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Reconsidering Land Ceiling Legislation in South Africa: Lessons Learned from India

Tina Kotze*

The unequal distribution of agricultural land in South Africa is a direct consequence of the racially discriminatory laws, policies, and practices that were in place for the larger part of the twentieth century. One of the key challenges that the post-1994 government faces is how to address the unequal distribution of land in general, and of "agricultural land" in particular. Considering the slow pace of land redistribution in South Africa, the 2019 Final Report of the Presidential Advisory Panel on Land Reform and Agriculture suggested land ceilings be assessed as a potential mechanism to redistribute agricultural land. Land ceilings impose restrictions on the maximum size of land any person or entity may own. Any land over and above the ceiling limit is regarded as surplus land and may be acquired and redistributed.

The Presidential Advisory Panel on Land Reform and Agriculture's recommendation to explore the possibility of imposing agricultural land ceilings is not a new proposal. Both the 2013 Agricultural Landholding Policy Framework and the 2017 Regulation of Agricultural Landholdings Bill provide for the imposition of land ceilings. However, until now, it was widely speculated (and even accepted) that any envisaged policy or proposed legislation aimed at imposing agricultural land ceilings, had been abandoned. Given the Panel's recommendation to assess the conditions for the application of land ceilings, this Article evaluates the provisions of the proposed Landholdings Bill to determine whether it requires further reformulation. Such a determination warrants a legal comparative analysis.

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India, like South Africa, shares a history of British colonial rule that resulted in a defective and ineffective agricultural system, including inequality in landownership. To address the inequality in landownership, India implemented agricultural land ceilings on a national scale. Given India's extensive experience with imposing land ceilings for more than sixty years, it is worth analyzing both the successes and failures of such legislation and the reasons for these outcomes. This Article focuses on the success of the State of West Bengal. Such a comparative perspective may provide insight into and guidance on establishing (or amending) and implementing land ceiling legislation in South Africa.

The Article concludes with recommendations centered on the formulation (or amendment) of ceiling legislation in South Africa, having regard to the need to preserve prime agricultural land for food security purposes. The Article suggests that the formulation of "agricultural land," the determination of exemptions to the operation of land ceilings, and the retrospectivity of the Act should be considered carefully to ensure that landowners do not reclassify or sell off portions of their land before the implementation of the Act. Provided that the necessary amendments are made to the Landholdings Bill, land ceilings may (at least theoretically) ensure that land is redistributed to beneficiaries of the land reform program while ensuring that agricultural productivity and food security is not jeopardized.

I. Introduction

Agricultural land inequality is a global phenomenon.[1] A recent study led by the International Land Coalition found that land inequality has been increasing steadily since the 1980s.[2] The increase is a result of the proliferation of large-scale industrial farming models supported by market-led policies and open economies prioritizing agricultural exports and return on large-scale investments through economies of scale.[3] Several studies have documented the negative impacts of concentrated landownership and large-scale land acquisitions on social and economic development, food security, political stability, and gender

[1] W Anseeuw and GM Baldinelli, International Land Coalition 'Uneven Ground Land Inequality at the Heart of Unequal Societies: Research Findings from the Land Inequality Initiative' November 2020 1–39, <https://d3o3cb4w253x5q.cloudfront.net/media/documents/2020_11_land_inequality_synthesis_report_uneven_ground_final_en_spread_low_res_2.pdf>; L Bauluz, Y Govind, F Novokmet and International Land Coalition, 'Global Land Inequality: Data Paper' October 2020 <https://d3o3cb4w253x5q.cloudfront.net/media/documents/2020_10_land_inequality_data_paper_global_en_spread.pdf>; J Glass, R Bryce, M Combe, NE Hutchison, MF Price, L Schulz and D Valero, *Research on Interventions to Manage Land Markets and Limit the Concentration of Land Ownership Elsewhere in the World* (Scottish Land Commission, Commissioned Report No 001, 2018) 1–62 <https://www.landcommission.gov.scot/downloads/5dd6c67b34c9e_Land-ownership-restrictions-FINAL-March-2018.pdf>; M Wegerif, W Anseeuw and International Land Coalition, 'Unearthing the Less Visible Trends in Land Inequality' (*Land Inequality Initiative*, 2020) <https://www.landcoalition.org/en/resources/land-and-inequality/>.

[2] Anseeuw and Baldinelli (n 1) 7.

[3] Anseeuw and Baldinelli (n 1) 7. See further K Deininger, *Land Policies for Growth and Poverty Reduction: A World Bank Policy Research Report* (OUP 2003).

equality.[4] The Scottish Land Commission compared land concentration policy and legislative interventions and concluded,

> Concentrated land ownership can create situations in which a single individual or organisation can exercise power over who can obtain land, when, what for and at what price. The risks associated with such concentration of power run counter to the needs of a modern, dynamic economy. They can result, sometimes inadvertently, in dysfunctional rural land markets that can make it difficult for rural communities to fulfil their economic potential, limit opportunities for community development and can constrain or even damage social resilience.[5]

Countries use different policy and legislative interventions to address the unequal distribution of agricultural landownership. These interventions include limitations on foreign ownership,[6] specific

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[4] See in general Organization for Economic Co-operation and Development (OECD), 'Does Income Inequality Hurt Economic Growth?' (*OECD*, December 2014) <https://www.oecd.org/social/Focus-Inequality-and-Growth-2014.pdf>; United Nations, Department of Economic and Social Affairs, 'Sustainable Development Goals' (UN 2020) <https://sdgs.un.org/> and Food and Agriculture Organisation of the United Nations, *Voluntary Guidelines on Responsible Governance and Tenure* (FAO 2012). See further Anseeu and Baldinelli (n 1) 9–13, 16–18; World Bank, *World Development Report: Agriculture for Development* (World Bank 2008); Deininger (n 3); J Falkinger and V Grossman, 'Oligarchic Land Ownership, Entrepreneurship and Economic Development' (2013) J Development Economics 206–15; LK Stevans, 'Income Inequality and Economic Incentives: Is There an Equity–efficiency Tradeoff?' (2012) Research in Economics 149–60; W Easterly, 'Inequality Does Cause Underdevelopment: Insights from a New Instrument' (2007) J Development Economics 755–6; JP Faguet, F Sanchez and MJ Villaveces, *The Paradox of Land Reform, Inequality and Local Development in Colombia* (Working Paper, the London School of Economics and Political Science, 2016); JE Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W.W. Norton 2021).

[5] Scottish Land Commission 'Legislative Proposals to Address the Impact of Scotland's Concentration of Land Ownership: A Discussion Paper from the Scottish Land Commission' (*Scottish Land Commission*, 4 February 2021) 2 <https://www.landcommission.gov.scot/downloads/601acfc4ea58a_Legislative%20proposals%20to%20address%20the%20impact%20of%20Scotland%E2%80%99s%20concentration%20of%20land%20ownership%20-%20Discussion%20Paper%20Feb%202021.pdf>.

[6] For example, policy objectives associated with such restrictions generally include preventing foreign-based speculation in land, controlling the amount and direction of direct foreign investment, ensuring local control over food production, and indirectly controlling immigration.

administrative ownership approval processes, restrictions on land use and management, a preemptive right given to government (or specific individuals such as land reform beneficiaries) to buy land, and imposing land ceilings and/or land floors to regulate the maximum or minimum amount of land a person or entity may own.[7] A range of historical, political, economic, and social "motivations underpin the [selection and] implementation of interventions to achieve policy objectives related to land ownership in the various countries."[8]

In South Africa, the unequal distribution of agricultural land is a direct consequence of racially discriminatory laws,[9] policies, and practices that

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[7] Food and Agriculture Organisation of the United Nations (n 4) 25 identifies land ceilings as a policy option for governments to consider because it makes more land available to be redistributed for agricultural use, be it for subsistence, smallholder and/or emerging farmers' use. See further Glass et al. (n 1) 1–62.

[8] Ibid 12.

[9] JM Pienaar, *Land Reform* (Juta 2014) 80, 94, 375; Advisory Panel on Land Reform and Agriculture *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (4 May 2019) 23–5 <https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000>; Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 29 (November 2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf>. For example, the Natives Land Act 27 of 1913 subsequently renamed the Black Land Act 27 of 1913, the Native Trust and Land Act 18 of 1936 subsequently renamed the Development Trust and Land Act 18 of 1936, the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966. Together, the Natives Land Act and the Native Trust and Land Act can be regarded as forming significant cornerstones of apartheid. See T Fenyes, C van Rooyen and N Vink, 'Reassessment of the Land Acts of 1913 and 1936' (1990) Development Southern Africa 583–9 in this regard. See further HJ Kloppers and GJ Pienaar, 'The Historical Context of Land Reform in South Africa and Early Policies' (2014) 17 Potchefstroom Electronic Law Journal 677–706, 680–4 and L Robinson, 'Rationales for Rural Land Redistribution in South Africa' (1997) Brook J Int'l L 465–504, 472. For a discussion of the historical context of the Natives Land Act 18 of 1936; see P Wickins, 'The Natives Land Act of 1913: A Cautionary Essay on Simple Explanations of Complex Change' (1981) South African J Economics 105–29; H Feinberg, 'The Natives Land Act of 1913 in South Africa: Politics, Race and Segregation in the Early 20th Century' (1993) Int'l J African Historical Studies 65–109. For a general discussion of land initiatives between 1913 and 1948, see H Feinberg, 'Black South African Initiatives and the Land: 1913–1948' (2009) J Contemporary History 39–61.

were in place for most of the twentieth century.[10] One of the key challenges that the post-1994 South African government faces is how to address the unequal distribution of land generally, and agricultural land specifically.[11] Since the new constitutional dispensation and the abolishment of the racially based land control system,[12] South Africa has followed an approach to land where, in principle, access is possible for all persons.[13] This system is characterized by an open, unlimited market and unlimited farm sizes.[14] Ownership of land is subject to the imperative set out in section 25(5) of the Constitution, which provides that the state has a duty to take the necessary legislative steps to broaden access to land on an equitable basis.[15] Despite the constitutional mandate and broader societal goal to facilitate access to land and redistribute wealth to those previously disadvantaged under apartheid,[16] the legacy of land dispossession has not been redressed.[17]

In 1994, the Reconstruction and Development Programme target was to transfer 30% of white commercial agricultural land held in private ownership to poor Black South Africans within five years.[18] However, by 1999, "less than one per cent of commercial farmland had been made

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[10] Kloppers and Pienaar (n 9) 677; L Ntsebeza and R Hall (eds), *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (HSRC Press 2007) 3; Pienaar (n 9) 80–136.

[11] Ntsebeza and Hall (n 10) 3.

[12] The Natives Land Act 27 of 1913 (Black Land Act 27 of 1913); the Native Trust and Land Act 18 of 1936 (the Development Trust and Land Act 18 of 1936); the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966. See further Pienaar (n 9) 80, 94, 375; Advisory Panel on Land Reform and Agriculture (n 9) 23–5; Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (n 9) 29.

[13] JM Pienaar, 'Land Reform: January to March' (2017) 1 Juta Q Rev 1–8 1. See also Pienaar (n 9) 276–80 for more background on global approaches to access to land. See further Glass et al. (n 1) 15.

[14] Pienaar (n 9) 370.

[15] South African Constitution, section 25(5) states, "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."

[16] Kloppers and Pienaar (n 9) 677; Ntsebeza and Hall (n 10) 3; Pienaar (n 9) 80–136.

[17] Advisory Panel on Land Reform and Agriculture (n 9) 5.

[18] Reconstruction and Development Programme (*SA History*, 1994) <https://www.sahistory.org.za/sites/default/files/the_reconstruction_and_development_programm_1994.pdf>.

available to Black South Africans."[19] Accordingly, the South African government extended the deadline to 2014.[20] After almost three decades post-apartheid, this target has still not been realized, and it is unclear whether the target has been abandoned.[21] Moreover, despite two land audit reports released in November 2017 by the Land Centre of Excellence and the South African government, there is still no reliable data on landownership in South Africa. There is also no accurate reflection of ownership patterns in terms of race, making it impossible to ascertain whether there has been any meaningful redistribution.[22] However, the constitutional mandate to redistribute agricultural land and reduce the concentration of agricultural landownership in the hands of a white minority remains imperative. In particular, section 25(5) of the Constitution provides that the state must provide for "reasonable legislative and other measures … to foster conditions which enable citizens to gain access to land on an equitable basis." Accordingly, the question is not whether South

[19] Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (n 9) 207–8.

[20] T Kepe and R Hall *Land Redistribution in South Africa* (Commissioned Report for the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, An Initiative of the Parliament of South Africa, 28 September 2016) 13.

[21] Ibid 13 (stating "this target was set for 1999, then deferred to 2014, then to 2025, then apparently abandoned, and was in any case based on estimates of affordability rather than any inherent social, economic or political logic.").

[22] Compare Land Centre of Excellence, 'Land Audit: A Transactions Approach' (*AgriSA*, November 2017) <https://cisp.cachefly.net/assets/articles/attachments/71719_agrisa_land-audit_november-2017.pdf> and Department of Rural Development and Land Reform, *Land Audit Report: Phase 2 Private Land Ownership by Race, Gender and Nationality* (*Government of South Africa,* November 2017) <https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf>. See further Land Accountability and Research Centre, 'Who Owns the Land? Half an Answer from AgriSA Land Audit' (*Custom Contested*, 8 November 2017) <https://www.customcontested.co.za/who-owns-the-land-half-an-answer-from-agrissa-land-audit/>; South African Institute of Race Relations 'Who Owns the Land: A Critique of the State Land Audit' (*Institute of Race Relations*, 26 March 2018) <https://irr.org.za/reports/occasional-reports/files/who-owns-the-land-26-03-2018.pdf>.

Africa should pursue agricultural land reform, but rather *how* South Africa should do so.[23]

In the redistribution process, agricultural productivity, development, and food security may not be compromised,[24] and mechanisms employed have to be aligned with constitutional imperatives, including the parameters provided for in the property clause, section 25 of the Constitution.[25] The Final Report of the Presidential Advisory Panel on Land Reform and Agriculture 2019 recommended that land ceilings be assessed as a viable mechanism to redistribute agricultural land.[26] Land ceilings impose restrictions or "ceiling limits" on the maximum area of land any person (individual or family) or entity (company, corporation, or trust) may own.[27] Landholdings over the ceiling are surplus land that may be acquired by the government (through purchase, expropriation, or confiscation) and redistributed to selected beneficiaries of the land redistribution program.[28] In this way, land ceilings are a redistributive regulatory measure intended to provide access to agricultural land for selected beneficiaries[29] to increase Black landownership.[30]

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[23] HP Binswanger-Mkhize, C Bourguignon and R van den Brink, 'Introduction and Summary' in HP Binswanger-Mkhize, C Bourguignon and R van den Brink (eds), *Agricultural Land Redistribution: Toward Greater Consensus* (World Bank Group 2009) 21.

[24] Preamble of the Regulation of Agricultural Land Holdings Bill *GG* 40697 of 17 March 2017 (Regulation of Agricultural Land Holdings Bill); Department of Social Development and the Department of Agriculture, Forestry and Fisheries *The National Policy on Food and Nutrition Security* (August 2013), published in *GG* 37915 of 22 August 2014; Department of Agriculture *The Integrated Food Security Strategy for South Africa* (17 July 2002); HP Binswanger-Mkhize, 'From Failure to Success in South African Land Reform' (2014) 9 African J Agricultural and Resource Economics 253–69.

[25] South African Constitution, s 25(1); Advisory Panel on Land Reform and Agriculture (n 9) 5.

[26] Advisory Panel on Land Reform and Agriculture (n 9) 33, 98.

[27] Ibid 98.

[28] See, e.g., the Department of Agriculture, Land Reform and Rural Development, *National Policy for Beneficiary Selection and Land Allocation* GN 2 in *GG* 42939 of 3 January 2020; Advisory Panel on Land Reform and Agriculture (n 9) 33.

[29] *National Policy for Beneficiary Selection and Land Allocation* (n 28) 12, 15–16 identifies categories of beneficiaries for land allocation, including landless people, farm workers, labor tenants, and their families and aims to "create a crop of new young Black smallholder/commercial farmers."

[30] See in general Glass et al. (n 1) 1–62.

The Presidential Advisory Panel on Land Reform and Agriculture's recommendation to explore the possibility of imposing agricultural land ceilings is not a new proposal. Land ceilings as a redistributive regulatory measure was first mooted at the National Land Summit in 2005[31] and again debated during the 2011 Green Paper on Land Reform process.[32] Moreover, until now, it was widely speculated (and even accepted) that any envisaged policy, such as the 2013 Agricultural Landholding Policy Framework[33] (ALPF) and/or proposed legislation—specifically the 2017 Regulation of Agricultural Landholdings Bill[34] aimed at imposing agricultural land ceilings—had been abandoned. The draft Landholdings Bill was published

[31] Department of Agriculture and Department of Land Affairs, 'Report of the National Land Summit' (27-30 July 2005) NASREC: Johannesburg, Gauteng. See further K Kondlo, 'Ceilings on Agricultural Landholdings: Lessons for South Africa from the Experiences of India and Pakistan' (2018) J Public Administration 515–7, 516.

