

Will state custodianship lead to real empowerment?

As this article is being written, parliamentarians serving on the Ad Hoc Committee are considering various proposals to amend section 25 of the Constitution put forth by political parties. As readers will likely know, no final wording could be agreed on by the end of May so the Committee was given additional time until the end of August to come up with a report for the National Assembly. One of the most contentious proposals that could not be agreed upon by the end of May, was to state that land is a natural resource and the common heritage of the people as a whole under the custodianship of the state. To place it into context, the same wording already exists in legislation controlling water and mineral rights in South Africa. It is for this reason that no private person can 'own' water in South Africa but must rather apply to the state for a use right. The proposal would essentially place land in the same category.

State custodianship over a resource such as water may be justifiable because it is a limited resource. The state therefore has to act to ensure that water is equitably distributed and to prevent any single person from prejudicing another. The state likewise has a duty to ensure that all of South Africa's people have access to land on an equitable basis. On this basis one can understand the temptation to equate custodianship to redistribution but that would ignore the fundamental difference between land and water.

For instance, water is a consumable resource that is in a state of flux. It is always moving along a catchment area and oversight is required to prevent upstream users from taking all of the water to the detriment of those further along the catchment. If the state does not step in to limit the use upstream, it can prejudice users further along the catchment and where needed, water can even be moved through inter-basin transfers. The public interest considerations for land are very different. The manner in which land is managed could have an impact on adjacent properties if invasive plants are left to propagate, no preventative measures are put in place to prevent erosion or fires from spreading etc. but these risks can be mitigated by placing a duty of care on the owner or occupier. Whilst the state has a real role to play in the way in which water is managed, the public interest in land relates more to who holds access to the land.

There is no doubt that the state has a significant role to enable equitable access to land. In other words, the state must work towards redistributing land in the public interest. Whether or not custodianship is the right vehicle to do so is another matter altogether because custodianship goes well beyond enabling equitable access. In law, a custodian or trustee is typically appointed to manage someone's affairs when that person is not capable of managing it themselves. For instance, when a farm is inherited by a child, a trustee would manage the farm on his behalf until the child is capable to do so himself. This is precisely the challenge with using state custodianship to further redistribution: The intention may be to promote equitable access but the implications go well beyond this aim. In fact, it would imply that the state is required to manage the land on behalf of those who live or work on it as they are not trusted to manage the land optimally when left to their own devices. Ironically, this form of state control runs contrary to the basic principle of empowerment.

According to management theory, empowerment involves delegating autonomy and decision-making power to the lowest level of responsibility. If someone is empowered, it

means that they are allowed to make critical decisions and accept responsibility for the consequences of those decisions. Similarly, broad-based black economic empowerment is defined in the B-BBEE Act as "...increasing the number of black people that manage, own and control enterprises and productive assets...". Make no mistake, South Africa needs to change the racial profile of land ownership/access and the state has a central role to play in this regard. However, custodianship may not be the best vehicle to achieve this because it removes decision-making autonomy and responsibility from those who are given access to land. A far more sustainable solution would be to drive a targeted land redistribution programme that empowers new owners or occupiers to manage the land and not merely reside there.