**STATE CUSTODIANSHIP OF LAND IS THE ONLY RATIONAL APPROACH TO EXPROPRIATION WITHOUT COMPENSATION: THE ECONOMIC FREEDOM FIGHTERS POSITION**

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The National Assembly Ad Hoc Committee to Initiate and Introduce Legislation amending Section 25 of the Constitution is seized with the responsibility and obligation of introducing legislation that should amend Section 25 of South Africa's Constitution to allow land expropriation without compensation. Those who were part of the early 1990s negotiated settlement for South Africa to move from wholesale apartheid to economic apartheid with civil rights, agreed on a property clause that institutionalised and solidified the unequal property relations between white and black people in South Africa.

On the 27th of February 2018, the National Assembly adopted a Parliamentary motion brought by Economic Freedom Fighters and mandated the Constitutional Review Committee to do two things primarily;

1. **review and amend section 25 of the Constitution to make it possible for the State to expropriate land in the public interest without compensation, and in the process conduct public hearings to get the views of ordinary South Africans, policy-makers, civil society organisations and academics, about the necessity of, and mechanisms for expropriating land without compensation; and**
2. **propose the necessary constitutional amendments regarding the kind of future land tenure regime needed, considering the necessity of the State being a custodian of all South African land.**

Between the 26th of June 2018 and the 4th of August 2018, the Constitutional Review Committee (CRC) held 16 public hearings across all nine provinces and listened to passionate pleas of primarily black people who demanded that land should be returned to its rightful owners. The Committee received 449 522 written submissions. In addition, more than 60 organisations and individuals went to make oral presentations in Parliament.

Whilst the CRC dealt intensely with the first part of the mandate. It did not pay attention enough attention to the second mandate. Nevertheless, the 5th democratic Parliament adopted a final CRC report on the 4th and 5th of December 2018, by the National Assembly and the National Council of Provinces, respectively. The CRC report mandated, amongst others, subsequent processes to consider the State custodianship of all South Africa’s land.

The CRC report made the following observation on State Custodianship, “there were differing views regarding ownership/custodianship of land and issuing title deeds to beneficiaries. There was an argument for the State to have sole custodianship of all land, while the other argument was for issuing title deeds to beneficiaries of land redistribution programme. A mixed approach to ownership of land was proposed, thus recognising the importance of individual land ownership rights".

**State custodianship of South Africa's land is objectively the only mechanism to guarantee all South Africans equitable access to land. Any other method will not even scratch the surface of massive land poverty and hunger that defines the black majority and Africans in particular. Land poverty and hunger are undoubtedly a direct consequence of the barbaric colonial conquest and the nonsensical, cruel system of apartheid that entrenched dispossession and isolation of the indigenous Africans.**

There is sometimes confusion between nationalisation and custodianship created to deliberately cause confusion by right-wing reactionary forces and derail parliamentary processes to amend the constitution. Nationalisation is defined as a transfer of ownership of means of production and exchange to the State and to utilise them for collective interest. Others have described nationalisation in more explicit terms. For example, a take-over of ownership and operation of an industry or business previously in the hands of private citizens, with or without the consent of the former owners and with or without fair compensation. In a practical sense, nationalisation describes different situations, including situations where a state:

1. Takes a minority shareholding in an enterprise (usually termed partial nationalisation)
2. Takes a majority shareholding but leaves managerial control in the hands of the private minority shareholders
3. The State takes over 100% ownership of an enterprise with or without compensation but enters into a management contract handing over management to private capital.
4. The State takes over the management of an enterprise with a minority or majority private shareholding.
5. The State takes over, with or without compensation, both 100% ownership and management of an enterprise.

The primary meaning of custodianship is the safekeeping and protection of materials relating to the past, which may or may not involve limiting or promoting access to such material. More generally, others define the notion of a custodian as an institution, community or individual, or government assuming the responsibility. There is limited literature on the conceptualisation of custodianship as it is relatively new and contested.

However, the Constitutional Court case, Agri SA v Minister for Minerals and Energy (CCT51/12) of 2013, distinguished ownership and custodianship. The majority view was that the custodianship exercised by the State did not amount to an acquisition of the right and only defined and did not define what custodianship means, beyond the State being a "facilitator" or a "conduit" for others to access South Africa's mineral wealth. The court appears to distinguish between the reason for expropriation in that it is custodianship because the State did not acquire the mineral rights to exploit them itself but on behalf of people as a whole.

The difference between nationalisation and custodianship is that nationalisation translates to the transfer of ownership to the State. The State takes some form of management or control of nationalised assets. Whereas custodianship suggests, the State acquires rights on behalf of others to facilitate access without either managing, controlling, or exploiting in the case of mineral resources. Under state custodianship, there must be rules of administration applicable.

To thoroughly understand State custodianship of the land, one does not need to go further than vital pieces of legislation in South Africa that govern vital natural resources, i.e. Mineral Petroleum and Resources Development Act (MPRDA). Section 2 a) and b) of the Act give the two primary objectives of this seminal law and states that the objects of the Act are to a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic, and b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources.

Section 3 (1) of the MPRDA emphatically states that "**Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans**". The entirety of the Act after that determines and defines the circumstances under which those with the capacity to cultivate the mineral and petroleum resources should be allowed to do so. That is not the subject of this perspective. However, it is important to highlight that this legislation is consistent with the constitution and international laws, hence that most mines operating under this legislation are multinational corporations.

The second illustration of State custodianship of a natural resource in South Africa is on water. In the National Water Act of 1998, "National government is designated the public trustee of the nation's resources to 'ensure that water is protected, used, developed, conserved, managed and controlled sustainably and equitably, for the benefit of all persons and in accordance with its constitutional mandate". Effectively, whoever harvests water for agricultural, domestic and energy purposes necessarily need the State's permission, which is composited of a democratically elected Parliament, the Executive and an Independent Judiciary. The National Water Act is not unconstitutional and does not infringe on anyone's rights.

The State, composed of an elected Parliament, appointed Executive and Independent Judiciary, is the most dependable custodian of South Africa's natural resources. The State is currently the custodian of South Africa's mineral resources, water and strategic pieces of land. The custodianship is justified by political, economic, historical, and moral justification, as state custodianship is intended to benefit most people.

State custodianship is the only practical manner in which South Africa can effectively succeed in land redistribution. Redistribution should be the essence of land reform, and the State cannot redistribute what it does not have. The risk of a piece-meal approach to land redistribution is that the State will distribute the land under its control and, at some point, find itself landless while white people continue to control the majority of the land.

Due to South Africa’s cruel history of barbaric racism underpinned by the colonial dispossession of land from the black majority and Africans, the State custodianship of the land is the only rational and logical option towards equal redistribution of the land. The Surveyor General recently illustrated that close to 80% of Africa's land is owned and controlled by the white minority. The black majority is congested in 13% of the largely barren land, whilst the remainder is owned and controlled by different spheres of government.

More fundamentally, for society as unequal as our, State Custodianship of land is important for the following reasons:

1. Land, which ought to be a public resource, has been commodified and can be owned, bought or sold. This is a foreign concept to the manner Africans relate to the land; as a means of affirming identity, as a solidifier of the relationship between the physical world and the spiritual world, as an inheritance from those who came before us, which must be passed to those still to come. Private ownership of land is a colonial construct. State custodianship of land would therefore be a means through which the concept of land ownership is decolonised. The State does not own the land, the people as a whole do, and the State is a mere custodian on behalf of the people/.
2. Private ownership of land has allowed for the injudicious accumulation of land by only a few of those with access to capital. It is not even all white people who own land in the South African context, but just a tiny minority. State custodianship of land will mediate this dynamic and ensure that everyone has access to land by allocating land use rights. This will not be mediated by money but by the use for which the land is intended. So, State custodianship would ensure a more equitable redistribution of land use rights and eliminate exploitation of one class by another, and in South Africa's case, of one race by another.
3. The land question has taken a more urban form due to rapid urbanisation, leading to unsustainable and dehumanising informal settlements in the cities. State custodianship of land would give the State massive leeway to and for ensuring sustained, State directed development for the benefit of the majority of South Africans. This will include targeted development of human settlements in areas closer to where people work and the eventual elimination of unexpected developments.
4. State custodianship of land is the most reliable manner of guaranteeing the security of tenure. The land-use rights given to citizens become a solemn contract between the State and the citizens it represents. The clarity of purpose for which these rights are given ensures that no one can arbitrarily take these land use rights away.
5. Linked to the above, State custodianship would guarantee the rights of the most vulnerable in society against evictions. Farmworkers, farm dwellers and people in townships get evicted every day from areas they have lived their whole lives when purported new owners buy the farms. When the land is under the custodianship of the State, the rights of these people to the legal occupation of the land will be guaranteed.
6. This will also lower the cost of building houses and reduce the number of years people must service their home loans. Buying land for housing development is the most expensive part of building a house in urban areas. State custodianship will eliminate this aspect of the cost, lifting a heavy load on many South Africans who are heavily indebted or cannot afford to buy their own houses.
7. State custodianship will also allow for a more democratic manner of administering land. For example, in the former homelands, where traditional leaders still do land allocation, women are sometimes barred from the land allocation based on their gender; and young, unmarried people are also not granted land parcels. State custodianship would ensure that land is administered democratically, with no discrimination based on gender, age or sexual orientation.

South Africa has a total land surface of almost 122 Million Hectares. About 79% of this land is privately owned, 14% owned by the State, and 7% unaccounted for, meaning it was unregistered land, which the State may technically own, according to the 2014 Land Audit Report. Of the privately-owned land, the last land audit (2017) shows that of the surveyed land, individuals, companies and trusts own 89 523 044 ha, which is about 90% of the land under private ownership. Broken down into finer details, land in private ownership is as follows: Individuals own 37 800 986 ha or 39% of this total land; followed by trusts at 29 291 857 ha or 31%; companies at 23 199 904 or 25%; Community Based Organisations at 3 549 489 ha or 4%; and co-ownership at 883 589 ha or 1%.

On farmland ownership, the Land audit found that whites own 26 663 144 ha or 72% of the total 37 031 283 ha farms and agricultural holdings by individual landowners; followed by Coloureds at 5 371 383 ha or 15%, Indians at 2 031 790 ha or 5%, Africans at 1 314 873 ha or 4%, other at 1 271 562 ha or 3%, and co-owners at 425 537 ha or 1%.

The State is currently custodian of including the land parcels in the control of the Department of Public Works, Trade & Industry, Forestry and Agriculture, SANPARKS, different government departments and Municipalities. In Public Works, most of the land is fallow, but that which is leased to private users, security of tenure is guaranteed and attached to the use purpose. The land that accommodates Special Economic Zones (SEZs) is under the custodianship of the State, and those using the land have the security of tenure in line with the purpose they applied for the land usage. For instance, the land given to FORD automotive for the recently unveiled auto special economic zone in Tshwane cannot be used for any other purpose despite the industrial expansion.

SANPARKS owns about 6 million hectares of game reserves and national parks and leases portions of that land to private game lodges, some with foreign and multinational owners. The security of tenure in those private game lodges is guaranteed.

The Department of Agriculture, Forestry and Fisheries (DAFF) indirectly manages 368 505 hectares of State plantations (Category A) through lease agreements signed with four private forestry companies and the South African Forestry Company Ltd (SAFCOL). DAFF also directly manages one hundred and nine (109) commercial forest plantations (Category B and C) with a total area of 63 114.21 hectares (ha). The Category B and C plantations are mainly in Limpopo, Mpumalanga, Eastern Cape and KwaZulu-Natal. The geographic location of the commercial plantations is spread over five different regions, namely: Eastern Cape, KwaZulu-Natal, Limpopo, Mpumalanga and North West.

Category A plantations with a total of seventy-one (71) state-owned plantations (181 185 hectares) are managed by private companies leasing the land from DAFF for a minimum period of 70 years. The companies are MTO Forestry (Pty) Ltd; Amatola Forestry (Pty) Ltd; SiyaQhubeka Forest (Pty) Ltd; and Singisi Forest Products (Pty) Ltd. In addition to this, an area of 187 320 hectares is managed by the South African Forestry Company (SAFCOL), a State-owned company. The security of tenure in those areas is guaranteed. Municipalities own the land, and some release such for agricultural purposes.

**WAY FORWARD**

**THE CURRENT CONSTITUTION READS AS FOLLOWS;**

**The Section 25(Property Clause) is Drafted Thus:**

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.
2. Property may be expropriated only in terms of law of general application.
   1. For a public purpose or in the public interest; and
   2. Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

1. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

* 1. The current use of the property;
  2. The history of the acquisition and use of the property;
  3. The market value of the property;
  4. The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  5. The purpose of the expropriation.

1. For the purposes of this section
   1. 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; and
   2. Property is not limited to land.
2. 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.
3. 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.

1. A person or community dispossessed of property after the 19th of June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

1. No provision of this section 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).**
2. Parliament must enact the legislation referred to in subsection (6).

**THE EFF PROPOSED AMENDMENT READS AS FOLLOWS**

**25. Property**

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.
2. Property may be expropriated **without compensation.**
   1. Only in terms of law of general application –
   2. for a public purpose or in the public interest;

***REMOVE SUBSECTION 3***

1. For the purposes of this section –
   1. 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; and
   2. property is not limited to land.
   3. Land is a natural resource and the common heritage, which belongs to the people as a whole, under the custodianship of the democratic State.
2. The State must take reasonable legislative and other measures which enables state custodianship and for citizens to gain access to land on an equitable basis.
3. 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.
4. A person or community dispossessed of property as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
5. No provision of this section 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).
6. Parliament must enact the legislation referred to in this Section.