[32] Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) GN 639 in *GG* 34607 of 16 September 2011; Kondlo (n 31) 515–7; Pienaar (n 9) 244. Also see the background highlighted in the Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill (n 24) 36. See further JM Pienaar 'The Mechanics of Intervention and the Green Paper on Land Reform' (2014) 17 Potchefstroom Electronic L J 641–75 and A Rudman 'Re-defining National Sovereignty: The Key to Avoid Constitutional Reform? Reflections on the 2011 Green Paper on Land Reform' (2012) 23 SLR 417–37.

[33] Department of Rural Development and Land Reform Agricultural Landholding Policy Framework: Setting upper and Lower Bands for the Ownership and use of Agricultural landholdings (July 2013). For a detailed discussion of this policy document see, JM Pienaar 'Land Reform: July to September' (2013) Juta Q Rev 1.3.3. See also the Green Paper on Land Reform (n 32) that provided the first indication that landholdings would be regulated. The idea to impose agricultural land ceilings was first set out in the ALPF. Subsequent to the ALPF, numerous uncoordinated and contradictory announcements and statements were made by the President and/or relevant Minister in the course of 2014–2016 regarding the limitation of landownership. For example, broad statements regarding the limitation of landownership of South Africans (both natural and legal persons) were made during the 2015 State of the Nation address. The statements in the State of the Nation address entailed that ownership of farms would be restricted to 12,000 hectares or two farms and that foreign landownership would be prohibited. See Government of South Africa, State of the Nation Address (2015) <https://www.gov.za/state-nation-address-2015>; Department of Rural Development and Land Reform, 2015/2016 Financial Year, Budget Policy Speech 8 May 2015. See also Pienaar (n 13) 2; Anon 'ANC Calls for Faster Land Reform' (Fin24, 29 January 2015) <http://www.fin24.com/Economy/ANC-calls-for-faster-land-reform-2015-01-29>; Q Hunter 'ANC Wants Land Cap of 12 000 Hectares or Two Farms' (Mail and Guardian, 28 January 2016) 17.

[34] Regulation of Agricultural Land Holdings Bill.

in March 2017 for public comment, but no further steps have been taken to bring it before Parliament.[35] The Landholdings Bill acknowledges, "there is a need to redistribute agricultural land more equally by race and class, raise agricultural output and food security and to advance social justice and political stability by obtaining agricultural land to support and promote productive employment and income to poor and efficient small scale farmers."[36]

Accordingly, the Landholdings Bill[37] aims to reverse the legacy of colonialism and apartheid and also to ensure a just and equitable distribution of agricultural land to Africans.[38] The Landholdings Bill provides for the establishment of the Land Commission,[39] the creation and maintenance of a national agricultural land register,[40] the declaration of present ownership,[41] the acquisition of private agricultural land,[42] the prohibition against acquisition of agricultural landownership by foreign nationals,[43] and the determination of ceilings in respect of agricultural land.[44]

Several countries have at some stage, as part of their land reform programs, instituted ownership and size limitations on agricultural

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[35] Parliamentary Monitoring Group, Regulation of Agricultural Landholding Bill (X-2017) <https://pmg.org.za/bill/690/>.
[36] Preamble of the Regulation of Agricultural Land Holdings Bill.
[37] The Regulation of Agricultural Land Holdings Bill.
[38] Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill (n 24) 37. Regulation of Agricultural Land Holdings Bill, cl 2 also provides that the objects of the Bill are to obtain agricultural land for redistribution in order to support and promote productive employment and income to poor and efficient small scale farmers; ensure redress for past imbalances in access to agricultural land; promote food security; provide a transparent and more conducive regulatory framework for the generation and use of policy-relevant information on agricultural landownership and usage; provide certainty regarding the ownership of public and private agricultural land and enable the state to effectively deliberate on matters of land, natural resource economics, property market, and extent of land use.
[39] Regulation of Agricultural Land Holdings Bill, cl 4.
[40] Regulation of Agricultural Land Holdings Bill, cl 12.
[41] Regulation of Agricultural Land Holdings Bill, cl 15.
[42] Regulation of Agricultural Land Holdings Bill, cl 26.
[43] Regulation of Agricultural Land Holdings Bill, cls 19–24.
[44] Regulation of Agricultural Land Holdings Bill, cl 25.

landholding, including Egypt, India, Mexico, Pakistan, Philippines, and Taiwan.[45] The imposition of land ceilings in most of these countries has proven ineffective in redistributing of agricultural land. The ALPF identifies India, particularly the State of West Bengal as one of the few states that was relatively successful in implementing land ceilings and redistributing agricultural land.[46]

India's experience with imposing land ceiling legislation at a national scale for more than sixty years may provide insight in formulating and implementing land ceiling legislation in South Africa.[47] India is a federal state[48] with twenty-nine states each with its own legislation regulating

[45] These countries were listed in the Agricultural Landholding Policy Framework (n 33) 12–17. See also Kondlo (n 31) in general.

[46] T Hanstad and J Brown, *Land Reform Law and Implementation in West Bengal: Lessons and Recommendations* (Rural Development Institute Reports on Foreign Aid and Development, Report No 112, 2001) 1–66 4, West Bengal comprises only 3.3% of the land in India, but it is responsible for 20% of the redistribution of surplus ceiling land. *Agricultural Land Holding Policy Framework* (n 33) 14; The Government of India, Ministry of Rural Development, Department of Land Resources, *Draft National Land Reforms Policy* (18 July 2013) 5, policy identifies West Bengal, Kerala, and Jammu and Kashmir as achieving some measure of success with the implementation of their land ceiling policies; Government of India, Ministry of Rural Development, Department of Land Resources *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (2008) 27.

[47] T Besley and R Burgress, 'Land Reform, Poverty Reduction and Growth: Evidence from India' (2000) 115 Q J Economics 389–430; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 241–63, 242–3.

[48] The Constitution of India, art 1 provides for a "Union of states." Part 5 of the Constitution of India read with the Union List in the Seventh Schedule, which provides for various subjects in terms of which only the Union or Central government can legislate.

agricultural land ceilings.[49] Apart from a few exceptions,[50] the imposition of land ceiling legislation in India has not produced meaningful redistribution of agricultural land.[51] Over the last few years, farmers across the country have staged large protests[52]—demanding land titles, better prices for agricultural produce, and farm loans.[53] These protests suggest an agrarian crisis. Farmers are stuck in a cycle of low returns and debt. In June 2017, 70% of Indian farm families reported having spent more than they

[49] The legislature of each state government has the exclusive power to legislate and implement land reform. See the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; the Assam Fixation of Ceiling on Land Holdings Act 1 of 1957; the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962; the Gujarat Agricultural Lands Ceiling Act 27 of 1961; the Haryana Ceiling on Landholding Act 26 of 1972; the Himachal Pradesh Ceiling on Land Holding Act 19 of 1973; the Jammu and Kashmir Agrarian Reforms Act 17 of 1976; the Karnataka Land Reforms Act 10 of 1962; the Kerala Land Reforms Act 1 of 1964; the Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960; the Orissa Land Reforms Act 16 of 1960; the Punjab Land Reforms Act 10 of 1973; the Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973; the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978; the Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961; the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978; and the West Bengal Land Reforms Act 10 of 1965.

[50] *Draft National Land Reforms Policy* (n 46) 5; *Agricultural Land Holding Policy Framework* (n 33) 14; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–7. See further PS Appu *Land Reforms in India: A Survey of Policy, Legislation and Implementation* (Vikas Pub. House 1996) 178.

[51] Ministry on Rural Development, Government of India, Ministry of Rural Development *Report on Other Land Reform Programmes* (2016); SK Ray 'Land System and its Reform in India' (1996) Indian J Agricultural Economics 220–7 estimates that over thirty-five years, less than 2% of the total operated land has been redistributed. See further RS Deshpande 'Current Land Policy Issues in India' (2003) Land Settlement and Cooperatives: Special Edition 1–14, 1 <http://www.fao.org/3/y5026e/y5026e0b.htm#bm11>; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–8.

[52] YS Sekhon 'Critique on Land Ceilings Reforms in India (A Failed Public Policy)' (*Pen Acclaims*, 2019) 1–5, 3–4 <http://www.penacclaims.com/wp-content/uploads/2019/08/Yuvraj-Singh-Sekhon.pdf>. For example, in March 2018, farmers from all over Maharashtra walked 180 kilometres over seven days to reach Mumbai and demand land titles, better prices for agricultural produce, and farm loans. In July 2017, farmers from Tamil Nadu protested in Delhi with skulls hanging from their necks to demand a loan waiver after the state was hit by a drought. In June 2017, Madhya Pradesh farmers dumped milk, fruits, and vegetables on the roads.

[53] Sekhon (n 52) 3–4.

had earned and more than 52% said they were indebted and health costs were adding to their debt.[54]

Yuvraj Singh Sekhon argues that the root of this agrarian crisis stems from the poor formulation and implementation of ceiling legislation.[55] Over the long term, agricultural land ceilings have aggravated India's existing problem of uneconomically fragmented land holdings,[56] leading to a general decline in agricultural productivity[57] and posing risks to food security. Sekhon explains, "farmers which were once given land by the government in the hope to uplift them in society and eradicate poverty are today either selling off those lands or are leasing them out because they are unable to sustain agriculture … [because] modern world agriculture is only viable on a large scale."[58]

Furthermore, several Indian states amended their land ceiling legislation to allow industries and non-farmers to buy large parcels of agricultural land, to farm on a larger scale, or to use the land for industrial or residential purposes.[59] India seems to be moving away from land ceilings and towards consolidating rather than subdividing agricultural landholdings.

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[54] National Sample Survey Office, Report on Income, Expenditure, Productive Assets and Indebtedness of Agricultural Households in India, (Report No. 576 2017); Sekhon (n 52) 3–4.

[55] Sekhon (n 52) 3.

[56] S Pal, PR Chowdhury and Z Saher, 'Land Ceiling Size, Land Acquisition and De-industrialisation – Theory and Evidence from the Indian States' (5 February 2021) available on SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3271982>; F Lopes and M Chari 'In 12 Years, 11 States Changed Land Ceiling Laws in Favour of Industry Over Farmers' (*IndiaSpend*, 10 February 2021) <https://www.indiaspend.com/land-rights/in-12-years-11-states-changed-land-ceiling-laws-in-favour-of-industry-over-farmers-724650>; Sekhon (n 52) 4.

[57] C Ashokvardhan *Ceiling Laws in India* (CRS, LBSNAA 2005) 9; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–8.

[58] Sekhon (n 52) 4.

[59] Lopes and Chari (n 56). These states are Andhra Pradesh, Gurjarat, Haryana, Karnataka, Madhya Pradesh, Maharashtra, Punjab, Rasjasthan, Tamil Nadu, Uttarakhad, and West Bengal. The pace of amendments has accelerated since 2014, with states across political dispensations amending laws to enable land use for non-agricultural purposes, including industry and real estate.

Despite the general lack of long-term redistribution in most Indian states,[60] West Bengal stands out as one of the few success stories where land ceilings were imposed as a successful redistributive measure. The success of West Bengal can largely be attributed to the formulation of its ceiling legislation. For this reason, the formulation of land ceiling legislation in West Bengal is of particular importance for drafting, or rather amending, the proposed Landholdings Bill in South Africa.

The need for and consideration of redistributive regulatory measures, such as the Landholdings Bill, cannot be viewed in a vacuum but should rather be understood in light of "both the historical legacies and conditions of … [South Africa's] democratic transition."[61] Accordingly, this Article begins with a brief contextualization of the need for redistribution as envisaged by the property clause, followed by an overview of the approach to redistribution in South Africa to date. The call to reconsider land ceiling legislation in South Africa is then explored in view of the experiences in India. The Article then provides a brief overview of the provisions in the Indian Constitution dealing with the right to property as a constitutional right and land reform. These provisions are contrasted to the right to property as a fundamental right and the constitutionally embedded land reform program under the South African Constitution. The constitutional provisions of the right to property and land reform in both India and South Africa impact the interpretation, implementation, and protection of private property rights. It is therefore useful to highlight and differentiate between the constitutional bases for implementing redistributive measures, such as land ceilings, in India and South Africa. Thereafter, the imposition of land ceilings in India—including the underlying reason for the imposition of such a regulatory measure—is discussed. The Article considers the reasons

[60] *Report on Other Land Reform Programmes* (n 51). See further Deshpande (n 51) 1–14; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–8.

[61] H Klug 'Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-apartheid South Africa' (2018) S Afr J Hum Rts 469–91, 469.

for the general failure of land ceilings in India.[62] The aim is primarily to critique the 2017 Landholdings Bill, particularly in view of the experience in India and West Bengal. The insight gained and the lessons learned from the experience in West Bengal are then used to provide recommendations for the formulation (or amendment) of the Landholdings Bill while being cognizant of the need to preserve prime agricultural land for food security purposes. The creation of land ceiling legislation should be distinguished from its implementation.[63] Without going into extensive detail, the Article highlights necessary institutional arrangements that may contribute to the successful implementation of land ceiling legislation in South Africa.

II. Land Reform in South Africa: Setting the Scene

A. The Constitution of South Africa: A Negotiated Settlement

The unequal distribution of agricultural land in South Africa is a direct consequence of the racially discriminatory laws, policies, and practices that were in place for the larger part of the twentieth century.[64] As Heinz Klug explains, "land dispossession was one of the key policies that triggered and justified the international community's designation of apartheid as a crime

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[62] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246; NC Behuria *Land Reform Legislations in India: A Comparative Study* (UBS Publishers 1997) 132; Sethi 'Land Reform in India: Issues and Challenges' in P Rosset, R Patel and M Courville (eds), *Promised Land: Competing Visions of Agrarian Reform* 75; Hanstad and Brown (n 46) 26; Besley and Burgress (n 47) 389, 394; R Mearns *Access to Land in Rural India: Policy Issues and Options* (World Bank Policy Research Working Paper 2123, May 1999) 10.

[63] An implementation strategy aimed at the practical operation of the envisaged legislation and embodying aspects such as administrative bodies and institutions responsible for implementing the ceiling legislation, the availability and rationing of public resources (budgetary allocations and questions of capacity in various departments), and the timeframes within which to realize the implementation of land ceilings are not canvassed here.

[64] For example, the Natives Land Act 27 of 1913 subsequently renamed the Black Land Act 27 of 1913, the Native Trust and Land Act 18 of 1936 subsequently renamed the Development Trust and Land Act 18 of 1936, the Group Areas Act 41 of 1950 and the Group Areas Act 36 of 1966.

against humanity."[65] The legacy of apartheid sets the stage for the recognition of property rights and the need for redistributive redress in post-apartheid South Africa.[66] South Africa underwent a peaceful, negotiated transition to democracy culminating in the interim (1993) and final Constitution (1996).[67] Klug describes the property clause as the result of a negotiated compromise between various stakeholders, including the apartheid government, the African National Congress (ANC), international actors (such as the World Bank and International Monetary Fund),[68] unions, and civil society.[69] At the start of the substantive constitutional debates and negotiations in early 1993, the ANC and the National Party (apartheid government) presented opposing proposals regarding the recognition and protection of private property rights in the Constitution.[70] After much debate, input from various domestic and international stakeholders, and

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[65] Klug (n 61) 489; UNGA Resolution 3068 'Resolution: International Convention on the Suppression and Punishment of the Crime of Apartheid' (30 November 1973) UN Doc. A/RES/3068.

[66] Klug (n 61) 489–90. See further HP Binswanger and K Deiniger 'South African Land Policy: The Legacy of History and Current Options' (1993) World Development 1451–75.

[67] Klug (n 61) 477–88; H Klug 'Bedevilling Agrarian Reform: The Impact of Past, Present and Future Legal Frameworks' in J van Zyl, J Kirsten and HP Bingwanger (eds), *Agricultural Land Reform in South Africa: Policies, Markets and Mechanisms* (OUP 2002) 161–98, 162, 168; H Klug 'Hybrid(ity) Rules: Creating Local Law in a Globalized World' in Y Dezaley and BG Garth (eds), *Global Prescriptions* (University of Michigan Press 2005) 276–305; E Lahiff 'Land Redistribution in South Africa: A Critical Review' in FFK Byamugisha (ed), *Agricultural Land Redistribution and Land Administration in sub-Saharan Africa: Case Studies of Recent reforms* (The World Bank 2014) 27–54.

[68] World Bank Experience with Agricultural Policy: Lessons for South Africa (World Bank 1992); World Bank, Southern African Department South Africa Agriculture: Structure, Performance and Options for the Future: Informal Discussion Paper on Aspects of the Economy of South Africa (World Bank 1994); World Bank Summary: Options for Land Reform and Rural Restructuring in Land Redistribution Options Conference October 12-15, 1993: Proceedings Land and Agricultural Policy Centre. Contra: G Williams 'Setting the Agenda: A Critique of the World Bank's Rural Restructuring Programme for South Africa' (1996) J Southern African Studies 139–66.

[69] Klug (n 61) 477–88. See in general H Klug 'Property's Role in the Fundamental Political Structure of Nations: The Southern African Experience' (2017) Brigham-Kanner Property Rights Conference J 145–78.

[70] Klug (n 61) 477–88 and Klug in Van Zyl, Kirsten and Bingwanger (n 67) 162–8 for the debate in formulating the property clause in the interim and final Constitution; *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).

negotiations, the agreement among the political parties stipulated that existing land and property rights would be protected and endorsed, but that redress of past inequities was crucial.[71]

South Africa's land reform program, which aims to redress the unequal distribution of land and skewed landownership and settlement patterns, to improve tenure security, and to restore loss of land and rights in land, was approached in two distinct phases. The first phase, initiated following the appointment of F.W. de Klerk as State President and the unbanning of political parties (including the ANC and release of Nelson Mandela), was an exploratory land reform program.[72] During this phase, the South African land control system was de-racialized.[73] Juanita Pienaar explains that the first exploratory phase of land removed the "racial crux" from all land-related measures and prohibited further discrimination on the basis of race, but also laid the foundations for the all-encompassing land reform program that would follow.[74] The second phase comprised lengthy constitutional debates between the apartheid government and the ANC,[75] aimed at embedding land reform in the property clause of the interim and final Constitution.[76] In this regard, Pienaar argues,

> a less focused and less reform-centred approach was embodied in section 28 of the interim Constitution, whereas a clearly more reform-centred and more expansive land reform approach is embodied in the final Constitution …. While this understanding underlined the approach to redistribution, it immediately embodied the intrinsic

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[71] See in general Klug (n 69) 145–78; *Experience with Agricultural Policy* (n 68); *South Africa Agriculture: Structure, Performance and Options for the Future* (n 68); World Bank *Summary* (n 68).
[72] Pienaar (n 9) 141, 153.
[73] Ibid 162–164, For example, the Department of Land Affairs, *White Paper on South African Land Policy* (1997) and corresponding legislative measures, the Abolition of Racially based Land Measures Act 108 of 1991, as amended in 1993; Upgrading of Land Tenure Rights Act 112 of 1991; Less Formal Township Establishment Act 113 of 1991.
[74] Pienaar (n 9) 163–5.
[75] Klug (n 61) 477–88 and Klug in Van Zyl, Kirsten and Bingwanger (n 67) 162 –8.
[76] See in general Klug (n 69) 145–78.

> tensions which would accompany land reform measures thereafter.[77]

Embedding a land reform program in the Constitution has important implications.[78] AJ (André) van der Walt describes section 25 of the Constitution as "unique"[79] in its combination of two seemingly broad contradictory parts.[80] Subsections 25(1)-(3) provide for the protection of existing property rights, "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

The Constitution also recognizes the state's power to expropriate property for a public purpose or in the public interest subject to just and equitable compensation, thereby protecting private property rights and interests against unconstitutional interferences.[81] By contrast, subsections 25(4)-(9), encompassing the land reform program, allow and even compel state action to promote land reform and other related reforms, including the redistribution of land.[82] In particular, the constitutional mandate to redistribute land is found in section 25(5) of the Constitution,[83] "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." Essentially, the purpose of land

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[77] Pienaar (n 9) 167–69.
[78] JM Pienaar 'Land Reform Embedded in the Constitution: Legal Contextualisation' (2015) Scriptura 2, 14–16 specifically discusses the implications of having land reform embedded in the Constitution. See also Pienaar (n 9) 20–2; AJ van der Walt *Constitutional Property Law* 3 ed (Juta 2011) 12; R Hall 'Transforming Rural South Africa? Taking Stock of Land Reform' in Ntsebeza and Hall (n 10) 87–106.
[79] Van der Walt (n 78) 12.
[80] Pienaar (n 9) 174; SRA Dlamini *Taking Land Reform Seriously: From Willing Seller-Willing Buyer to Expropriation* (LLM thesis, University of Cape Town 2014) 17.
[81] South African Constitution, s 25(1)–(3); Pienaar (n 9) 174–5; Van der Walt (n 78) 12, 16, 174–9.
[82] South African Constitution, s 25(5) and 25(8). See also Van der Walt (n 78) 12; Pienaar (n 9) 179–85.
[83] Pienaar (n 9) 273.

redistribution is to broaden access to land for residential and productive purposes to citizens on an equitable basis in order to improve their livelihoods. However, to date, no law or policy has been enacted to define this right, nor has section 25(5) been judicially interpreted. Accordingly, two aspects of this constitutional mandate require further clarification. First, section 25(5) of the Constitution is the only provision in the property clause that specifically refers to citizens. In terms of section 25(5) of the Constitution, any citizen in principle should have access to land and to this end access to land has to be broadened, particularly to those who have been previously disadvantaged. Second, section 25(5) does not guarantee or constitute a (fundamental) right to land, nor does it guarantee that everyone will receive land.[84] Instead, according to Pienaar, "access" within the section 25(5) context refers to '"opening up" the land base in order to derive some benefit from it, thereby incorporating the ability to derive or the possibility of deriving a benefit and not a right to derive a benefit.[85] While section 25(5) entails broadening access to land, is often assumed to mean changing Black ownership patterns.[86] Therefore, it seems that the South African government often equates redistribution (or broadening access to land) to changing black ownership patterns.[87] However, despite the South African government's initial target of redistributing 30% of agricultural land in white ownership to Black beneficiaries by 2014, section 25(5) does not purport to address landownership patterns. If the state acquires privately owned land, this may ensure that a greater percentage of the land

[84] Pienaar (note 9) 283.
[85] Ibid. See in general JC Ribot & NL Peruso, 'A theory of access' (2003) 68 Rural Sociology 153–81.
[86] Reconstruction and Development Programme (n 18) 13.
[87] Ibid.

is owned by the state, thereby changing ownership patterns from white-owned land to state-owned land. However, acquiring land—without granting Black beneficiaries with individual or communal title—will not alter patterns of Black ownership.

The property clause as a whole (sections 25(1)–(9)) was designed to establish an equitable balance between the protection of private property on the one hand and "the promotion of a public interest which includes the reform of the property regime,"[88] on the other. In other words, having the land reform program embedded in the property clause also impacts how section 25 should be interpreted.[89]

Van der Walt argues that a purposive interpretation of the property clause and measures promulgated in light of section 25 is needed.[90] Section 25 should be applied in "such a way that both the protective and the reformative purposes of the clause are respected, promoted and fulfilled."[91] The purpose of the second part of the property clause[92] is not only to "legitimate and to promote land reform and related reforms,"[93] but also to allow for "the general reform or redevelopment of property law."[94] In this regard, it may be argued that the "restructuring of property law … and land reform measures and designs may bring about the changes"[95]

[88] Ibid 182; South African Constitution, s 25(4). See also First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 798 (CC) para 50 where the Constitutional Court held that section 25 "has to be seen both as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions." See also Agri SA v Minister for Minerals and Energy 2013 4 SA 1 (CC) paras 61–62.
[89] Pienaar (n 9) 175.
[90] Van der Walt (n 78) 3.
[91] Pienaar (n 9) 175.
[92] South African Constitution, ss 25(5)–25(9).
[93] Pienaar (n 9) 176.
[94] Ibid.
[95] Ibid 168.

needed to address the inequalities in relation to landownership and land use.[96] In this regard, Van der Walt argues,

> [T]raditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to … public-purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests.[97]

This inherent tension in the property clause affects how land would be acquired for redistribution purposes and ultimately informs the market-based or market-assisted approach to redistribution briefly discussed in the following section.[98]

B. Broadening Access to Land: The Approach to Land Redistribution in South Africa

Since embarking on an all-encompassing land reform program, one of the most contentious issues that confronted the South African government was the acquisition and transferal of suitable land, on a large scale, affordably and sustainably.[99] The basic approach to the acquisition of private land for redistribution was directly linked to the peaceful political transition, which resulted in negotiated, market-led or market-assisted land

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[96] Kloppers and Pienaar (n 9) 707. See also S Tsawu, An Historical Overview and Evaluation of the Sustainability of the Land Redistribution for Agricultural Development (LRAD) programme in SA (LLM thesis, Stellenbosch University 2006) 1–2 and Pienaar (n 9) 375.

[97] AJ van der Walt *Property in the Margins* (Juta 2009) 16; Pienaar (n 9) 820.

[98] Pienaar (n 9) 169.

[99] Ibid 226, 360.

reform, founded on the willing-buyer-willing-seller (WBWS) principle.[100] This approach was done with an eye to the importance of international investor confidence in a new democratic South Africa.[101] For example, during the early constitutional debates in the 1990s, international actors such as the World Bank launched initiatives and played a valuable role in the political and economic transition in South Africa.[102]

The South African government's decision to opt for a market-led approach,[103] even though it was not constitutionally embedded,[104] was

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[100] Pienaar (n 9) 249, 819–20. See further R Hall 'Who, What, Where, How, Why? Many Disagreements About Land Redistribution in South Africa' in B Cousins and C Walker (eds), *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (Jacana Media 2015) 127–44, 134–35; E Lahiff, SM Borras Jr and C Kay 'Market-led Agrarian Reform: Policies, Performance and Prospects' (2007) 28 Third World Quarterly 1417–36, 1420; Dlamini (n 80) 27; M Aliber and R Mokoena 'The Interaction Between the Land Redistribution Programme and the Land Market in South Africa: A Perspective on the Willing-buyer/Willing Seller Approach' (2002) *Land reform and Agrarian Change in Southern Africa: An Occasional Paper Series* Programme for Land and Agrarian Studies 1–45, 2.

[101] According to Lahiff in Byamugisha (n 67) 32–33 the concept of the WBWS "gradually entered the discourse around land reform in South African during the period 1993–1996, reflecting the shift in economic thinking" within the ANC. Lahiff explains further that, this WBWS-principle was completely "absent entirely from the ANC's 'Ready to Govern' policy statement of 1992, which instead advocated expropriation and other nonmarket mechanisms." See further Hall in Cousins and Walker (n 100) 134–5; Lahiff, Borras Jr and Kay (n 100) 1420; Dlamini (n 80) 27; HP Binswanger and K Deininger 'South African Land Policy: The Legacy of History and Current Options' in Van Zyl and Bingwanger (n 67) 64–103; Kepe and Hall (n 20) 7–8.

[102] Klug (n 61) 483 explains that:

> Although the ANC Land Commission remained extremely sceptical of the equities of the World Bank's proposals for a market-driven reform focused on small-scale producers, it realised that the Bank's argument could be deployed to maintain the issue of land reform on the political agenda. With this aim, the ANC Land Commission encouraged Binswanger [senior World Bank advisor] to persuade the De Klerk government that land reform was an essential part of South Africa's political transition'.

See also *Experience with Agricultural Policy* (n 68); *South Africa Agriculture: Structure, Performance and Options for the Future* (n 68); World Bank *Summary* (n 68). See further Binswanger and Deininger in Van Zyl and Bingwanger (n 67) 64–103.

[103] This approach was based on the WBWS principle as confirmed in the *White Paper on South African Land Policy* (n 73) Part 4: Land Reform Programmes, which specifically provided that "[r]edistributive land reform will be largely based on willing buyer willing seller arrangements.".

[104] Klug (n 61) 476–7, 486–9. M Aliber 'Unravelling the Willing Buyer, Willing Seller Question' in Cousins and Walker (n 100) 145–60; Kepe and Hall (n 20) 31–32.

premised on international actors and advisors' advocacy for land concentration, large-scale agriculture, the payment of market-based compensation where land was acquired and redistributed, and the need to resuscitate and stabilize markets.[105] Against this background, there has been a "plethora of policy initiatives,"[106] such as market-driven (demand-[107] or supply-led[108]) programs aimed at redistributing agricultural land to the land reform beneficiaries. Although the WBWS principle may have caused price hikes, making a market-based approach to

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[105] Klug (n 69) 155; Klug (n 61) 476–7, 486–9; *Experience with Agricultural Policy* (n 67); *South Africa Agriculture: Structure, Performance and Options for the Future* (n 67); World Bank *Summary* (n 67). See further E Fortin 'Reforming Land Rights: The World Bank and the Globalization of Agriculture' (2005) Social and Legal Studies 147–77.

[106] Kepe and Hall (n 20) 29, 84; Dlamini (n 80) discusses the different redistribution policies or programmes namely, the Settlement/Land Acquisition Grant as proposed in the *White Paper on South African Land Policy* (n 73) Part 4.7: Grants and Services; the Land Redistribution for Agricultural Development ('LRAD'); and the Proactive Land Acquisition Strategy ('PLAS'); Department of Rural Development and Land Reform, *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context and for the Establishment of the Office of the Valuer-General* (18 October 2012); Department of Rural Development and Land Reform *State Land Lease and Disposal Policy* (25 July 2013); Department of Rural Development and Land Reform *Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework* (March 2017). See further MC Lyne and MAG Darroch 'Land Redistribution in South Africa: Past Performance and Future Policy' (*Researchgate*, 2003) <https://www.researchgate.net/publication/237652958_Land_Redistribution_in_South_Africa_Past_Performance_and_Future_Policy>.

[107] In the early years of democracy state-assisted, demand-led land purchase took the form of small grants to poor households to buy land for settlement and small-scale farming. See *White Paper on South African Land Policy* (n 73) Part 4.7: Grants and Services; Pienaar (n 9) 218; R van de Brink, G Thomas and H Binswanger 'Agricultural Land Redistribution in South Africa: Towards Accelerated Implementation' in Ntsebeza and Hall (n 10) 152–201, 175; Dlamini (n 80) 45; Kepe and Hall (n 20) 16–18; R Hall and T Kepe 'Elite Capture and State Neglect: New Evidence on South Africa's and Reform' (2017) Rev African Political Economy 1–9, 2; T Kotzé The Regulation of Agricultural Land in South Africa: A Legal Comparative Perspective (LLD dissertation, Stellenbosch University, 2020) 169–171.

[108] From 2011, under former President Jacob Zuma, the state moved away from state-assisted land acquisition to state-led purchase. Under this supply-driven approach, the state became the purchaser of land (the willing buyer), which did not always result in the transfer of title to the beneficiaries. Instead, such land acquired by the state was usually leased to the beneficiaries, in line with the State Land Lease and Disposal Policy. While the policy identifies different priority groups, beneficiary targeting and selection continue to favor the commercially orientated farms, ahead of the rural poor.

land reform expensive and potentially unaffordable and unsustainable,[109] political pressure[110] spurred the process of land reform.[111]

To address the populist cries to accelerate redistribution, a National Land Summit was held in 2005, and again at subsequent ANC conferences in 2007 and 2012,[112] calling for the abolition of the market-based approach and amendments to the Constitution.[113] Some of the recommendations included urging the South African government to use its expropriation powers more readily in future, scrapping restrictions on the subdivision of land under the Subdivision of Agricultural Land Act 70 of 1970, providing extensive support for small-scale agriculture, reversing the growing concentration of landholdings, changing the current large-farm-size culture, regulating foreign landownership, and imposing a land tax.[114]

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[109] Pienaar (n 9) 226, 360.

[110] The government set a target to redistribute 30% of agricultural land by 2014. However, in terms of the Department of Rural Development and Land Reform, *Annual Report 2013/14* 10, only about 4.2 million hectares have been transferred since 1994.

[111] JM Pienaar 'Willing-seller-willing-buyer and Expropriations as Land Reform Tools: What can South Africa Learn from the Namibian Experience?' (2018) 10 Namibian LJ 41–64.

[112] The 53rd National Conference of the African National Congress (ANC) was held in December 2012. See also W du Plessis, JM Pienaar and NJJ Olivier 'Land Matters and Rural Development: 2009 (2)' (2009) 2 SA Public Law 608-610 and R Hall and L Ntsebeza 'Introduction' in Ntsebeza and Hall (n 10) 1–26, 15–16.

[113] M Letsoalo 'NUMSA Targets Land Reform, the Constitution – and Pravin' (*Mail and Guardian*, 4 June 2012) <https://mg.co.za/article/2012-06-04-no-compensation-numsa-targets-land-reform-the-constitution-and-pravin-gordhan>. See further the Constitution Eighteenth Amendment Bill [B18-2021] in *GG* No 42902 of 13 December 2019 (Constitution Eighteenth Amendment Bill) that was rejected in December 2021. For the complete parliamentary process of the constitutional amendment see Parliamentary Monitory Group 'Constitution Eighteenth Amendment Bill (B12-2021): Section 74 Constitutional Amendments <https://pmg.org.za/bill/913/>. For the Expropriation Bill B23-2020 GN 1082 in *GG* 43798 of 09-10-2020 (Expropriation Bill) history and events to date, see Parliamentary Monitory Group <https://pmg.org.za/bill/973/> accessed 29 January 2022.

[114] See Parliamentary Monitoring Group 'Land Summit Recommendations: Department Briefing' (*PMG*, 13 September 2005) https://pmg.org.za/committee-meeting/5522; *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context* (n 106) 4; Pienaar (n 9) 250.

However, the recommendations did not produce any official policy or legislative amendments.[115]

C. Speeding Up Redistribution in South Africa: A Move Towards Land Ceiling Legislation

Since the new Constitution, South Africa has adopted a land system characterized by an open, unlimited market without rules concerning the amount of agricultural land one person or entity may own.[116] It is also not tied to any racial or cultural backgrounds and dispositions. However, landownership is constrained by section 25(5) of the Constitution in that the state has a duty to take necessary steps to broaden access to land for South African citizens.[117]

The Land Reform Provision of Land and Assistance Act 126 of 1993,[118] was promulgated to give effect to section 25(5). It forms the foundation upon which access to land may be broadened. In essence, Act 126 provides the Minister discretionary power to acquire, allocate, and develop land for purposes of small-scale farming, residential, public, community, and business or similar uses,[119] and to provide funds for land purchase.[120]

However, the dismal track record of the Department of Agriculture, Land Reform and Rural Development, particularly its failure to achieve any

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[115] Pienaar (n 9) 249. In this regard, the establishment of the Office of the Valuer-General set out in the Department of Rural Development and Land Reform, *Green Paper on Land Reform* (2011) was the first step in addressing these concerns. Valuation for land reform purposes was first introduced in the *Green Paper on Land Reform* 5–7 followed by the *Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context* (n 106), which ultimately resulted in the Property Valuation Act 17 of 2014.

[116] Pienaar (n 9) 370.

[117] Pienaar (n 13) 2.

[118] Initially this Act was named the Provision of Certain Land for Settlement Act. This Act has since been renamed twice. First, by way of amendment as the Provision of Land and Assistance Act in 1998 and subsequently as the Land Reform: Provision of Land and Assistance Act in 2008.

[119] Act 126, s 3.

[120] Ibid s 10.

meaningful redistribution,[121] and its general failure to realize the rights under the tenure security[122] and restitution programs,[123] cannot be ignored. Many commentators have canvassed the reasons for these failures,[124] and they have been highlighted in case law.[125]

Given the slow pace of land redistribution in South Africa, it was recently suggested in the 2019 Final Report of the Presidential Advisory Panel on Land Reform and Agriculture that land ceilings should be assessed as a mechanism to facilitate the redistribution of agricultural land. This is not a new proposal. Previously, both the 2013 ALPF and the 2017 Landholdings Bill explored and provided for land ceilings in South Africa.

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[121] Advisory Panel on Land Reform and Agriculture (n 9) 12; *Rakgase v Minister of Rural Development and Land Reform* 2020 (1) SA 605 (GP) (*Rakgase*). See also JM Pienaar 'Approaching Systemic Failure? A Brief Overview of Recent Land Reform Case Law' (2020) 3 Tyskrif vir die Suid-Afrikaanse Reg 536–46.

[122] See, eg, *Mwelase v Director-General, Department of Rural Development and Land Reform* 2019 (6) SA 657 (CC) (*Mwelase*). This case concerned the failure by the Department of Rural Development and Land Reform (Department) to process land tenant applications submitted in terms of the Land Reform Act. Because of that failure, the Constitutional Court, confirmed the order granted by the Land Claims Court namely, the appointment of a Special Master for labor tenants to assist the Department in its implementation of the Act.

[123] For example, the government has failed for more than twenty years to complete the initial restitution plan in terms of the Restitution of Land Rights Act. See further the Restitution of Land Rights Amendment Act 15 of 2014 which extended the deadline for the submission of claims to 29 June 2019. However, the Constitutional Court in *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC) (*Land Access Movement*) declared the Restitution of Land Rights Amendment Act invalid. More recently, the speaker sought a further extension to enable Parliament to enact the new act, culminating in the judgment of *Speaker, National Assembly v Land Access Movement of South Africa* 2019 (6) SA 568 (CC) (*Speaker, National Assembly*).

[124] See further Hall in Cousins and Walker (n 100) 127–44; B Cousins ''Through a glass darkly': Towards Agrarian Reform in South Africa' in Cousins and Walker (n 100) 250–69; Kepe and Hall (n 20); F Mtero, N Gumede and K Ramantsima *Elite Capture in Land Redistribution in South Africa* (*PLAAS Research Project 55,* 3 December 2019) <http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/5089/PLAAS-RR-55-Elite-Capture-Web.pdf?sequence=1&isAllowed=y>. See also Advisory Panel on Land Reform and Agriculture (n 9) 12–13. See further JM Pienaar 'Reflections on the South African Land Reform Programme: Characteristics, Dichotomies and Tensions (part 1)' (2014) 3 Tyskrif vir die Suid-Afrikaanse Reg 425–46; JM Pienaar 'Reflections on the South African Land Reform Programme: Characteristics, Dichotomies and Tensions (part 2)' (2014) 4 Tyskrif vir die Suid-Afrikaanse Reg 689–705 and Pienaar (n 121) 536–46.

[125] For example, *Rakgase* (n 121); *Mwelase* (n 122); *Speaker, National Assembly* (n 123); *District Six Committee v Minister of Rural Development and Land Reform* 2019 (4) All SA 89 (LCC) (*District Six Committee*).

It was assumed (and even accepted) that these proposals for redistributive land reform had been abandoned. Given the recommendation of the Panel to conduct an in-depth assessment into the conditions for the application of land ceilings as part of South Africa's redistribution program, there is a need to revisit and explore whether land ceilings could be a viable and effective regulatory measure for redistribution. Such a determination requires legal comparative research.[126] India is a valuable comparative jurisdiction for the purposes of this Article, given its sixty-year experience with imposing land ceilings. Such a comparison is useful in gaining insight and deriving lessons to ultimately provide recommendations for the improvement of envisaged land ceiling legislation in South Africa.

III. Land Reform in India

A. India as a Comparative Jurisdiction: Setting the Scene

India is primarily an agricultural society that, like South Africa, has a history of British colonial rule.[127] At independence in 1947, India inherited a semi-feudal legal order and an ineffective agrarian structure characterized by great inequality of landownership; absentee landlords; a high incidence of tenancy; and an array of uneconomic, fragmented, and subdivided agricultural landholdings.[128] Tim Hanstad explains, "[a] small percentage of wealthy and politically well-connected individuals, owned most of the country's agricultural land, leaving … [most] of the rural population landless or nearly landless."[129]

Like in South Africa, redistributive measures are necessary in India to address skewed landownership patterns. In India, land is not only used for the production of food and a source of livelihood, but it is also a "symbol

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[126] See Kotzé (n 107).
[127] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 242–3.
[128] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 242–3; Sethi in Rosset, Patel and Courville (n 62) 73–92 73; Appu (n 50) xviii, 188.
[129] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 242–3; Sethi in Rosset, Patel and Courville (n 62) 73–92 73; Appu (n 50) xviii.

of social identity, status, power and wealth."[130] There are strong linkages between access to land and ownership of land on the one hand, and the social status of an individual and/or his or her family, on the other.[131] While India and South Africa share a history of colonialism, characterized by extensive land appropriation,[132] these countries differ greatly in a number of respects, including governmental structure and protection of private ownership, population numbers, the amount of arable land available, climate, and rainfall. In both countries, land reform is difficult, time-consuming, and expensive—but necessary.[133]

B. The Constitution of India: Contrasting the Constitutions of India and South Africa

The Constitution of India provides that India is a "sovereign, socialist, secular democratic republic."[134] The Republic of India has a parliamentary government that is federal in structure.[135] The Constitution provides for two levels of government: (1) a Union or Central government[136] and (2) twenty-nine[137] individual state governments.[138]

At the time of independence, the need to protect existing property rights, which entrenched the unequal distribution of existing property

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[130] V Bhgat-Ganguly 'Special Issue on Land Acquisition, Rehabilitation and Resettlement in India' (2016) 4 J Land and Rural Studies 1-2, 1.
[131] *Draft National Land Reforms Policy* (n 46) 2.
[132] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 242–3.
[133] Ibid 242–3.
[134] Constitution of India, preamble.
[135] Constitution of India, art 1 provides for a "Union of states."
[136] Constitution of India, part 5 read with the Union List in the Seventh Schedule, which provides for various subjects in terms of which only the Union or Central government can legislate.
[137] The First Schedule of the Constitution of India lists the States and their territories. India has twenty-nine states: Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Nagaland, Orissa, Punjab, Rajasthan, Sikkim, Tamil Nadu, Telangana, Tripura, Uttarakhand, Uttar Pradesh and West Bengal.
[138] Part 6 of the Constitution of India read with the state list in the Seventh Schedule, which provides for various subjects in terms of which only the individual state governments can legislate.

entitlements, and the political aim of achieving a more egalitarian society through the redistribution of land, resulted in an intense debate in the Constituent Assembly.[139] These debates, similar to those before adopting the South African Constitution, led to a compromise between competing interests.[140] The compromise resulted in the Indian Constitution recognizing the right to property as a fundamental right in the Bill of Rights.[141] Initially, the property clause consisted of two parts: Articles 19(1)(f) and 31.[142] Article 19(1)(f), found under the right to freedom, stated, "All citizens shall have the right to acquire, hold and dispose of property." Article 19(5) allowed for reasonable restrictions on the right to acquire, hold, and dispose of property,[143]

> Nothing in sub clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent[s] the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

Article 31(1), which provided for the right to property,[144] and which is similar to section 25(1) of the South African Constitution, provided, "No person shall be deprived of his property save by authority of law."

Article 31(2), dealing with expropriation, which originally provided that property may not be disposed of or acquired for public purposes unless

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[139] AJ van der Walt *Constitutional Property Clauses* (Juta 1999) 193. See further J Murphy 'Insulating Land Reform From Constitutional Impugnment: An Indian Case Study' (1992) CILSA 129–55; A Jain 'Constitutional Battles and the Right to Property in India' (2014) 3 J Civil L Services 1–4; J Singh 'Separation of Powers and the Erosion of the 'Right to Property' in India' (2006) 17 Constitutional Political Economy 303–24.

[140] Van der Walt (n 139) 193.

[141] Constitution of India, art 19(1)(f); Van der Walt (n 139) 193, 203. See in general Murphy (n 139) 129–55; Jain (n 139) 1–4; Singh (n 139) 303–24.

[142] Van der Walt (n 139) 192.

[143] Van der Walt (n 139) 192.

[144] The sub-heading "Right to Property" was omitted by the Constitution (44th Amendment) Act, 1978.

the law in question provides for compensation[145] was amended and replaced multiple times[146] and finally repealed in 1978.[147]

The inherent tension between guaranteeing the right to property on the one hand, while also endeavoring to achieve social and economic reform through land reform and state-planned industrial growth, on the other hand,[148] resulted in tensions among the legislature and executive, which sought to implement their development agenda, and the judiciary, which enforced the fundamental right to property of those affected by the reforms.[149] In short, the judicial enforcement of the property clause often led indirectly[150] to the invalidation of a number of laws aimed at social and economic reform, including land reform legislation.[151] However, the legislature responded to each judicial decision by amending the Constitution.[152]

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[145] Van der Walt (n 139) 192.

[146] Constitution of India, art 31(2) was replaced by the Constitution (4th Amendment) Act 1955. It was replaced again by the Constitution (25th Amendment) Act 1971 and repealed in 1978 by the Constitution (44th Amendment) Act.

[147] The Constitution (44th Amendment) Act, 1978.

[148] Van der Walt (n 139) 193, 205.

[149] Ibid 93, 205.

[150] Ibid 195 notes that the courts "struck down the laws in question but did not justify their decisions with reference to the property guarantee as such, preferring to base their decisions on either the equality clause in article 14 or the reasonableness provision in article 19 [of the Constitution of India, 1950]."

[151] For example, in *Kameshwar Singh v The Province of Bihar* AIR (37) 1950 Pat 392 (SB), the Bihar State Management of Estates and Tenure Act 21 of 1949 (which was aimed at abolishing the *Zamindari* system) was struck down by the Patna High Court for being ultra vires because it provided for unreasonable and unlawful restrictions on property rights and was in conflict with the property guarantee in the Constitution. The court in *Kameshwar Singh v The State of Bihar* AIR (38) 1951 Pat 91 (FB) struck down a similar law, the Bihar Land Reforms Act 30 of 1950, which provided for the acquisition by the State of land held by the *zamindars*. This case was later reconsidered on appeal, after Article 31 was amended to preclude the application of Article 14 to land reform laws.

[152] For example, the constitutional assembly introduced the Constitution (1st Amendment) Act 1951, which inserted Articles 31A and 31B into the property clause, while appeal proceedings were still pending in *Kameshwar Singh v The State of Bihar* AIR (38) 1951 Pat 91 (FB). Van der Walt (n 139) 195 notes that Article 31B in particular "ousted judicial review of all land reform measures listed in the Ninth Schedule to the Constitution." This was confirmed on appeal in *State of Bihar v Kameshwar Singh* AIR (39) 1952 SC 252 where the Supreme Court conceded that the Bihar land reform legislation was protected from judicial

Ultimately, the Constitution (44th Amendment) Act 1978 repealed the property clause (Articles 19(1)(f) and 31) from the chapter on fundamental rights in the Constitution.[153] Article 300A was inserted separately in the Constitution in part 12, titled "finance, property, contracts and suits," which merely provides that "No person shall be deprived of his property save by authority of law."

Accordingly, Article 300A creates a constitutional rather than a fundamental right.[154] Several implications flow from the status of the right to property as a constitutional right. For one, it weakens the protection of the right in question. The right to property as a constitutional right "guarantees nothing more than the assurance that deprivations of property shall not be effected, simply by administrative decree."[155] At the very least this means that any limitation on property rights has to be imposed by a law of general application, within the legislative power of each individual state's legislature.[156] Such regulatory provisions imposing limitations on the right to property "should also not violate fundamental rights or other constitutional restrictions."[157] An analogy can be drawn with the South African property clause. If for example, the right to property was removed from the Bill of Rights in the South African Constitution, it would weaken the protection afforded to the right. Any interference with the right to property would not have to be justified in terms of the limitation (section 36 of the Constitution) clause on the grounds of reasonableness or proportionality. The only requirement would be for the interference to occur in terms of legislation and that the legislation in question does not infringe upon fundamental rights. Second, the avenue for legal redress and third, the corresponding remedy available to the person whose right to

scrutiny following the introduction of Articles 31A and 31B of the Constitution. Other constitutional amendments include the Fourth (1955); Seventh (1964); Seventeenth (1964); Twenty-Fourth (1971); Twenty-Fifth (1972); Twenty-Sixth (1972); Twenty-Ninth (1972); Thirty-Fourth (1974); and the Thirty-Ninth (1975) constitutional amendments.

[153] Van der Walt (n 139) 192.

[154] Ibid 203, 213, 215–6.

[155] Ibid.

[156] Ibid 203.

[157] Ibid 213.

property has been interfered with, will be different. If the right is a fundamental right the affected person may approach the Supreme Court of India,[158] as opposed to the lower courts.[159]

The remedies afforded to the affected person may also differ in this regard.[160] Compared to the South African position where reasonableness and proportionality play a role in the protection of property rights and interests where a land reform measure restricts the right to property, the status of the right to property in India allows the executive and legislature to implement land reforms even if private property rights and interests are adversely affected.[161] Accordingly, having a right to property embedded in the Bill of Rights specifically, as opposed to any other part of the Constitution, has specific implications.

Furthermore, unlike the property clause in the South Africa Constitution,[162] the Republic of India does not entrench or outline its land reform program in its Constitution. There is also no overarching national legislation dealing with land reform measures. Instead, the Constitution of India provides for guiding principles known as the Directive Principles of State Policy in Part 4 of the Constitution that apply to the Union government and all state governments.[163] Amongst other principles, it provides specifically for the securement of a social order for the promotion of the welfare of all people,

> The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also

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[158] Constitution of India, art 32.
[159] Constitution of India, art 226.
[160] Constitution of India, art 32.
[161] Van der Walt (n 139) 205.
[162] South African Constitution, s 25(4)–25(8).
[163] Constitution of India, part IV.

> amongst groups of people residing in different areas or engaged in different vocations.[164]

Redressing the skewed landownership patterns through land reform is one way to uphold this directive. Importantly, land reform under the Indian Constitution is a state subject, listed in the state list in the Seventh Schedule.[165] The Constitution of India provides explicitly that individual states have exclusive legislative power over "[l]and, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."[166] In other words, the legislature of each state government has the exclusive power to promulgate land reform legislation. The implementation is also the exclusive responsibility of each state government.[167]

While India is an important comparative case study for land reform in South Africa in general,[168] it is its experience with land ceiling regulation, primarily aimed at redistributing surplus land to the poor, landless, and marginal farmers,[169] that is specifically relevant for this Article.

C. The Imposition of Land Ceilings in India

The distinguishing features of the Indian agrarian economy at independence included great inequality of landownership; absentee landlords; a high incidence of tenancy and an array of uneconomic, fragmented, and subdivided agricultural landholdings.[170] After independence, it was proposed that a progressive agrarian economy requires a reduction in the disparities of ownership of agricultural land in

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[164] Constitution of India, art 38.
[165] Appu (n 50) xviii.
[166] See entry 18 in the state list in the Constitution of India, sch 7.
[167] Appu (n 50) xviii.
[168] *Agricultural Land Holding Policy Framework* (n 33) 13.
[169] Appu (n 50) 17; Besley and Burgress (n 47) 389–430.
[170] Appu (n 50) 188.

India.[171] As a result, a significant body of land reform legislation was passed, dealing with, inter alia, "(1) abolishing intermediate interests in land, (2) regulating tenancy, (3) limiting the size of landholdings and redistributing the above-ceiling surplus, and (4) distributing government wasteland to those without agricultural land and houses."[172]

To redistribute land to the poor, landless, and marginal farmers, the Indian government introduced agricultural land ceilings at a national scale.[173] In other words, the underlying reason for the imposition of land ceilings was to ensure a more equal distribution of agricultural land between the wealthy and the poor. The Indian government and Planning Commission did not recognize land ceilings as a mechanism that would promote or increase agricultural production.[174] Rather, land ceilings were justified because it was postulated that they would "promote social justice and provide a congenial environment for the development of a co-operative rural economy."[175] Additionally, P.S. Appu notes that given the already fragmented agricultural landholdings, there was no risk in fragmenting large farms when land ceilings were imposed.[176]

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[171] Government of India, Planning Commission *The Second Five Year Plan* (1956) 178; Appu (n 50) 188.

[172] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 242, 244–51. Besley and Burgress (n 47) 389–430.

[173] *The Second Five Year Plan* (n 171) 178; Appu (n 50) 141, 194. The First Five Year Plan (1951–1956) did not propose the agricultural land ceilings. Land ceilings were first introduced in the Second Five Year Plan (1956–1961). New Delhi, All India Congress Committee, *Resolutions on Economic Policy and Programs* (1955–1956) 4–10. Similarly, the *White Paper on South African Land Policy* (n 73) provides that "[t]he purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods … Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers."

[174] Appu (n 50) 139. See in general M Ghatak and S Roy 'Land Reform and Agricultural Productivity: A Review of the Evidence' (2007) Oxford Review of Economic Policy 251–69 where the authors find that land reform legislation, in particular land ceiling legislation, has and still has a negative impact on agricultural productivity.

[175] *The Second Five Year Plan* (n 171) 178; Appu (n 50) 139.

[176] Appu (n 50) 188. In principle, this means that there are few large farms or large-scale farming enterprises in India.

Ceiling laws were enacted in three phases in India.[177] The first phase covered the period from 1956 to 1972 before the national guidelines were laid down. Accordingly, by 1961, all Indian states adopted agricultural land ceiling legislation.[178] States were given the authority, in light of the local conditions, to determine inter alia (1) the unit of application of the ceiling,[179] (2) the classification of land, (3) exemptions from the ceilings legislation, (4) the ceiling limit, (5) payment of compensation for ceiling surplus land, and (6) who the beneficiaries should be and what type of land rights are granted to them once they have acquired the ceiling surplus land.[180] This resulted in wide variations among the laws of different states.[181]

The availability of ceiling surplus land largely depended on the definitions adopted by the individual states for agricultural land,[182] family, ceiling limit, and exemptions.

Landowners could easily circumvent the operation of ceiling legislation either by relying on the numerous exemptions listed in the legislation or by

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[177] Behuria (n 62) 131.

[178] Appu (n 50) 143. See also K Venkutasubramanian 'Land Reforms Remain an Unfinished Business' (*Planning Commission*, 2013) <http://planningcommission.nic.in/reports/articles/venka/index.php?repts=m-land.htm>. See land ceiling legislation (n 49).

[179] The ceiling may be applicable to an individual or a family as a unit.

[180] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–48; Behuria (n 62); CD Deecre and M Leon *Empowering Women: Land and Property Rights in Latin America* (University of Pittsburgh Press 2001); G Gopal 'Gender and Economic Inequality in India: The Legal Connection' (1993) 13 BC Third World LJ 63–86 for an exposition of key aspects focused on in India. The identified beneficiaries are seemingly women and the poor. See further the Regulation of Agricultural Land Holdings Bill where the focus is not only on the poor. The Bill identifies Black people as beneficiaries of agricultural land. Accordingly, while both India and South Africa's ceilings legislation and policies focus on the redistribution of agricultural land for the poor, the South African perspective differs because the redistribution of agricultural land is also linked to race.

[181] Appu (n 50) 145. See in general W Ladejinsky 'New Ceiling Round and Implementation Prospects' (1972) 7 Economic and Political Weekly A125-A132. The 1972 Guidelines, in terms of which states amended their land ceiling legislation were shaped by a compromise of view of the Central Land Reform Committee, the Ministry of Food and Agriculture, the nine-member panel appointed by Congress, the Congress Working Committee, and the conference of the State Chief Ministers held in March 1972.

[182] Considering the varied agricultural production and climatic conditions across the country, it is not surprising that there is no comprehensive or generally accepted definition of agricultural land in land ceiling legislation.

exploiting the loopholes in legislation. The legislation exempted many landowners from the operation and implications of land ceilings. Unexempted landowners could also bypass the operation of the legislation by exploiting the shortcomings or loopholes in the formulation and implementation of the legislation.[183] For example, where the ceiling legislation did not operate with retrospective effect, landowners anticipating the enforcement of a land ceiling act in their state could reduce their landholding by selling the excess (ceiling surplus) land; transferring the land to family members through subdivision; or transferring it to friends, relations, or even fictitious persons.[184] These loopholes are one of the main reasons for the failure of land ceilings in India and is therefore explored in detail below.

To bring about some measure of uniformity in land ceiling legislation and to address the loopholes in the legislation, a new policy was implemented in 1971, aimed at lowering ceiling limits, fixing the unit of application as a family unit or holding, and reducing the number of exemptions.[185] This second phase took place after the adoption of national guidelines in 1972.[186] The impact of the land reform process was re-assessed decades later, which resulted in the publication and adoption of the Draft National Land Reforms Policy in 2013.[187] This final phase, still in progress, provided for some measure of uniformity in the land ceiling legislation in general. Essentially, the aim of both the 1972 Guidelines and the 2013 draft policy was to make more land available for redistribution at a faster pace,[188] given the slow and unsuccessful redistribution process flowing from the

[183] Ashokvardhan (n 57) 15.
[184] These are known as *benami* transactions. *Benami* is essentially an Indian origin word which means holding in someone else's or a fictitious name to cover up the identity of the beneficial owner. The *Benami* Transactions (Prohibition) Act 45 of 1988 regulates these types of transactions. See further A Mehta 'End of *Benami* Transactions? (PBTA, 1988)' (2017) 2 Chamber's J 43–49, 43.
[185] See Venkutasubramanian (n 178).
[186] Ibid.
[187] *Draft National Land Reforms Policy* (n 46).
[188] Appu (n 50) 167, 189.

land ceiling measures.[189] S.K. Ray estimates that over a period of thirty-five years, less than 2% of the total operated land was redistributed during the second phase.[190]

Nearly a decade after the adoption of the 2013 Draft Policy, there is a call for the repeal of land ceiling legislation in India and demand for the consolidation of fragmented land parcels.[191] Though the land ceiling legislation may have allowed for some redistribution after independence in the short- and medium-term, the continued existence and imposition of land ceilings in the long-term have resulted in fragmented uneconomical land parcels, and the legislation acts as a barrier for economic growth—especially for small-scale farmers. The plea to move towards land consolidation measures stems from the needs of successful farmers who are unable to acquire more land to increase their means of production, outputs, and income.[192] In other words, the land ceiling legislation may have worked in the short- and medium-term as a measure to redistribute some land to those in need. However, over the long-term the imposition of land ceilings has stagnated growth.[193] The legislation no longer redistributes land to those in most need, nor does it allow for small-scale farmers to farm effectively.[194] As mentioned above, Sekhon argued that the long-term agrarian crisis is a result of the poor formulation and implementation of ceiling legislation.[195]

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[189] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–8.
[190] Ray (n 51) 220–37.
[191] Ghatak and Roy (n 174) 251–69 where the authors find that land reform legislation, in particular land ceiling legislation, has and still has a negative impact on agricultural productivity.
[192] I Patnik and S Roy 'Time for India to Do Away With Agricultural Land Ceiling' (*The Print,* 8 March 2019) <https://theprint.in/opinion/time-for-india-to-do-away-with-agricultural-land-ceiling-laws/202666/>.
[193] *Report on Other Land Reform Programmes* (n 51); Report on Income, Expenditure, Productive Assets and Indebtedness of Agricultural Households in India (n 54). Ray (n 51) 220–37; Deshpande (n 51) 1–14, 1; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–48.
[194] Ghatak and Roy (n 174) 251–69; Patnik and Roy (n 192).
[195] Sekhon (n 52) 3.

Despite the long-term problems associated with the imposition of land ceiling legislation in India, the successful redistribution of agricultural land in the short- and medium-term should not be overlooked. An understanding and analysis of the failures of land ceiling legislation in India may provide insight and lessons for South Africa in formulating and implementing ceiling legislation to prevent a similar agrarian crisis in the long term. To this end, the following section explores the reasons for the failures of land ceiling legislation in India. The aim is to draw lessons from India's experience with land ceilings to avoid similar mistakes in formulating the Landholdings Bill in South Africa. Where necessary, formulation changes to the Landholdings Bill are suggested.

IV. Exploring the Failures of Land Ceiling Legislation in India (West Bengal): Lessons for South Africa

A. Introduction

According to various authors,[196] the ineffective use of the land ceiling legislation can be attributed to the formulation of the ceiling legislation itself, particularly the formulation of (1) the unit of application; (2) the classification of land; (3) the definition of (agricultural) land; (4) exemptions; (5) the ceiling limit, and; (6) the retrospectivity of the legislation. Apart from the formulation of ceiling legislation, other reasons such as the implementation of the land ceiling legislation; the lack of accurate and updated land records; the lack of adequate or fair compensation; the lack of actual redistribution; and the quantity and the quality of redistributed agricultural land also contributed to the unsuccessful use of land ceilings to redistribute agricultural land. The reasons for the failure of land ceilings in India is explored further below and contrasted with the legal position in the State of West Bengal, in terms of the West Bengal Land Reform Act 10 of 1956.

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[196] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246; Behuria (n 62) 132.

If the South African government proceeds with the promulgation and implementation of the Landholdings Bill, it is pivotal that the legislation is formulated correctly without compromising agricultural productivity. To this end, the Landholdings Bill in its current form may require substantial amendments to address the problems identified with the formulation of the ceiling legislation in India. A comparative perspective may provide insights in reformulating the Landholdings Bill in South Africa. Given the relative success in West Bengal, the position in West Bengal is contrasted and examined in relation to the general failures in other States and analyzed and compared to the position set out in the Landholdings Bill in the South African context. Under each section below, the aim is to reflect on and derive lessons from the land ceiling experience in West Bengal and to critique and propose amendments to the Landholdings Bill. It is believed that the lessons and insights gained from the comparative analysis will ensure that South Africa does not make similar mistakes in formulating (or rather amending) and implementing the proposed Landholdings Bill.

B. The Formulation of the Ceiling Legislation

The structure of land ceiling legislation in India allowed landowners to circumvent its provisions.[197] For example, in anticipation of the promulgation of ceiling legislation, landowners reclassified their land to fall outside the scope of the land ceiling legislation. Partitions and fictitious transfers in *benami* names occurred on a large scale. If the law had retroactive effect, the anticipatory fictitious transfers would not have disrupted the redistribution of land.

Important considerations when drafting land ceiling legislation include (1) the unit of application, (2) the classification of land, (3) the definition of (agricultural) land, (4) the number of exemptions, (5) the ceiling limit, and (6) the retrospectivity of the legislation. These considerations are discussed below in view of the experience in India in general and West Bengal in

[197] Sethi in Rosset, Patel and Courville (n 62) 75.

particular. The insights gained are used to make suggestions for the formulation of the Landholdings Bill in South Africa.

1. The Unit of Application

a. India

Land ceiling legislation defines the total area of land that an individual or family can own. The "unit of application" must thus be understood in relation to who the ceiling limit applies to. Some states apply the ceiling limit to an "individual unit" and some to a "family unit." The definition of "family" varies by state. The 1972 Guidelines required that the ceiling apply to the family as a unit, instead of individual members of the family, as had been the case in some states.[198] Furthermore, the 1972 Guidelines defined "family" to include husband, wife, and minor children.[199] Where the number of family members exceeds five, additional land may be allowed, provided that the total area did not exceed double the ceiling for a family of five members.[200]

The State of West Bengal initially applied the ceiling to individual landholders.[201] Subsequent to the 1972 Guidelines, West Bengal changed the unit of application to "family" holdings. The West Bengal Land Reform Act provides for a rather extended definition of "family," in relation to a *raiyat* (landholder or owner).[202]

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[198] W Ladenjinksy 'Land Ceilings and Land Reform' (1972) Economic and Political Weekly 401–8, 401; Behuria (n 62) 133.
[199] Ladenjinksy (n 198) 401; Appu (n 50) 166; Behuria (n 62) 133.
[200] Ibid.
[201] Venkutasubramanian (n 178).
[202] The WBLRA provides an extended definition of "family," in relation to a *raiyat* (land holder or owner). A "family," in relation to a *raiyat* (landholder or owner), will be deemed to consist of, but limited to five members, including:

> (i) [the *raiyat*] himself and his wife, minor sons, unmarried daughters, if any; (ii) his unmarried adult son[s], if any, who does [*sic*] not hold any land as a *raiyat*; (iii) his married adult son, if any, where neither such adult son nor the wife nor any minor son or unmarried daughter of such adult son holds any land as a *raiyat*; (iv) [a] widow of this predeceased son, if any, where neither such widow nor any minor son or unmarried daughter

The ceiling legislation in West Bengal provides for a concept of a joint family, limited to five members to constitute a unit. If the ceiling limit is applied to each family member as an individual unit, less land is available for redistribution. By contrast, when the ceiling limit is calculated in relation to a family unit, more land becomes available for redistribution purposes. For example, a family consisting of five members and constituting a single unit will be allowed to keep less land than if the ceiling limit is applied in relation to the family members as individual units or holders. In view of the experience in West Bengal and to ensure that more land is available for redistribution in South Africa, the unit of application in the Landholdings Bill should arguably be reconsidered.

b. South Africa

The South African Landholdings Bill provides that the ceiling should apply to individual private and public landowners—including natural, juristic, and foreign persons—and not to a family unit or holding.[203] Following the Indian model of using family unit may prove difficult in South Africa. Given the pluralistic nature of the South African dispensation and the constant development of the concept of "family,"[204] it would be difficult to formulate a standardized concept of a family landholding in South Africa or to limit the number of family members to five to constitute a unit or holding. Arguably, in the interest of redistributing land to as many

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> of such widow holds any land as a *raiyat*; [and] (v) a minor son or unmarried daughter, if any, of his predeceased son, where the widow of the predeceased son is dead and any minor son or unmarried daughter of the predeceased son does not hold any land as a *raiyat*.

[203] See Regulation of Agricultural Land Holdings Bill, cl 1 for a definition of owner.

[204] See, eg, *Hattingh v Juta* 2012 5 SA 237 (SCA) para 17 and *Hattingh v Juta* 2013 3 SA 275 (CC) para 34, referring to *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 31 where the court held that families come in different shapes and sizes. These cases highlight the difficulty forming a concept of "family" within the South African context. See further Department of Social Development *White Paper on Families in South Africa* (June 2013), which provides that a "family" in South Africa is complex, multi-faceted, and ever changing.

people as possible, such a limitation on the number of people constituting a family unit would however be fair.

2. The Classification of Land

a. India

Concerning the classification of land, some Indian states created different classes of land in relation to the definition of a "standard acre"[205] in their land ceiling laws.[206] For example, in the state of Andhra Pradesh, before 1972, a family holding was equal to either six acres of class A land, eight acres of class B land, ten acres of class C land, etc.[207] As a result, a family could own between twenty-seven and 324 acres.[208] The determination of land classes accounts for the availability of irrigation, the nature of the soil, the climate, and the location.[209]

Several states also adopted the concept of a "standard acre or hectare."[210] In general, a "standard acre or hectare" referred to an acre of irrigated land or other land of good quality in a state as a whole or in a

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[205] See Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973, s 3(d), 3(e) and 3(v); Assam Fixation of Ceiling on Land Holdings Act 1 of 1957, s 12; Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962, s 4; Gujarat Agricultural Lands Ceiling Act 27 of 1961, s 2(6); Jammu and Kashmir Agrarian Reforms Act 17 of 1976, s 2(1); Karnataka Land Reforms Act 10 of 1962, sch 1, part A; Kerala Land Reforms Act 1 of 1964, s 2(10), 2(11), 2(24), 2(38) and 2(41) read with s 82; Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960, s 2(f); Orissa Land Reforms Act 16 of 1960, s 2(5-a) read with s 2(13); Punjab Land Reforms Act 10 of 1973, s 4; Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973, s 4; Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978, sch 2; Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961, s 2(40); Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978, s 2(11) and West Bengal Land Reforms Act 10 of 1965, s 14(K)(f).

[206] One acre equals 0.405 hectares.

[207] See Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973, s 3(d), 3(e) and 3(v).

[208] Appu (n 50) 144.

[209] Ibid.

[210] Ibid.

region thereof.[211] Other classes of land—for example, non-irrigated, hill or desert land—were given corresponding lower values.[212]

The 1972 Guidelines classified land into three broad classes: (1) irrigated double-cropped land, (2) irrigated single-cropped land, and (3) dryland.[213] The 2013 Draft Policy only provides for the classification of two types of land—irrigated and non-irrigated[214]—with corresponding recommended ceiling limits.[215] In line with the 1972 guidelines and the 2013 Draft Policy, the West Bengal Land Reform Act provides for the classification of and the determination of an irrigated area of land.[216] In the Land Reform Act a "standard hectare" in relation to agricultural land is, equivalent to (1) 1.00 hectare in an irrigated area and (2) 1.40 hectares in any other area.[217] In relation to any other land, including land comprised in an orchard, a standard hectare is equivalent to 1.40 hectares.[218] Whether the land is irrigated impacts the amount a landowner may need to farm productively.

b. South Africa

A standard classification of land will ensure uniformity in classifying the land per hectare. The Landholdings Bill provides for the consideration of land capability factors, such as different classes of land, including high, medium, and unique agricultural land when determining the ceiling limit.[219] This means that the specific classification of land may guide and ultimately restrict the ceiling limit as is the case in India.

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[211] Ibid.
[212] Ibid.
[213] Ibid 173.
[214] *Draft National Land Reforms Policy* (n 46) 5.
[215] See the discussion of ceiling limits below. *Draft National Land Reforms Policy* (n 46) 5 provides that "[e]very state should revise its ceiling limits, if the existing limit is more than 5-10 acres in the case of irrigated land and 10-15 acres for non-irrigated land."
[216] Section 14K(d), which provides for a definition of irrigated land, read with s 14N of the WBLRA.
[217] WBLRA, s 14K(f)(i).
[218] WBLRA, s 14K(f)(ii) and (iii).
[219] Regulation of Agricultural Land Holdings Bill, cl 25.

3. The Definition of (Agricultural) Land

a. India

Land ceiling laws in India apply to agricultural land, but there is no generally accepted definition of agricultural land. Generally, the concept of agricultural land is formulated in one of two ways in the state laws. "Land" is either defined as land held, used, or capable of being used for (1) "agricultural purposes," followed by a list of uses that may be deemed agricultural purposes.[220] Alternatively, "land" is defined as land held for (2) purposes of "agriculture" in that specific state.[221] Most states also define "agriculture" in their ceiling legislation. The inadequate definition of agricultural land in India allowed landowners to reclassify their land as "non-agricultural" to circumvent land ceiling legislation.[222] However, West Bengal adopted a wide definition of "land,"[223] as opposed to "agricultural land," which prevented landowners from reclassifying their land and thus circumventing the legislation.[224] Based on the experience in India, it may be pivotal to define "agricultural land" as wide as possible to preempt and avoid the circumvention of the Landholdings Bill in South Africa.

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[220] See Assam Fixation of Ceiling on Land Holdings Act 1 of 1957, s 3(f); Gujarat Agricultural Lands Ceiling Act 27 of 1961, s 2(10); Haryana Ceiling on Landholding Act 26 of 1972, s 3(g); Himachal Pradesh Ceiling on Land Holding Act 19 of 1973, s 3(f); Jammu and Kashmir Agrarian Reforms Act 17 of 1976, s 2(9); Karnataka Land Reforms Act 10 of 1962, s 2(18); Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960, s 2(k); Orissa Land Reforms Act 16 of 1960, s 2(14); Punjab Land Reforms Act 10 of 1973, s 3(5); Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961, s 3(22).

[221] See Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973, s 3(j); Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962, s 2(f); Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978, s 2(3); Assam Fixation of Ceiling on Land Holdings Act 1 of 1957, s 3(a); Gujarat Agricultural Lands Ceiling Act 27 of 1961, s 2(1); Karnataka Land Reforms Act 10 of 1962, s 2(1); Orissa Land Reforms Act 16 of 1960, s 2(1); Rajasthan Imposition of Ceiling on Agricultural Holding Act 11 of 1973, s 2(b); Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961, s 3(1).

[222] Hanstad and Brown (n 46) 26; Besley and Burgress (n 47) 394.

[223] WBLRA, s 2(7).

[224] Besley and Burgress (n 47) 389, 394.

b. South Africa

The Landholdings Bill in South Africa only applies to agricultural land, defined as a residual category of land. The Bill defines agricultural land as,

> all land, other than (a) land in a proclaimed township or; (b) land that will be proclaimed as a township; (c) land which immediately prior to the commencement of the Act was formally zoned for non-agricultural purposes by any sphere of government or any public entity or; (d) which has been excluded from the provisions of this Act by the Minister; or (e) which has been determined as non-agricultural land use in accordance with the provisions of the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA"). [225]

Accordingly, the Bill applies to all land, except those areas excluded from the definition of agricultural land, even where the land cannot be used for agricultural purposes. Given the wide definition of agricultural land in the Landholdings Bill, it is unlikely that landowners will successfully argue that their land falls outside the scope of the legislation, and therefore it is less likely for landowners to circumvent the provisions of the Bill, as was the case in India. This definition of agricultural land will also ensure that more land is available in principle for redistribution.

In South Africa, once land is zoned as "agricultural land," it is extremely difficult, complex, costly, and time-consuming to change the zoning.[226] For example, under both Spatial Planning and Land Use Management Act 16 of 2013 and Subdivision of Agricultural Land Act 70 of 1970 consent from either the relevant municipality or Minister is required to rezone or change

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[225] Regulation of Agricultural Land Holdings Bill, cl 1. For a similar definition see SALA, s 1. See further *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC).

[226] Propertywheel 'What you need to know about the process of rezoning or subdividing' (*Propertywheel*, 6 April 2017) <https://propertywheel.co.za/2017/04/what-you-need-to-know-about-the-process-of-rezoning-or-subdividing/>. See J van Wyk 'Is Subdivision of Agricultural Land Part of Municipal Planning?' (2009) 24 South African Public L 45–62.

the use of the land.[227] Therefore, zoning laws may inadvertently prevent landowners from reclassifying their land, thereby making it difficult to circumvent the provisions of the Landholdings Bill.

One point of concern is that it would be ineffective if a land ceiling were imposed on agricultural land as a residual category, but the surplus land was nonarable. Accordingly, where the land identified for redistribution is for farming purposes and not merely settlement, a reformulation of "agricultural land" in the envisaged ceiling legislation may be required.[228] Given that the Bill is aimed at redistributing land for farming purposes, it may be more suitable in the South African context to adopt a wide definition of agricultural land similar to the other states in India. "Agricultural land" should be defined as "all land (a) for agricultural purposes or (b) for purposes of agriculture." Such a formulation makes it unlikely for landowners to circumvent the operation of land ceiling legislation. It also ensures that the ceiling surplus land acquired and redistributed to beneficiaries is arable.

4. The Exemptions

a. India

Indian states also allowed for a number of exemptions in the land ceiling legislation.[229] Initially, the Planning Commission suggested in its Second

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[227] SPLUMA, s 28 requires the relevant municipality to rezone or change the use of the land. SALA, s 3 requires ministerial written consent for subdivision and other activities that may alter the use of the land. See Van Wyk (n 226) 545–62.

[228] See Kotzé (n 107) ch 10.

[229] Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973, s 23; Assam Fixation of Ceiling on Land Holdings Act 1 of 1957, s 2; Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962, s 29; Gujarat Agricultural Lands Ceiling Act 27 of 1961, s 3; Haryana Ceiling on Landholding Act 26 of 1972, ss 5 and 54; Himachal Pradesh Ceiling on Land Holding Act 19 of 1973, s 5; Jammu and Kashmir Agrarian Reforms Act 17 of 1976, s 3; Karnataka Land Reforms Act 10 of 1962, ch 8; Kerala Land Reforms Act 1 of 1964, s 81; Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960, s 3; Orissa Land Reforms Act 16 of 1960, s 38; Punjab Land Reforms Act 10 of 1973, s 14; Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973, s 22; Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961, s

Five Year Plan that a list of land tracts should be exempted from the operation of ceilings legislation, namely plantations of tea, coffee, and rubber; existing orchards; cattle breeding farms; dairy and wool farms; well-managed and mechanized farms;[230] and sugarcane farms operated by sugar factories.[231] However, state legislatures exempted many more categories of land.[232] Some exemptions were justified, such as land held by central and state governments and small parcels of land voluntarily gifted by wealthy landowners to the landless known as *Bhoodan* and *Gramdam* land.[233] Other exemptions were not justified. Appu identifies private natural forest land, grazing land, tree plantations, hill land, and tank fisheries as unreasonable and unjustified exemptions.[234] States also generally exempted religious, charitable, or educational institutions or trusts; private and public sector industries; and cooperative farming industries.[235] Appu argues the latter institutions, trusts, industries and societies should be allowed to keep a minimum area of land to carry out their respective legitimate activities.[236] Such a minimum area would have to be determined individually, based on the needs of the relevant institution, trust, industry, or society.

The 1972 Guidelines limited the number of exemptions from land ceiling legislation. It provided for the exemption of, inter alia, plantations of tea, coffee, rubber, cardamom, and cocoa; *Bhoodan* and *Gramdam* land; land held

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73; Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978, s 4 read with s 6 and West Bengal Land Reforms Act 10 of 1965, s 14M(6) read with s 14R. Only the Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978 provides for no exemptions from the operation of the land ceilings.

[230] Although no definition or criteria are provided to determine if the farm is "well-managed" or "mechanized." It is also unclear who would make such a determination.

[231] Appu (n 50) 149.

[232] Ibid.

[233] These voluntary (as opposed to State instituted) land reform measures were driven by the Bhoodan-Gramdam movement. R Church 'Review: The Impact of Bhoodan and Gramham on Village India' (1975) 48 Pacific Affairs 94–98. See also E Linton *Fragments of a Vision: A Journey Through India's Gramdan Villages* (1971).

[234] Appu (n 50) 150.

[235] Ibid.

[236] Ibid.

by agricultural universities, colleges, schools, and research institutions.[237] Furthermore, state governments may, at their discretion, exempt existing religious, charitable and educational trusts, and institutions of a public nature.[238] In the case of cooperative farming societies, exemption may be granted on the condition that computing the ceiling area for a member will take into account his or her share in the society as well as the other lands held by such a member.[239] The Guidelines also provided that no exemptions should be granted to sugarcane farms and private trusts of any kind.[240] As a catch-all recommendation, the 1972 Guidelines provided that all other exemptions should be withdrawn.[241] However, the 2013 Draft Policy suggests that exemptions to religious, charitable, educational, research, and industrial institutions; trusts or organizations as well as plantations and aqua farms should be discontinued.[242] It recommends that these institutions, trusts, organizations, and farms should be restricted to the use of one unit of fifteen acres.[243]

West Bengal is one of the states with the fewest exemptions.[244] First, the West Bengal Land Reform Act provides that the ceiling limit shall not apply to any land owned by central, state, or local authorities.[245] Furthermore, trusts or institutions of a public nature exclusively for a charitable or religious purpose or both shall be deemed a *raiyat* and shall be entitled to retain lands not exceeding seven standard hectares, notwithstanding the number of its centers or branches in the state.[246] Accordingly, while not exempting charitable or religious trusts or institutions from the operation of land ceilings, the Act makes an exception with regard to the ceiling limit.

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[237] Ibid 167.
[238] Ibid.
[239] Ibid.
[240] Ibid 168.
[241] Ibid.
[242] *Draft National Land Reforms Policy* (n 46) 5. However, compare the different provisions dealing with numerous exemptions from the operation of land ceilings: See land ceiling legislation (n 225).
[243] *Draft National Land Reforms Policy* (n 46) 5.
[244] WBLRA, s 14M(6) read with s 14R.
[245] WBLRA, s 14R. See Behuria (n 62) 136.
[246] WBLRA, s 14M(6).

In other words, charitable and/or religious trusts and institutions are allowed to hold or own more land than other *raiyats*. In comparison, these types of trusts and institutions are absolutely exempted from the operation of the land ceiling legislation in other states.

Limiting the number of exemptions makes more land available for redistribution, which contributes overall to the effective implementation of the ceiling legislation. Therefore, West Bengal's success with land ceiling legislation may in part be attributed to the few exemptions it provided for in its legislation in comparison to other states.

b. South Africa

While the Landholdings Bill does not list exemptions, it provides that "the Minister may determine special categories of ceilings and exempt a particular category of agricultural land holding"[247] from the operation of the land ceilings. The Bill does not provide guidelines or criteria for determining special categories or exemptions. The Bill also specifically provides that "institutional funds that own agricultural landholdings portions of which constitute" ceiling-surplus land may by way of application to the Minister of Agriculture, Land Reform and Rural Development be exempted from the provisions dealing with land ceilings.[248] The Minister has the discretion to exempt particular categories of land or institutional funds from the operation of the ceiling legislation, subject to an application procedure.

Given the success in West Bengal, South Africa's land ceiling legislation should, as far as possible, provide for minimal exemptions. While exemptions from the operation of the Landholdings Bill should be limited, certain land will inevitably be exempted to protect other policy objectives such as the protection of prime agricultural land or special conservation

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[247] Regulation of Agricultural Land Holdings Bill, cl 25(1)(c).

[248] Regulation of Agricultural Land Holdings Bill, cl 26(4)(a). According to this Bill, "Institutional Funds" includes "investment funds, pension funds, hedge funds that invest or trade in agricultural land and related derivatives in their use of agricultural land as an asset class."

areas. In broadening access to land, it is therefore proposed that certain safeguards for the preservation of agricultural land be put into place while still providing for the imposition of land ceilings in South Africa.

5. The Ceiling Limit

a. India

Depending on the quality or the nature of the land, the ceiling limit is differential across states in India.[249] Each state took into account a variety of factors to determine the land ceiling, including the climate, the value of the lands in terms of crop potential, the fertility of the soil, the size of the property or family, and the production output.[250] For example, if the land in question was arid with low productivity, the land ceiling was set higher than the ceiling for fertile land.[251] Inversely, a lower land ceiling was imposed on irrigated land.[252]

Ceiling limits in India were set too high in relation to the average household operational holdings to have much of an impact on the agrarian

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[249] Behuria (n 62) 134, 166–83. Cf Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973, s 4 and 4A read with s 3(c); Assam Fixation of Ceiling on Land Holdings Act 1 of 1957, s 4; Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962, s 4; Gujarat Agricultural Lands Ceiling Act 27 of 1961, s 6; Haryana Ceiling on Landholding Act 26 of 1972, s 7; Himachal Pradesh Ceiling on Land Holding Act 19 of 1973, s 6; Jammu and Kashmir Agrarian Reforms Act 17 of 1976, s 2(1); Karnataka Land Reforms Act 10 of 1962, s 63; Kerala Land Reforms Act 1 of 1964, s 82; Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960, s 7; Orissa Land Reforms Act 16 of 1960, ss 37A and 39; Punjab Land Reforms Act 10 of 1973, ss 4 and 7; Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973, ss 4 and 5; Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978, s 6; Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961, ss 5 and 7; Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978, s 5 read with s 4 and West Bengal Land Reforms Act 10 of 1965, s 14K. For a brief summary of the ceiling limits from 1950-1970 in Jammu and Kashmir; West Bengal; Andhra Pradesh; Assam; Bihar; Gujarat; Punjab; Haryana; Kerala; Maharashtra; Karnataka; Madhya Pradesh; Orissa; Rajasthan; Tamil Nadu and Uttar Pradesh, see Appu (n 50) 145-149. See also Venkutasubramanian (n 178); A Nauriya 'The Land Question in Southern Africa and India' <http://www.satyagraha.org.za/word/the-land-question-in-southern-africa-and-india-by-anil-nauriya/> accessed 11 February 2022.

[250] *Agricultural Land Holding Policy Framework* (n 33) 11.

[251] Nauriya (n 249).

[252] Ibid.

sector.[253] Lowering the ceiling limit, while taking into account the operational requirements of the land for effective productivity, ensures that more land is classified as ceiling surplus land, which ensures that more land is in principle available for redistribution. In other words, the higher the ceiling the less land could be identified as ceiling surplus land, which also resulted in less land being available for redistribution.[254] Imposing a lower ceiling on land identified as "irrigated land" deters landowners from investing and making improvements, such as using modern irrigation systems.[255] In other words, landowners fail to improve the land through irrigation systems for fear that the land will be recategorized as "irrigated land," allowing owners to hold less land in terms of the ceiling limit. Subsequently the land, including the improvements made to it will be regarded as ceiling surplus land to be redistributed to beneficiaries. The impact of a lower ceiling limit ultimately stifles investment in the modern agricultural sector and acts as a barrier for farmers to grow economically.[256] Accordingly, the 1972 Guidelines provided for revised ceiling limits.

The recommended ceiling limit for best category land in a state with assured irrigation and capable of producing at least two crops a year is ten to eighteen acres.[257] In relation to second class land, the ceiling limit should range between eighteen and twenty-seven acres.[258] Furthermore, no person may hold more than fifty-four acres of dry land[259] except for hill and desert areas that may have a marginally higher land ceiling.[260]

The 2013 Draft Policy proposed that states should revise their ceiling limits where the existing limit is more than five to ten acres for irrigated

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[253] Mearns (n 62) 10; Behuria (n 62) 132.
[254] See *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 28.
[255] Patnik and Roy (n 192).
[256] Report on Income, Expenditure, Productive Assets and Indebtedness of Agricultural Households in India (n 54) read with *Report on Other Land Reform Programmes* (n 51). See further K Deininger, S Jin and HK Nagarajan 'Land Reforms, Poverty Reduction, and Economic Growth: Evidence from India' (2007) J Developmental Studies 496–521; Patnik and Roy (n 192).
[257] Appu (n 50) 149.
[258] Venkutasubramanian (n 178).
[259] Ladenjinksy (n 198) 401.
[260] Venkutasubramanian (n 178).

land and ten to fifteen acres for non-irrigated land.[261] Given the different climatic conditions, the crops grown, and the density of the population in each state, it is reasonable to provide for a small range within which the ceiling limit should be fixed, as opposed to introducing a precise and uniform limit for all states.[262]

Compared to other states, West Bengal, from the outset, set a low ceiling, which may have contributed to a more successful and effective redistribution of land. Initially, West Bengal imposed a uniform ceiling of twenty-five acres on individual (as opposed to family) holdings.[263] However, in line with the 1972 Guidelines, the legislation in West Bengal was amended to apply to a family unit or holding. The ceiling limit was also reduced to five hectares (12.4 acres) of irrigated land or seven hectares (17.3 acres) of unirrigated land[264] for a "family" of five members.[265] Given West Bengal's redistributive success, it may be necessary for South Africa to reconsider the ceiling limit in the Landholdings Bill.

b. South Africa

As it currently stands in South Africa, Chapter 7 of the Landholdings Bill provides for the categories of ceilings for agricultural landholdings. Different categories of land ceilings may be determined for different districts and regions.[266] Exact ceilings for each district are to be announced by notice in the *Government Gazette*, by the Minister, after consultation.[267] The Minister has the discretion to determine special categories of ceilings and may also provide for exemptions of particular categories of landholdings.[268] For the determination of ceilings for agricultural

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[261] *Draft National Land Reforms Policy* (n 46). See also Appu (n 50) 267–73.
[262] Appu (n 50) 295.
[263] Ibid 144–5.
[264] WBLRA, s 14M; Appu (n 50) 145.
[265] Behuria (n 62) 136.
[266] Pienaar (n 13) 3; Regulation of Agricultural Land Holdings Bill, cl 25(1) .
[267] Regulation of Agricultural Land Holdings Bill, cl 25(1).
[268] Regulation of Agricultural Land Holdings Bill, cl 25(1)(c).

landholdings for each district, regard must be had to "such criteria and factors as may be prescribed."[269]

The following criteria and factors are listed, (1) land capability factors (essentially high, medium or unique agricultural land,[270] matters pertaining to production output, variations in physical potential in terms of soil type, and the relationship between resources); (2) capital requirements of different enterprises; (3) measure of expected household and agro-enterprise income; (4) annual turnover; (5) relationship between product prices and price margins; and (6) any other matter as may be prescribed.[271]

In summation, there is no standard ceiling applicable to all agricultural land in South Africa. Instead, the ceiling limit is, similar to the position in India, differential and determined per district or region, having regard to the various criteria and factors prescribed above. The formulation of ceiling limits, therefore, requires careful consideration so as not to stifle economic growth and agricultural productivity. It is clear from the experience in West Bengal that the ceiling limit should be kept low to ensure that more land is available for redistribution.

6. The Retrospective Effect

a. India

In general, land ceiling legislation in India does not prohibit transfers retrospectively.[272] The majority of Indian states only banned transfers after the implementation of the ceiling law.[273] In anticipation of the implementation of land ceiling legislation, or where the states failed to implement the land ceilings in a timely manner, landowners therefore resorted to partitions, fictitious transfers, or simply disposed of their land

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[269] Regulation of Agricultural Land Holdings Bill, cl 25(2).
[270] These concepts are not defined in the Regulation of Agricultural Land Holdings Bill.
[271] Regulation of Agricultural Land Holdings Bill, cl 25; Pienaar (n 13) 3.
[272] For an exposition of the States which provided for land ceiling legislation with retrospective effect, see Behuria (n 62) 184–211.
[273] Behuria (n 62) 132.

falling above the ceiling limit to circumvent the legislation.[274] For example, landowners would resort to *benami* transactions[275] to dispose of surplus land or gift the land among relations, friends and dependents.[276] The disposal of surplus land not only made less land available for redistribution, but it was also difficult to determine who the true owner of the property, specifically (agricultural) land was. Accordingly, the act of monitoring the type of transactions conducted is also integral in the legislation's success or not. These types of transactions also contributed towards inaccurate or incomplete land records, which is also regarded as one of the reasons for the failure of land ceiling legislation in India.[277]

Only Gujarat and West Bengal provided for the retrospective effect of the land ceiling legislation. In West Bengal, land transferred by sale, gift, or otherwise partitioned by a *raiyat* after August 7, 1969, but before the publication of the West Bengal Land Reform (Amendment) Act, 1971 shall be taken into account in determining the ceiling area, as if the land had not been transferred or partitioned.[278] The Act also provides that this provision

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[274] Ibid; Appu (n 50) 154; *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 28, 148.

[275] Before the *Benami* Transactions (Prohibition) Act 45 of 1988 came into force, *benami* transactions were legal in India and there was no bar or punishment under any law for entering into any *benami* transactions. In this regard, the land ceiling legislation in general did not make provision for dealing with *benami* transfers. The property, which formed the subject matter of the *benami* transactions, was also not liable for confiscation by the government. The 1988 Act, as its title indicates, was enacted with the aim of prohibiting *benami* transactions. However, the 1988 Act did not provide for an adequate mechanism to enforce the prohibition against *benami* transactions. *Draft National Land Reforms Policy* (n 46) 6 recommended that the Act be amended for the purpose of curbing and monitoring evasions of ceiling legislation through fraudulent, *benami*, land transactions The *Benami* Transactions (Prohibition) Amendment Act 43 of 2016 provides for (a) a wider definition of *benami* transactions, (b) process of confiscation and acquisition of *benami* property by the government against payment of no compensation and, (c) imprisonment for persons conducting *benami* transactions. The disposal of surplus land to relations, friends, and dependents, by way of *benami* transactions, not only made less land available for redistribution, but it was also difficult to determine who the true owner of the property, specifically (agricultural) land, was. See further *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 28 and Hanstad et al. in Binswanger-Mkhize et al. (n 23) 247; Mehta (n 184).

[276] Appu (n 50) 154.

[277] See heading titled, The lack of accurate and updated land records below.

[278] WBLRA, s 14P(1).

shall not apply to *bona fide* transfers or partitions and that the onus of proving such a transfer or partition shall lie with the transferor.[279] Furthermore, the transfer or partition will be deemed to be *mala fide* if the transfer or partition was made in favor of the transferor's relatives.

b. South Africa

The Landholdings Bill, in its current form, does not prohibit transfers retrospectively. It only provides that "any agreement to acquire or dispose of agricultural land is void, in so far as it purports to exclude or to limit any provision of this Act" from the date of commencement of the Act.[280]

The experience in Gujarat and West Bengal suggest the Bill should prohibit the transfer of agricultural land retrospectively. However, the provisions of the Subdivision of Agricultural Lands Act, read with the Landholdings Bill, may restrict owners from subdividing and subsequently transferring portions of their agricultural land to relations, friends, and dependents to circumvent the provisions of the Bill.[281] This means that transactions similar to *benami* transactions are less likely to occur.

7. Concluding Remarks

The discussion and analyses above have highlighted the importance of well-formulated legislation in the context of land redistribution, particularly as it pertains to the imposition of land ceilings as a regulatory measure. The failure to properly formulate legislation allowed landowners to easily circumvent the legislation, either by reclassifying, subdividing, and/or selling the land or portions thereof to fall below the ceiling limit.

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[279] WBLRA, s 14P(2).

[280] Regulation of Agricultural Land Holdings Bill, cl 3(2).

[281] Before the reconfiguration of the national executive on May 29, 2019, cooperation between the different departments, namely the Department of Rural Development and Land Reform (DRDLR) and the Department of Agriculture, Forestry and Fisheries (DAFF), would have been required to ensure that land owners, before the commencement of the Landholdings Bill, did not subdivide and transfer ceiling surplus land to relations, friends and dependents to circumvent the Regulation Bill. However, in light of the newly constituted DALRRD (which arises from a merger between the DAFF and the DRDLR), it may be more difficult to circumvent the aims of the Bill.

Subdivision resulted in fragmented uneconomical portions of land, which negatively impacts small-scale farmers' economic growth because they are unable to acquire more land.

Apart from the formulation of the land ceiling legislation, the lackluster implementation of land ceiling legislation is another reason for its failure a redistributive measure. Accordingly, the implementation of land ceilings in India (or rather lack thereof) is discussed in the next section. Other reasons for the failure of land ceilings include the lack of accurate and updated land records, the lack of equitable compensation for landowners for surplus land, the failure to transfer ownership of the land to intended beneficiaries, and issues entailing the quality and quantity of land awarded to beneficiaries. While the formulation of land ceiling legislation is pivotal for the successful implementation of land ceilings and is the focus of this contribution, other factors or a combination of factors also affect the success of land ceilings as a redistributive measure.

C. The Implementation of Land Ceiling Legislation

1. India

Indian states have been reluctant to implement land ceilings.[282] Reluctance may stem from (1) lack of political will,[283] (2) administrative delays, and/or (3) legal disputes over classification of land and determination of surplus land.[284] The determination of fair compensation, which was calculated differently by each state, could not be challenged in the courts and therefore could not and did not contribute to the delay in implementing land ceiling legislation.[285] The amount of compensation is

[282] Sethi in Rosset, Patel and Courville (n 62) 75; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–8.
[283] Planning Commission of India, *Report of the Task Force on Agrarian Relations* (1973) 7; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 247–8.
[284] *Draft National Land Reforms Policy* (n 46) 25 provides that the absence of a common adjudicatory body and uniform procedure is leading to complexities and delays in the settlement of land disputes. See also *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 27.
[285] Constitution of India, art 31C.

also discussed below as a proposed and separate reason for the failure of land ceiling legislation in India.[286]

West Bengal administered and implemented its land ceiling legislation effectively.[287] Because civil courts follow strenuous, costly, and time-consuming procedures, the West Bengal Land Reform Act bars the jurisdiction of civil court in almost all disputes arising from the operation of the ceiling legislation.[288] Instead, the disputes among *raiyats* or between the *raiyats* and the government are decided by revenue officers through an administrative process. Appeals may be brought before the District Land and Land Reforms Officer or other senior officers appointed or allocated to hear appeals.[289] Therefore, in West Bengal, the particular forum for disputes is prescribed resulting in (1) a specialized fixed forum administered by specialized administrative officials and (2) a less complex and time-consuming dispute resolution process.

2. South Africa

Section 25(5) of the Constitution mandates the South African government—not individuals, families, monopolies, or private sector corporations—to broaden access to land. Therefore, apart from the formulation of legislation regulating agricultural land for redistribution purposes in South Africa, the effective use of land ceilings also depends on the South African government's effective implementation thereof.[290] In view of the experience in West Bengal the South African government should consider new institutions such as specialized officials and effective

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[286] See heading titled, The lack of adequate or fair compensation below.
[287] According to, Hanstad and Brown (n 46) 4.
[288] WBLRA, ss 34 and 61.
[288] WBLRA, s 53A. See also LGAF Team, Landesa 'Improving Land Governance in West Bengal' (2014) *State Report: Land Governance Assessment Framework* 16.
[289] WBLRA, s 54. See also LGAF Team, Landesa (n 288) 16, which states that an aggrieved party may approach the Land Reforms Tenancy Tribunal against the decisions of the appellate authority and the decision of the Tribunal can be challenged before the Division Bench of the High court earmarked for this purpose.
[290] Sethi in Rosset, Patel and Courville (n 62) 75; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–8.

tribunals to ensure the successful implementation of land ceiling legislation.

In principle, South Africa requires an effective land administration system characterized by (1) a strong political will on the part of the executive, specifically the Department of Agriculture, Land Reform and Rural Development (DALRRD)[291] to implement and monitor compliance with land ceiling legislation; (2) a clear and effective administrative process, governed by a competent body, such as a National Land Commission for the acquisition and redistribution of surplus land; (3) an effective mechanism for resolving land disputes timeously dealing with inter alia the classification of land and determining whether the land constitutes surplus land and the determination of just and equitable compensation; and (4) sufficient capacity and resources to undergird the relevant mechanisms.

The dismal track record of the DALRRD, particularly its failure to achieve any meaningful redistribution,[292] cannot be ignored. Various

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[291] On 29 May 2019, President Ramaphosa announced the appointment of a reconfigured national executive following the general elections, President Cyril Ramaphosa Announces Reconfigured Departments (*South African Government*, 14 June 2019) <https://www.gov.za/speeches/president-cyril-ramaphosa-announces-reconfigured-departments-14-jun-2019-0000>. The Minister of Agriculture, Land Reform and Rural Development is responsible for the newly reconstituted Department of Agriculture, Land Reform and Rural Development (DALRRD). This is a new department arising from a merger between the DAFF and the Department of Rural Development and Land Reform (DRDLR). See further Hanstad et al. in Binswanger-Mkhize et al. (n 23) 247–8; Advisory Panel on Land Reform and Agriculture (n 9) vi.

[292] For example, *Rakgase* (n 121). See also Pienaar (n 121) 537–9 and the Advisory Panel on Land Reform and Agriculture (n 9) 12. There has also been a failure to realize the rights of intended beneficiaries under the tenure security and restitution programs, forming part of the land reform programs. See, e.g., *Mwelase* (n 122). This case concerned the failure by the Department of Rural Development and Land Reform to process land tenant applications submitted in terms of the Land Reform Act. Because of that failure, the Constitutional Court confirmed the order granted by the Land Claims Court namely, the appointment of a Special Master for labor tenants to assist the Department in its implementation of the Act. The government has also failed for more than twenty years to complete the initial restitution plan in terms of the Restitution of Land Rights Act. See further the Restitution of Land Rights Amendment Act 15 of 2014 which extended the deadline for the submission of claims to June 29, 2019. However, the Constitutional Court in *Land Access Movement* (n 123) declared the Restitution of Land Rights Amendment Act invalid. More recently, the speaker sought a further extension to enable parliament to enact the new act, culminating in the judgment of *Speaker, National Assembly* (n 123).

reasons for these failures have already been put forward in detail by commentators and academics[293] and highlighted in case law.[294] The aim of this Article is neither to provide an overview of such failures nor to proffer further analysis regarding the origins of such failures.

The Landholdings Bill provides for a Land Commission to oversee the administrative process regulating the acquisition and redistribution of surplus land.[295] Inevitably, cooperation among the Land Commission and other departments and offices, such as the DALRRD, the Office of the Registrar of Deeds[296] and the Office of the Valuer-General[297] will be required to ensure an effective administrative process.

The Landholdings Bill does not provide for a dispute resolution mechanism. It is uncertain whether the Land Claims Court[298] has jurisdiction to resolve land disputes under the Landholdings Bill or whether parties can resort to alternative dispute resolution processes, such

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[293] See further Hall in Cousins and Walker (n 100) 127; Cousins in Cousins and Walker (n 100) 250; Mtero, Gumede and Ramantsima (n 124). See also Advisory Panel on Land Reform and Agriculture (n 9) 12–13.

[294] For example, *Rakgase* (n 121); *Mwelase* (n 122); *Land Access Movement* (n 123); and *District Six Committee* (n 125).

[295] Regulation of Agricultural Land Holdings Bill, ch 2.

[296] The DRA regulates all aspects of the registration of deeds and the office and duties of the Registrar of Deeds.

[297] Property Valuation Act 17 of 2014, ch 2. However, it is still unclear when and to what extent the OVG will be involved in the redistribution process. See *Moloto Community v Minister of Rural Development and Land Reform*, unreported, case no LCC 204/2010, 4 February 2019, Land Claims Court, Randburg <http://www.justice.gov.za/lcc/jdgm/2019/2019-lcc-204-2010.pdf> and *Emakhasaneni Community v Minister of Rural Development and Land Reform,* unreported, case no LLC 03/209, 6 March 2019, Land Claims Court, Durban <http://www.justice.gov.ze/lcc/jdgm/2019/2019-lcc-03-2009.pdf>. The question arises whether the Property Valuation Act 17 of 2014 and the determination of value by the Valuer-General ousts the jurisdiction of the court to determine just and equitable compensation. From these two judgments, it is clear that clarity regarding the impact of the Property Valuation Act remain unaddressed. Further clarification, specifically in jurisprudence is needed regarding the exact scope of the act; when the act must be used and at what stage of the expropriation process; and what the relationship, duties, and responsibilities of courts *vis-á-vis* the Office of the Valuer-General and Property Valuation Act are.

[298] The LCC specializes in disputes that arise out of laws, such as Restitution of Land Rights Act; Land Reform Act; and Extension of Security of Tenure Act 62 of 1997, *inter alia* that underpin the South African land reform initiative.

as internal administrative processes,[299] arbitration, or mediation.[300] In the absence of guidance, landowners will have to approach the courts to resolve land disputes, which may delay the implementation of land ceiling legislation and the overall redistribution process. A specialized forum is required.

The 2019 Land Reform Report recommended strengthening the Land Claims Court by requiring a permanent judge president and at least four permanent judges.[301] Justice Minister Ronald Lamola endorsed this recommendation, announcing that he planned to bring a Land Court Bill to Parliament to help govern the adjudication of land restitution claims, expropriation, and redistribution disputes.[302] This Land Court Bill would replace the Land Claims Court with a new Land Court with jurisdiction to adjudicate specific national land laws. The new court will also "promote and provide for Alternative Dispute Resolution structures."[303] A specialized Land Court could adjudicate on the categorization of agricultural land, the exemption of land from land ceilings, and the determination of compensation for surplus land. The Land Court could also deal with disputes related to the redistribution of agricultural land using a less complex and time-consuming dispute resolution process than currently in place.

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[299] For example, in terms of the Promotion of Administrative Justice Act 3 of 2000.

[300] For example, other land reform legislation such as the Land Reform Act and Extension of Tenure Security Act 62 of 1997 make provision for the arbitration or mediation procedures.

[301] Advisory Panel on Land Reform and Agriculture (n 9) 81.

[302] G Davis 'Modernising SA Courts among Lamola's top priorities' (*EWN*, 3 July 2019) <https://ewn.co.za/2019/07/03/moderinising-sa-courts-among-ronald-lamola-s-top-priorities>. See also Address by Minister Ronald Lamola, MP Minister of Justice and Correctional Services at the occasion of the budget debate of the Office of the Chief Justice, July 2019, National Assembly, Cape Town (*South African Government*, 17 July 2019) <https://www.gov.za/speeches/budget-debate-office-chief-justice-17-jul-2019-0000>.

[303] Sabinet 'Draft Land Court Bill on Track' (*Sabinet*, 27 July 2020) <https://legal.sabinet.co.za/articles/draft-land-court-bill-on-track/>.

D. The Lack of Accurate and Updated Land Records

1. India

The effective delivery of land rights to citizens is dependent on an efficient, secure, and cost-effective deeds registry system. The lack of accurate and updated land records in India is a major constraint on the effective implementation of ceiling legislation.[304] Poor recordkeeping not only makes it difficult to identify the landowners (or *raiyats*), but it also poses difficulties in determining whether the legislation has been successful.[305]

In West Bengal, the Land Information System has three distinct divisions that include: (1) the cadastral map,[306] (2) a record of rights,[307] and (3) the registration of conveyance instruments for the transfer of land and mortgages. The cadastral map and record of rights are prepared by the Land and Land Reforms Department while the Finance Department administers the registration of deeds for the transfer of land and mortgages.[308] The state is obliged to maintain and update land records resulting from transfer or inheritance.[309]

The effectiveness of the ceiling legislation will be improved if the state takes appropriate and effective steps to maintain records when land is

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[304] Mearns (n 62) 10; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 247, 259; *Draft National Land Reforms Policy* (n 46) 28 suggests that the states should hold inventory of surplus land. See also *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 40.

[305] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 247, 259.

[306] The Bengal Tenancy Act 1885 for the first time provided the legal basis for preparation of revenue village maps following the method of cadastral survey. On the basis of such maps, the records of rights were prepared.

[307] LGAF Team, Landesa (n 288) 14 explains that the record of rights contained particulars relating to each tenant or occupant of the land or sharecropper, the name of each tenant's or occupant's landlord, classification and quantity of land of each tenant, etc. The record of rights was revised in the 1950s under the West Bengal Estate Acquisition Act 1 of 1954. Revision of record of rights was again taken up in 1975 under the WBLRA and is not complete yet in respect of all the administrative districts of the State.

[308] LGAF Team, Landesa (n 288) 13–14.

[309] WBLRA, s 50.

transferred under the Act.[310] In 1990, West Bengal started digitizing the record of rights[311] and was the first state to integrate digitized cadastral maps with a related record of rights.[312] West Bengal recently amended its Land Reform Act to facilitate the e-delivery of land records through affixing digital signatures.[313] This has enhanced the speed of service delivery and has contributed to the effective implementation of the ceiling legislation.

2. South Africa

Effective implementation of the Landholdings Bill in South Africa depends on accurate and updated land records. To this end, the Bill provides for the establishment of a Land Commission as mentioned above. The Land Commission will oversee the collection and dissemination of all information regarding ownership of agricultural land[314] and will develop and maintain a register of agricultural landholdings to monitor the distribution and redistribution of agricultural land.[315]

Disclosures of ownership differ for private and public agricultural land. Chapter 4 of the Bill requires landowners to disclose their present ownership and acquisition of ownership with respect to private agricultural land. Chapter 5 provides that the relevant accounting officer, must submit details regarding the ownership and acquisition of public agricultural land. These disclosures and the proposed land register will enable the government to monitor and evaluate its compliance with the constitutional directive to ensure land, tenure, and related reforms.[316] The Land

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[310] LGAF Team, Landesa (n 288) 14.
[311] According to the LGAF Team, Landesa (n 288) 14, the record of rights are completely digitized except those of 1 473 odd revenue villages of three districts. Those records are expected to be completed within a short period of time.
[312] LGAF Team, Landesa (n 288) 14.
[313] WBLRA, s 50(2).
[313] Memorandum on the Objects of the Regulation of Agricultural Land Holdings Bill (n 24) 37.

[315] See Regulation of Agricultural Land Holdings Bill, cl 8 for the functions of the Land Commission.
[316] Regulation of Agricultural Land Holdings Bill, cl 2.

Commission will also make it easier to determine at what pace and to what extent redistribution of agricultural land has taken place.

The establishment of a land register is pivotal to the successful implementation of the land ceiling legislation, but also for *any* regulatory measure aimed at redistributing agricultural land. However, various concerns arise pertaining to whether the Land Commission will have the technical ability to administer such a registry sufficiently and accurately.

Creating the register will be a monumental task equivalent to trying to recreate a significant portion of the existing deeds registry while updating the register continuously and simultaneously. Creating a register will help to determine how much land the state owns and has available for redistribution. Although both the Land Commission and the Office of the Registrar of Deeds fall under the newly constituted DALRRD, it is unclear how the redistribution process will be reconciled with South Africa's existing land registration process in terms of the Deeds Registries Act 47 of 1937. More than this, there is no provision for cooperation among the Land Commission, the Office of the Registrar of Deeds, and the Officer of the Valuer-General in the Landholdings Bill in relation to the transfer of ownership.[317] For example, will the new register replace the deeds registry wholly, partially, or not at all. It is also unclear what the responsibilities of the Land Commission and the Registrar of Deeds are in relation to the consolidation or subdivision of agricultural land.

In September 2019, the President assented to the Electronic Deeds Registration Systems Act 19. This Act aims to provide for the development, establishment, and maintenance of an electronic deeds registration system to administer, digitize, and expedite the registration of deeds to ensure a more efficient and cost-effective deeds registration process.[318] Such an electronic system may accelerate the land administration and contribute to the successful implementation of land ceiling legislation in South Africa.

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[317] Recent case law in the Land Claims Court has highlighted this lacuna. See, e.g., *Moloto* and *Emakhasaneni Community* (n 297).
[318] EDRS Act, s 2.

E. The Lack of Adequate or Fair Compensation

1. India

The Planning Commission left it to the state governments to decide on the principles applicable for determining compensation for ceiling surplus land in light of local conditions.[319] Predictably, this resulted in a lack of uniformity regarding the determination of the amount of compensation payable, if any, to landholders expropriated of ceiling surplus land. States applied and defined factors such as the unit of application, the categories of land, exemptions, and ceiling limits differently. The 1972 Guidelines provided,

> Compensation payable for the surplus land on the imposition of ceiling laws should be fixed well below the market value of the property so that it is within the paying capacity of the new allottees mainly comprising the landless agricultural workers who belong to the Scheduled Castes and the Scheduled Tribes.[320]

Some states determine compensation based on land revenue while other states look at the classification of the land.[321] Regardless of how compensation is calculated, the amounts cannot be challenged in court.[322]

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[319] For a comparison of the amount of compensation for ceiling surplus land, see Behuria (n 62) 189–211. Compare s 15 and sch 2 of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1 of 1973; Assam Fixation of Ceiling on Land Holdings Act 1 of 1957, s 12; Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 12 of 1962, ss 14 and 23; Gujarat Agricultural Lands Ceiling Act 27 of 1961, s 23; Haryana Ceiling on Landholding Act 26 of 1972, ss 16-17; Himachal Pradesh Ceiling on Land Holding Act 19 of 1973, s 14; Jammu and Kashmir Agrarian Reforms Act 17 of 1976, s 11 and Part B of sch 3; Karnataka Land Reforms Act 10 of 1962, s 72; Kerala Land Reforms Act 1 of 1964, ss 91-93; Madhya Pradesh Ceiling on Agricultural Holdings Act 20 of 1960, ss 16-21; Orissa Land Reforms Act 16 of 1960, ss 47 and 50; Punjab Land Reforms Act 10 of 1973, s 10; Rajasthan Imposition of Ceiling on Agricultural Holdings Act 11 of 1973, s 19; Sikkim Agricultural Land Ceilings and Reforms Act 14 of 1978, ss 12 and 15; Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 58 of 1961, ss 50, 54 and 55; Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 18 of 1978, ss 17 and 22; and West Bengal Land Reforms Act 10 of 1965, s 14V.

[320] Ashokvardhan (n 57) 19–20.

[321] Behuria (n 62) 140.

[322] Constitution of India, art 31C.

An inability to challenge compensation awards may have caused landowners to try and circumvent the provisions of the ceiling legislation.[323]

N.C. Behuria suggests that the amount of compensation paid to landowners for the acquisition of ceiling surplus land is negligible when compared with the market value of the land.[324] Paying below market value compensation made the program unpopular with landowners.[325] This arguably led to landowners using the loopholes discussed above.[326]

In West Bengal, the Land Reform Act provides that the amount of compensation shall be equal to fifteen times the land "revenue"[327] or its equivalent assessed for such land.[328] However, it is unclear how or when the "equivalent assessed for such land" will be calculated. Where such revenue or its equivalent has not been assessed or is not required to be assessed, an amount calculated at the rate of 135 rupees for an area of 0.4047 hectares automatically applies.[329] Generally, this default compensation amount is lower than fifteen times the land revenue or the market value of the land.[330] Furthermore, as mentioned above, such a determination, may not be challenged in court. Instead, appeals pertaining to the amount of compensation paid may only be brought before administrative officers namely, the District Land and Land Reforms Officers.[331] Therefore, based on the experience in India, the amount of compensation for ceiling surplus land, particularly the determination thereof and whether the amount may be challenged in court, should be carefully considered in the South African context.

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[323] Constitution of India, art 31C.
[324] Behuria (n 62) 140. See also Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246.
[325] Mearns (n 62) 10; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 247.
[326] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246.
[327] Section 3(11) defines "revenue" as that which is lawfully payable or deliverable in money or in kind or both by a *raiyat* under the provisions of the Act in respect of the land held by him or her. See also WBLRA, ch 4 for other provisions relating to revenue.
[328] WBLRA, s 14V.
[329] Ibid.
[330] Ashokvardhan (n 57) 19; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246.
[331] See part II. B. 2 (South Africa) above.

2. *South Africa*

Under the Landholdings Bill, the Minister may expropriate surplus land if the owner and the Minister are unable to reach an agreement on the purchase price.[332] This provision should be viewed in light of the increasing cry for the state to use its expropriation powers more readily[333] and the new Expropriation Bill currently available for public comment.[334]

The Expropriation Bill provides for categories of land that may be expropriated in the public interest (for land reform purposes) without compensation. In particular, the Expropriation Bill in its current form provides,

> It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to—(a) where the land is not being used and the owner's main purpose is not to develop the land or use it to

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[332] Regulation of Agricultural Land Holdings Bill, cl 26(1)(c).

[333] *A Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context* (n 106) 4; Pienaar (n 9) 250.

[334] The Expropriation Bill. See further the attempt to amend the property clause to provide for expropriation for nil compensation: Constitution Eighteenth Amendment Bill read with the Expropriation Bill. While this Bill did not come to fruition, the regulation of compensation for expropriation for land reform purposes is still envisaged in terms of the new Expropriation Bill. See further S Viljoen 'Expropriation Without Compensation: Principled Decision-making Instead of Arbitrariness in the Land Reform Context (Part 1)' (2020) TSAR 35–48; S Viljoen 'Expropriation Without Compensation: Principled Decision-making Instead of Arbitrariness in the Land Reform Context (Part 2)' (2020) TSAR 259–70; N Sibanda 'Amending Section 25 of the South African Constitution to Allow for Expropriation of Land Without Compensation: Some Theoretical Considerations of the Social-obligation Norm of Ownership' (2019) 35 SAJHR 129–46; J Dugard 'Unpacking Section 25: What, if Any, are the Legal Barriers to Transformative Land Reform?' (2019) 9 Constitutional Court Rev 135–60; E (WJ) du Plessis 'How the Determination of Compensation is Influenced by the Disjunction Between the Concept of 'Value' and 'Compensation'' in B Hoops, EJ Marais, H Mostert, JAMA Sluysmans and LCA Verstappen (eds), *Rethinking Expropriation Law III: Fair Compensation* (2018) 189–220; J van Wyk 'Compensation for Land Reform Expropriation' (2017) J South African L 21–35; WJ du Plessis 'Valuation in the Constitutional Era' (2015) 18 Potchefstroom Electronic LJ 1726–59; Du Plessis 'Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform' (2014) Potchefstroom Electronic LJ 798–831; ZT Boggenpoel 'Compliance with Section 25(2)(b) of the Constitution: When Should Compensation for Expropriation be Determined?' (2012) 129 South African LJ 605–20.

> generate income, but to benefit from appreciation of its market value; (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration; (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it; (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and (e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.[335]

While the Expropriation Bill explicitly grants the court the power to assess nil compensation where land is expropriated for land reform purposes, it is not a given that compensation for expropriations for land reform purposes will be nil in every case. The standard remains "just and equitable" compensation. Accordingly, even where property is expropriated for land reform purposes, all the relevant circumstances and factors, including those listed in section 25(3) of the Constitution should be considered holistically to determine whether it would be just and equitable to pay no compensation or extremely low compensation.[336]

At first glance, the proposed Expropriation Bill may appear to threaten private property rights.[337] However, the expropriation of land for land reform for nil compensation has arguably always been a possibility in principle.[338] The expropriation of land for redistribution purposes in terms of the Landholdings Bill, the protection of existing rights and the determination of compensation for landowners exemplifies the "creative

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[335] Expropriation Bill, cl 12(3).
[336] Van der Walt (n 78) 506–7.
[337] South African Constitution, s 25(2) and (3); L Ntsebeza 'Land Redistribution in South Africa: The Property Clause Revisited' in Ntsebeza and Hall (n 10) 122.
[338] South African Constitution, s 25(2) and (3) read with s 25(8).

tension"[339] that underpins the property clause in its current and proposed form. Compensation, in line with the Constitution in its current and proposed form,[340] must be just and equitable and may be higher, lower than market value, or even nil, depending on the circumstances of each specific case.[341]

In South Africa, landowners can challenge the amount of compensation by way of mediation or in court.[342] Court challenges may contribute to the tedious and time-consuming redistribution process and the slow pace of land reform.[343] A challenge to the amount of compensation will not affect the vesting of ownership in the expropriating authority.[344] Accordingly, the redistribution of agricultural land to beneficiaries may continue, regardless of whether there is a dispute regarding the amount of compensation paid. While the redistribution process may be more affordable in theory and contribute to the redistribution program's overall efficacy, it does not mean that the process will be less complex or more efficient. To this end, the determination of compensation, if any, is but one of the considerations that may impact the effective implementation of land ceilings legislation. In line with section 25(3) of the Constitution and given the circumstances of each case, the standard for determining compensation remains "just and equitable" given the circumstances of each case.

F. The Lack of Actual Redistribution: Beneficiaries

1. India

Once the state acquires ceiling surplus land, the state must determine to whom the land should be redistributed. The Second Five Year Plan recommended that preference be given to displaced tenants, landless

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[339] Van der Walt (n 78) 12, 16. Similarly Pienaar (n 9) 175, 365 describes s 25 as a "two-sided sword."
[340] See the Constitution Eighteenth Amendment Bill, read with the Expropriation Bill, cl 12(3).
[341] South African Constitution, s 25(3).
[342] Regulation of Agricultural Land Holdings Bill, cl 32.
[343] South African Constitution, s 25(2)(b).
[344] Ibid.

farmworkers, and farmers with uneconomic agricultural landholdings.[345] However, there was no guidance pertaining to what constitutes an uneconomic agricultural landholding. The 1972 Guidelines provided that priority should be given to the landless agricultural workers, in particular those belonging to the Scheduled Castes and Scheduled Tribes.[346] The Scheduled Castes and Scheduled Tribes are constitutionally recognized and regarded as officially designated groups of historically disadvantaged people in India.[347] Despite the recommendations, the states had to determine who would be an eligible beneficiary and what type of land rights would be granted. Most ceiling laws provide for distribution of ceiling surplus land to landless, agricultural tenants or laborers, and/or displaced persons.[348] However, the priority varies widely.[349] For example, in some states, the first priority is given to agricultural tenants, while in other states preference is given to agricultural laborers in the Schedules Castes or Scheduled Tribes.[350] The type of land rights granted to the beneficiaries or the terms of settlement on the ceiling surplus land also differs greatly.[351] Some states completely prohibit beneficiaries from transferring ownership of the agricultural land once they have acquired it,[352] whereas other states prohibit the transfer of ownership only for a period (ranging from ten to twenty years).[353] The legislation may also require the beneficiary to use the land for a particular purpose, such as "personal cultivation."[354]

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[345] Appu (n 50) 141.
[346] Behuria (n 62) 142, 164.
[347] