpretation of its stewardship and fiduciary responsibility in respect of land as well.[745] If there was still any doubt as to whether there might be a sociopolitical trend towards state custodianship of land, the recently proposed extension of state custodianship to include *all* land in the objects of the *Eighteenth Amendment Bill*[746] clarified the matter.

This thesis examined the explicit and implicit possibilities of state custodianship in respect of natural resources by considering its characteristic features and legal implications.[747] This was followed by a discussion of the nuances and ideological manifestations that accompany a state custodianship model, and more specifically, the status of its implicit or explicit application to land.[748]

It would appear that the legal construct of state custodianship has not resulted in greater equitable redistribution. Instead, it has extended the economic benefits derived from access to minerals to a larger group of elites (albeit not along racial lines) and has further solidified the private-sector monopoly in the mining industry. The only difference now is that the state is made party to the dealings, which are subject to state regulation. While it may be argued that such an arrangement delivers indirect benefits for local communities, the literature indicates that any such benefits are disproportionately small and come at a great cost to their security of land tenure.[749]

Land is a natural resource to which the Constitution demands equitable access for all South Africans, and the state must promote social and economic development. The

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[744] See chapter 5.
[745] See par. 4.2.4, chapter 6 in general, and par. 6.4.
[746] Sec. 2. While the inclusion of state custodianship in the property clause did not get the required two-thirds majority in Parliament, its consideration and inclusion in the drafts does point to a degree of support for express state custodianship of land in certain political quarters.
[747] See par. 4.2.
[748] See par. 5.2.1 and chapter 6.
[749] See par. 2.1.2 and 4.2.1.

legislated purposes of measures such as state custodianship in the MPRDA are premised on these constitutional objectives. The Constitution further requires these statutory interventions to be reasonable, and to this end, state custodianship must be informed by the stewardship ethic.[750] State custodianship creates a fiduciary relationship between the state and the nation on whose behalf the state administers the custodial assets. The Constitution even extends the state's stewardship duty of care to include future generations' beneficial use, thus giving the state, as custodian, rights and duties towards both present and future beneficiaries. Accordingly, it is concluded that state custodianship in the MPRDA is not a temporary form of regulation, but endures for future generations. Nevertheless, applying state custodianship for the systemic protection of concentrated economic wealth in the hands of a few undermines political, social and cultural development to the detriment of the most vulnerable, and belies the constitutional objectives of equitable access and beneficial use, as well as the stewardship ethic.[751]

7.2.1.1 *What is state custodianship, and is it recognised in South African law?*

While state custodianship in the MPRDA shares certain characteristics with public trusteeship in the NWA, the two are legally distinguishable. Although statutes incorporate state custodianship as a conduit for transformation, the legal construct has certain characteristic features and legal implications that make it susceptible to misinterpretation and abuse. State custodianship lacks a doctrinal basis to ground its constitutional interpretation and state actors' accountability in the exercise of their extensive powers.[752] It is concluded, therefore, that the current test for natural resources governance in South Africa is whether the state can find and maintain a sound balance between interventionism (regulation) aimed at development on the one hand, and the protection of South Africa's democracy on the other.

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[750] Barendse 2016: 21. "Stewardship is one of the dominant terms used to describe goals, principles and actions taken to achieve sustainability in natural resource management." Also see par. 3.2 and 3.5.1.3.
[751] See par. 3.4.
[752] See par. 4.2.5.

7.2.1.2 *Does state custodianship manifest in apartheid and constitutional land reform laws and policies?*

It is further concluded that a state custodianship approach is indeed being applied to South African land reform. However, it has not yet been expressly enacted into any land reform laws on the same basis as custodianship of mineral resources in the MPRDA so as to facilitate a property regime change. It has been proposed in draft laws, though, and is apparent from policies that reflect ideological manifestations of apartheid custodianship intertwined with political party agendas.[753] History has shown that exaggerated political ideology in a state's approach to trusteeship or custodianship of natural resources can lead to the infringement of property rights and often also socioeconomic rights. State regulation of property is not uncommon in other jurisdictions, nor is it historically uncommon in South Africa. Yet somehow, land has remained impervious to statutory regulation, staying entrenched in the private property regime, regardless of state custodianship.

7.2.1.3 *Should land be treated differently, and not be subject to state custodianship?*

It is noted that the state appears reluctant to break away from the so-called hierarchical apartheid ownership structures. This thesis has suggested that this reluctance is the result of a few factors, including the state's inability to conceptualise new, alternative property rights in ways that will not harm economic stability, as well as the threat of food insecurity and eventual economic collapse should state custodianship of *all* rural or agricultural land be expressly enacted as a way to transform the rural economy.

It is conceded, however, that there have been attempts to weaken the grip of the prevailing private property rights structure. A notable development in this regard was the constitutional reconceptualisation of property as limited by the public interest, providing for state action though expropriation, and deprivations under public

[753] See chapter 6 in general, and par. 6.4.1.1 to 6.4.1.3.1 specifically.

trusteeship and state custodianship in the national interest. In addition, Constitutional Court jurisprudence has made significant strides in influencing the interpretation of property in both common and customary law.[754]

Still, the state's approach to natural resources is increasingly regulatory, which points to the developing and expanding role of the state in managing environmental resources. This research contends that the most recent understandings and interpretations of the state's role deviate from the conventional sovereign 'trusteeship' role in respect of the environment as a whole. The way in which the state's role is lately being framed differs fundamentally from public trusteeship and is more aligned with the state custodianship seen in the MPRDA.

It is suggested here that the references to the state as 'custodian' instead of trustee in recently proposed land reform laws and policies are no accident. They are, in fact, intentional and carry legal implications that provide insight into the state's new policy direction and understanding of its role in relation to land as a natural resource. It is contended that the proposed inclusion of state custodianship of land in the property clause of the Constitution would have conflicted with the protection of private property and would have resulted in a property regime change for *all* property. And these are regulatory outcomes for which neither the state nor the South African economy is prepared.

7.2.1.4 *Does state custodianship compel a property regime change?*

For state custodianship to effect a property regime change, it must be enacted through statute to apply to all land as a natural resource. Thus, the statute acts as a vehicle for radical transformation. This has not been done in respect of land in general. Instead, the state has directed its state custodianship approach towards rural communal land specifically through 'transformative' land reform laws and policies.[755] In light of the democratic state's custodial approach to rural land that

[754] See par. 6.3; Muller *et al.* 2019: 50-55.
[755] See par. 6.4.1.1.

clings to past property constructs, however, the 'transformative' nature of these laws and policies is highly questionable.

7.2.1.5 *Are radical transformative statutes and policies a vehicle for state custodianship of land?*

As mentioned above, no land reform laws have been enacted that expressly designate the state as the custodian of *all* land, and an in-depth study on the constitutionality of such a step falls outside the ambit of this study. It is, however, noteworthy that the application of state custodianship to *certain* land in this way protects established private-sector economic interests, which continue to operate under the private property regime. The presence of a state custodianship approach in land reform policy (apart from land that is privately owned) has had significant consequences for security of tenure in communities that comprise land reform claimants and beneficiaries. A state custodianship approach in the previous homelands informed the recent spate of traditional land laws to the detriment of existing living customary law systems.[756] The state has effectively created a dual property rights system, which directly contradicts its supposed objective to establish a single property system. The research shows that state custodianship, as a regulatory mechanism, results in the centralisation of state authority over the natural resource. It inherently undermines the prospect of decentralised management.[757] Therefore, one may infer that forms of state regulation such as public trusteeship and state custodianship involve an element of authoritarianism, which is intrinsically at odds with self-determination. It is evident from the research conducted that regulatory interventions sit more comfortably with capitalism and the market economy.[758] It has been observed that the recent state custodianship focus of laws and policies in respect of mineral and land resources has suited the state and traditional leaders well, but has generally weakened local people's land rights to the

[756] See par. 6.4.1.2 to 6.4.1.3.
[757] Adams 2013: 93.
[758] See par. 4.2.2, 5.2.1, 6.4.1.2, 6.4.1.3 and 6.5.1.2.

commons.[759] This is evident from the exclusionary effects, with local communities no longer having a say or control over the allocation of land or the use of natural resources in their areas. These powers now lie with a number of state and traditional authorities that are distant from the community and are no longer locally accountable.[760]

These exclusionary outcomes demonstrate the degree of authoritarianism being exercised in the implementation of transformative laws and policies, and how self-determination is being inherently impeded as a natural consequence of state custodianship. It is concluded that South Africa is struggling to balance its economic goals and its socialist promises to the masses. It is not yet certain whether the re-establishment of traditional authorities' powers will secure the rural vote. Nonetheless, a holistic reading of the NDP 2030 shows that South Africa hopes to be a "democratic developmental state" that is concerned with both economic growth and social progress.[761] This research has further shown that economic transformation may be impaired by a lack of social cohesion, and social cohesion requires a sound understanding of the diversity of the South African people and the varied social and functional nature of property in their lives. This is a lesson that South Africa's history of dispossession has taught us.

The disconnect between the legal outcomes of the MPRDA and recent land reform laws and policies on the one hand, and the social progress element of the democratic developmental state model on the other hand, has been pointed out. It becomes even more glaring when one considers the apartheid-style custodianship and ideologies that seem to resurface in the implementation of the modern-day custodianship approach.[762] This disconnect has the potential to jeopardise social cohesion, as the state's 'custodial' approach to land reform measures seems to

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[759] See par. 4.2.4 and 6.4.1.2.1.
[760] Adams 2013: 94.
[761] Van Eck "Social democracy and the 'developmental state' as development alternatives for South Africa" https://www.researchgate.net/publication/241751613_Social_Democracy_and_the_Developmental_State_as_Development_Alternatives_for_South_Africa (accessed on 19 April 2022); Rosa 2011: 542-565.
[762] See par. 6.4.

revert to apartheid divisive boundaries and slide back into paternalistic, patriarchal exclusionary ideologies.

7.2.2 Conclusions on the importance of legal-political context

A recurring theme in this research has been the importance of the legal-political context within which economic and social models for development operate. It has been concluded that the legal-political context has a significant impact on the constitutional interpretation of legal constructs, especially with regard to natural resources that directly influence economic wealth. This was discussed with reference to the colonial and apartheid eras, which ultimately revealed two political schools of thought or paradigms – the socialist democratic camp and the state interventionist camp. The finer theoretical inclinations of each have been discussed with reference to property and the public or national interest. What is clear is that the socialist democracy failed to deliver the redistributive rewards expected, or at least at the pace expected. In response to this perceived failure, there has been a shift in ANC land policy towards the state interventionist camp. In certain respects, the interventionist approach aligns with the NDP 2030 vision of transforming the rural economy. However, there are definite concerns that call into question the state's interpretation of its fiduciary role and what is perceived in this research as an overestimation of its custodianship at the expense of local communities.[763]

As American jurisprudence has emphasised, one of the reasons for imposing a fiduciary duty is the beneficiary's dependence on and vulnerability to state action.[764] If political charges of paternalism are to be averted, those administering land in trust should rather assume that beneficiaries are fully capable of managing their own affairs. This understanding suggests that the trustee has a specific duty to consult landholders in any dealings with regard to land, as well as a more general duty to interpret its powers in a manner that is sensitive to the landholders' historical

[763] See par. 4.2.4.
[764] See par. 3.5.1, and more specifically par. 3.5.1.2.

position.[765] This has clearly not been the state's approach to the regulation of communal land tenure.

It is concluded that political ideological influences on the use of law and policy in regulating property and natural resources are historically inescapable. Ultimately, the law and politics are often two sides of the same coin. At the same time, however, no law or policy is exempt from the process of constitutional influencing. Therefore, it has been argued that the problem of insecurity of tenure may not lie with ownership *per se*. Instead, the root of the problem may be land laws and policies that fail to grant ownership to land reform beneficiaries and communities who seek it, rather defaulting to a paternalistic approach of state custodianship of land that is reminiscent of apartheid trust tenure[766] and fails to provide alternative tenure forms that are legally secure and reflective of present-day rural land tenure practices. In other words, it is crucial that the drafters of land reform laws and policy have a better understanding of the content and legal implications of property law constructs, and how these can be creatively and lawfully adapted to strengthen security of tenure. The enactment of transformative laws and policies has the potential to reconfigure the property rights system.

However, whether the regulation of property laws will lead to transformative and just outcomes depends more on the legal-political context. As explained, 'legal-political context' for purposes of this research refers to the state's constitutional interpretation of its own role, the extent to which the state gives effect to the Bill of Rights, the level of democracy (i.e. accountability and public participation in law making) adhered to by the state, and the political will to dismantle property strongholds through redistribution and strengthening of property rights. In addition, part of the legal-political context is also the public's judgment of the state's ability – in other words,

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[765] Bennett & Powell 2000: 622.

[766] See par. 6.3.1. See also Wicomb 2014: 145. "The acceptance that the historical and ongoing non-recognition of customary forms of tenure are new examples of marginalisation and discrimination, provides the opportunity for customary communities to argue for the ring-fencing of their rights to resources in the face of state custodianship … [T]his addresses the problem of state custodianship of resources that potentially limit the customary tenure protected by the Constitution."

the legitimacy of a government in the eyes of its people. If government officials are perceived as experts who aim to promote the common good and general welfare of society, state interventions would typically be regarded more favourably.[767] On the other hand, if officials and their conduct are experienced as paternalistic, autocratic, unethical and only aimed at benefiting a certain societal grouping (i.e. elites), citizens would generally not welcome state interventions.[768]

The reality is that the vast majority of developing states have accepted that the liberalisation of economies and continued democratisation of political systems can stimulate sustainable development and economic growth. It is clear, therefore, that politics influence the economy and *vice versa*. The two cannot be separated but are intertwined. Thus, the levels and ways of development depend on the state's interventionist role in the economy and society.[769]

7.2.2.1 *A word on apartheid-style ideologies as regressive and undemocratic*

It is concluded that necessary reforms must involve a degree of land regulation by the state. However, statutory and policy measures must at all costs avoid apartheid-style ideology that is contrary to or in conflict with the constitutional objectives of land redistribution and security of tenure. South Africa already has a high level of state intervention or regulation, with the state intervening in society in general and its economy in various ways. These include regulatory interference by means of national laws, policies and by-laws, as well as more facilitatory interventions such as plans, strategies, programmes and projects.[770] However, the intensity and scale of interventions should be considered against the particular nature of the state.

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[767] Parton 1994: 14.
[768] See par. 6.4.1; Van der Waldt 2015: 36-37; Parton 1994: 9-32.
[769] See par. 3.2.1.3; Meyer & Van der Elst 2014: 76
[770] Van der Waldt 2015: 37. See also Mostert 2013: 157. "The balance between state regulation and private rights has fluctuated significantly over time. The ebb and flow of such policies affected the nature of regulation significantly but has had less impact on the intensity of the regulation." Badenhorst *et al.* 2007: par. 1.

It is important to note that a developmental state belongs to a category of state that intervenes in the affairs of society, and particularly in the economy.[771] However, South Africa is directing its efforts at becoming a 'democratic' developmental state, as opposed to a mere developmental state.[772]

The MPRDA and NWA are examples of statutes that serve as vehicles to achieve the transformation of existing property structures. It has been established that state custodianship in the MPRDA is a radical legislative measure to transform the property structure, which entails altering property rights. It is at this point of interference in property rights where the oppositional and exclusionary rationale of pre-constitutional ideology, which promotes a narrative of irreconcilable tensions, emerges as an excuse for avoiding creative solutions that demand a modicum of flexibility from all rights holders. As such, the property regime conundrum is framed as a supposed choice between the protection of property rights on the one hand, and the regulation of property in the public or national interest on the other.

If, however, the property regime conundrum[773] is correctly viewed from the perspective that there is but one constitutional legal system, and that all laws, political policies and administrative action are subject to constitutional interpretation, the conundrum or 'choice' ceases to exist. From this perspective, justifiable state regulation of property is acceptable as a necessary consequence of the Constitution. To be 'justifiable' and 'reasonable', however, any implementation of state interventions such as state custodianship must adhere to a clearly defined property rights regime.[774] One cannot ignore the fact that individuals and their rights are located within political communities. As such, providing an account of the public function of property becomes vital, as this ensures that community interests and values are built into the property rights system. A failure to supply a coherent account of the public function of property makes it difficult to rationalise decisions

[771] Koehler & Chopra 2014: 26.
[772] Van der Waldt 2015: 38-39.
[773] See par. 6.2.
[774] See par. 6.2.

concerning the public interest and exposes such decisions to criticism for being an arbitrary exercise of power[775] and, therefore, in conflict with the notion of democracy.

Nevertheless, it is concluded here that state custodianship under the MPRDA and public trusteeship under the NWA are both legislative attempts to escape the exclusionary common law property rights system by replacing it with a statutory (regulatory) public property rights regime. This is being done in the hope of creating inclusionary outcomes, such as the equitable redistribution of natural resources, legally secure tenure, and the promotion of social and economic development. The extent to which the state can capably regulate property, while remaining within the parameters of the Constitution and Bill of Rights, will depend on the lawful consequences of its laws, policies and regulatory mechanisms. However, as this research has shown, state custodianship as a regulatory mechanism tends to recreate apartheid-era insecure tenure – a curious outcome, given that it is intended as a tool to escape inherited exclusionary systems.

Some argue that these exclusionary outcomes may be the result of a reliance on private property constructs, and the research confirms that it has indeed been difficult to escape the technical usefulness of private property law.[776] However, it seems far-fetched to argue that this is reason enough to abandon the technical value of private property altogether, or to conclude that private property constructs are incapable of being developed to serve the public interest. The private property regime cannot be made the sole scapegoat for the ongoing manifestations of apartheid-like exclusionary outcomes in a constitutional property system. If we do so, we would be putting too much stock in a legal construct that is intended to be a tool for change. If the law is the sword, it cannot be said that the sword has caused the harm, but rather the swordsman who wields the sword. Similarly, regulatory mechanisms such as state custodianship that rely on private law constructs must be wielded in a manner that intends transformation for social justice as well as

[775] Barnes 2009: 64-65.
[776] See par. 6.3.1.

economic development. This will require a level of flexibility and creativity on the part of Parliament and the legislature. This has not been the case. As a result, land reform remains locked in the same system of hierarchy that preserves the capitalist interests of elites through the retention and accumulation of wealth for some at the expense of the majority. According to this research, the common law of property is subject to a continuous process of constitutional influencing.[777] This can broaden the constitutional possibilities of the common law, provided that it is being interpreted and implemented in ways that give effect to the Bill of Rights and inclusivity.

7.2.3 Key findings: Distinguishing state custodianship from public trusteeship

The research has identified the following distinguishable aspects:

- Equitable access and beneficial use for all South Africans

  State custodianship under the MPRDA is failing to promote social and economic development for people in rural communities. Access to and benefit in land, water and mineral resources in South Africa continues to be concentrated in the hands of a privileged few. Public trusteeship differs from state custodianship in that it limits the state's ability to alienate, transfer or extinguish the common property held in trust on behalf of the nation. The presumption against alienation is an essential and well-established characteristic of the public trust doctrine that protects the natural resource from privatisation. Yet this limitation does not apply to state custodianship in the MPRDA.[778]

- The exclusion of private ownership of natural resources

  The state does not acquire private law ownership of the asset under public trusteeship or state custodianship. Yet the state's extensive powers and entitlements under state custodianship permit it to grant rights that are ordinarily associated with ownership. Therefore, through regulation, the state

[777] See par. 6.3.1.
[778] See par. 4.2.1.

maintains control over the ownership of natural resources, rendering it the gatekeeper to all mineral rights. This suggests that custodianship is somewhat akin to ownership and only narrowly escapes nationalisation of the resource.[779]

- A property regime change from private to public

  Both public trusteeship and state custodianship may deprive individuals of property rights in the process of regulation. This is so because, through their enactment, public trusteeship and state custodianship compel a property regime change from private to public. This is done by the removal or severance of the natural resource from the private property regime (i.e. landownership). Mineral resources lend themselves to state custodianship as opposed to public trusteeship, as minerals do not have a unitary interdependent cycle[780] and cannot be argued to be a basic human right needed for survival. The nature of the resource determines the most appropriate regulatory mechanism, which, in turn, determines the type of property rights. The NWA grants statutory water use rights. In contrast, the MPRDA creates limited real rights and relies heavily on private property rights, regardless of its ostensible property regime change.[781]

- The extent of judicial oversight

  The *Baleni* matter highlights the extent of the judiciary's involvement to ensure that the exercise of state custodianship is aligned with the public interest. It illustrates how state custodianship is susceptible to abuse and, if not correctly exercised, can have devastating consequences for land tenure.[782]

- A flexible and indeterminate nature

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[779] See par. 4.2.2.
[780] See par. 4.2.2.
[781] See par. 4.2.3.
[782] See par. 4.2.4; Presidential Advisory Panel on Land Reform and Agriculture 2019: 479.

As Mogoeng CJ indicated,[783] there is room to create other types of rights under a state custodianship model. Nothing prevents the state from granting statutory use rights in addition to limited real rights. Because state custodianship is a novel construct of an indeterminate nature, it is much more capable than public trusteeship of being developed to create new categories of property rights. However, this also makes state custodianship susceptible to varied political interpretations.[784] Therefore, it is incumbent on the Constitutional Court to provide interpretative substance to the content and constraints of this regulatory mechanism.[785]

- An expansive jurisdictional footprint

  State custodianship as implemented under the MPRDA affects a number of interrelated and interdependent natural resources. This invariably affects the socioeconomic rights of people and has required a high level of judicial oversight as a result.[786]

- The exclusion of expropriation with compensation

  Public trusteeship and state custodianship are both regulatory forms that amount to deprivation. As such, neither results in expropriation, and therefore, the payment of compensation is, in principle, excluded.[787]

7.2.4 Conclusions on shifts in political interpretations of land policy

A relatively new development alongside private-sector capitalism is the significant administrative and political role that traditional leaders are positioned to play in the management of communal land. This is a noticeable shift in national land policy, which previously demonstrated a sensitivity to the controversial history of so-called

[783] *Agri SA*: par. 25.
[784] Van der Walt 2000: 226-243.
[785] See par. 4.2.5.
[786] See par. 4.2.6.
[787] See par. 4.2.7.

tribal or traditional authorities. The state now recognises the (patriarchal) status of traditional leaders as functionaries or agents of the state. It is concluded that the state's abdication or delegation of its fiduciary responsibility to traditional leaders by way of statute runs counter to the conventional understanding of its inalienable trust relationship. Equally conflicting is the state's ongoing retention of substantive ownership entitlements in communal land, without providing beneficiaries legally secure tenure. Under state custodianship, the state reserves its right to grant ownership in certain instances and may grant a variety of land rights not limited to statutory use rights. Nevertheless, long-lasting tenancy remains the primary form of property rights granted to previously disadvantaged land reform beneficiaries.

This research suggests that the state has reviewed its political interpretation of its role, as well as of the meaning of 'security of tenure' and 'redistribution' under a regulatory model.[788] This new political interpretation of its regulatory role with regard to land manifests in recent land laws in ways that, according to an expert panel report, have resulted in harmful unintended consequences. It is concluded in this thesis that current land policy sets agricultural production for commercialisation[789] as a prerequisite for secure land tenure, which is a clear shift in political ideology away from earlier, socialist ANC land policy. This is evident from the prioritisation of statutory control of access to agricultural land and its optimal productive and commercial use by instituting restrictive landholding constructs that are highly administrative and dependent on the state's custodianship.[790] This is a distinctly different policy approach from that in the White Paper on Land Reform, which promised access to land as a "basic human need", and proposed private ownership

[788] See par. 6.4.1.3.1.
[789] Van der Waldt 2015: 39. "[I]n the case of privatisation, Kerr … does not hesitate to call privatisation a 'rip-off of the general public for the benefit of the wealthy'. According to him, 'Privatisation of public services [assets] involves a massive transfer of wealth from taxpayers to the pockets of private business interests'. It is evident that not all types of interventions yield positive results. There may be short-term benefits, but less-desired consequences for the longer term."
[790] Pope 2010: 337.

as the solution.[791] This is an example of policy that has the clear potential of exclusionary outcomes in the benefits of land as a natural resource.

7.2.5 Conclusions on the 'cloaked' or surreptitious nature of apartheid ideologies in the state's custodianship-of-land approach

The pervasive remnants of apartheid ideology continue to produce inequity with regard to the distribution and beneficial use of South Africa's natural resources. It is concluded that the democratic state's custodial approach to rural land that keeps clinging to past constructs of property fails to empower land reform beneficiaries with *actual* redistribution. It grants undefined and insecure property rights and fails to take into account the community, cultural and social diversity that makes property functional and social. It re-establishes Bantustan boundaries and exhibits a patriarchal, paternalistic ideology towards the allocation of land rights.

Moreover, while it is accepted that state custodianship amounts to the centralisation of state powers, the state in this instance has extended its centralised control over communal land and its resources to traditional authorities, who are simultaneously subject to and agents of the state. This is not in keeping with the state's role as 'trustee', in terms of which it must keep the environment and its natural resources in trust on the nation's behalf and safeguard natural resources for present and future generations. Through state custodianship policies on land, traditional leaders have been granted powers that are essentially an extension of the state's authority, being able to dispose of communal land unilaterally, without accountability to the community. As such, the state's custodianship of rural land is the exact opposite of transformative.

The transformation of landownership in South Africa was key to the ANC's ideological goals of national development,[792] and ANC land policies recognised

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[791] RSA 1991; Pienaar 2011: 33. See also par. 6.4.1.3.1.

[792] Greffrath "Land reform, political instability and commercial agriculture in South Africa: An assessment" https://www.academia.edu/37320502/Land_reform_political_instability_and_commercial_agriculture_in_South_Africa_An_assessment (accessed on 12 June 2022).

established occupants as the "rightful owners" of communal land.[793] Current land policy, on the other hand, sets agricultural production for commercialisation as a prerequisite for secure land tenure. This is not only a clear shift in ideology, but also supports the recurring theme of a disconnect between recent land reform laws and policies and the lived realities of rural people on communal land. Clearly, the strong socialist ideology that focused on securing tenure for the poor and most vulnerable is no longer the central land reform theme. The shift in land policy is supported by undertones and, in certain respects, outright expressions of state custodianship of land.

In conclusion, the state is grappling to strike an appropriate balance between its democratic principles and procedures on the one hand, and its ambitious developmental goals on the other. As a result, the extent of the state's regulatory role in society remains uncertain and inconsistent, as it continues to be influenced by a multitude of oppositional forces and agendas. This sees the state constantly subjected to different political ideological nuances, which gives rise to diametrically opposing constitutional interpretations.

South Africa's Constitutional Court has constitutional enforcement powers. As such, it has the last say on the meaning of the constitutional text and its application to a particular area, including the notion of state custodianship, which ultimately derives its stewardship and fiduciary authority from the Constitution. Therefore, the Constitutional Court can overrule legislation that is inconsistent with its interpretation of the Constitution.[794] It is the state's constitutional mandate to carry out effective redistribution and provide secure land rights to previously disadvantaged persons. Put simply, it is mandated to redress past injustice.

Therefore, treating communal land as a commodity solely purposed for commercialisation is contrary to the primary constitutional objectives of section 25 of the Constitution, and in conflict with the state's fiduciary responsibility in this regard.

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[793] Claassens 2014b: 771.
[794] Currie *et al.* 2001: 35.

Recent laws and policies suggest that the state's approach to achieving land reform has become disconnected from the sociopolitical context of dispossession it was intended to redress. As trustee or custodian, the state is intended to be a duty bearer, not a right holder or a competitor to beneficiaries. Recent land reform laws and policies also seem to obscure accountability mechanisms between land beneficiaries and landholding communities, the state, and traditional authorities as the state's functionaries in the former homelands. As such, state custodianship, coupled with an economic developmental drive for greater commercialisation and productivity, creates the possibility of opportunism and may result in dealings with traditional authorities that run counter to the state's conventional fiduciary duties as trustee of the environment.

7.3 RECOMMENDATIONS AND FUTURE RESEARCH

7.3.1 Recommendations

7.3.1.1 If South Africa is a democratic state, it must create a voice for the poor and marginalised, while protecting, defining and securing all citizens' rights, and promoting institutional separation of powers and functions. It is recommended that the state evaluate the balance between its democratic principles and its ambition of becoming a developmental state.

7.3.1.2 The centralisation of state authority, the maintenance of perpetual tenancy, the re-establishment of apartheid boundaries and powerful traditional authorities all come at the expense of civil society's evolving self-determination. While these may be typical by-products of a developmental state, they may result in authoritarianism if not properly managed, which would conflict with democratic governance. It is recommended that the state regularise transparent decision-making, strengthen accountability, and improve effective monitoring and oversight procedures.

7.3.1.3 State custodianship is in stark contrast to the constitutional and democratic regime (legal-political context) agreed upon as a compromise in the aftermath of apartheid. It deviates from the philosophical trusteeship principles in certain key respects. In addition, it points to a shift in political interpretation of the state's role in respect of natural resources that clashes with the political culture of socialist resistance and the expectations of previously disadvantaged groups. Moreover, it is being implicitly applied to communal and statutory land tenure, which raises concerns of a discriminatory dualist property system being created under the guise of 'state custodianship'. Custodianship of land is also likely being used as an entry point to gain access to other natural resources. It is recommended that state custodianship not be applied to land in its current indeterminate form.

7.3.1.4 It is recommended that the state amend traditional laws that exclude or limit women's engagement in traditional structures and decision-making. Traditional leaders should not be accountable to the state alone, but also to the communities they serve. Therefore, it is recommended that living customary law practices be supported in traditional laws and policy to remedy this disconnect.

7.3.1.5 The state should execute its fiduciary duties to protect, preserve and conserve natural resources and manage their sustainable use. It is recommended that this be done in a way that allows the entire country and particularly also local communities to benefit more directly from access to and use of all natural resources.

7.3.1.6 It is recommended that the state's interpretation of its role be aligned with global trends and constitutional jurisprudence on public trusteeship and the content of the stewardship ethic.

7.3.1.7 It has been said that the so-called 'trade-off' of social justice may affect social cohesion and inclusivity, which can have a negative impact on the

success of economic development in the long term. It is recommended that the state improve its public participation processes in meaningful ways to encourage social cohesion at a local level. State regulation must include context-sensitive policies of engagement on socioeconomic issues in society.

7.3.1.8 Parliament and the legislature do not have the authority to adopt laws that lack a constitutional norm. In other words, laws such as the *Traditional Courts Bill* should not pass constitutional muster. It is therefore expected that the *Traditional Courts Bill* will be declared unconstitutional, as it deprives people of their constitutional right to access the court of their choosing. It also seeks to confer on traditional authorities' administrative powers derived from regulatory statutes (not customary law), including the unilateral power to dispossess the very people they represent of their property rights. Statutory grounds for dispossession are ambiguous.

7.3.1.9 The initial goals of land reform were to return land that had been dispossessed to land claimants, reverse racially biased patterns of landownership, and dismantle the monopolisation of natural resources to the exclusion of the majority. These goals imply a facilitative, supportive state that has confidence in its people. This is in stark contrast with the exaggerated paternalistic custodianship approach demonstrated in recent state regulation. It is recommended that the state re-evaluate its ideological approach to land reform.

7.3.2 Future research

This research has raised many ancillary questions that are worth exploring further, but fell outside the main scope of the present research problem and primary research questions. Therefore, the following critical questions will be examined in future research:

7.3.2.1 What is justifiable socioeconomic development? And does state custodianship promote justifiable and reasonable socioeconomic development in South Africa?

7.3.2.2 Who are the true trustees or custodians of communal land – the state or traditional authorities? And what are the accountability procedures in terms of statutory and customary law?

7.3.2.3 What is the extent of, or limit placed on, public engagement with regard to the regulation of access to and use of natural resources in the national or public interest?

7.3.2.4 If the centralisation of property rights goes hand in hand with regulation, does the regulation of property mean security of tenure? In other words, can regulated property be 'secure'? In answering this question, the state's perceptions and how these perceptions influence what is considered secure tenure will be considered.

7.3.2.5 Is the developmental state paradigm the most appropriate for South Africa, given the present-day legal-political context of a majoritarian state? This research would examine the intersectionality between the developmental state paradigm and state regulatory measures. It will explore ways to ensure a sound balance between the autonomy needed to pursue national development goals, and the accountability required to ensure that the achieved objectives are a legitimate reflection of societal needs. Constitutions ought to be democracy-reinforcing, and the tension between constitutional review and majoritarian democracy remains a concern.

7.3.2.6 Does transformative constitutionalism leave too much scope for the determination of property rights and state powers, ultimately burdening the courts with interpreting these rights and powers?

It is therefore clear that the research and discussion of public trusteeship and state custodianship is not clear cut and behoves further research. Although these are useful tools to achieve land reform, if not properly employed and administered, it does not lead to the expected outcomes.

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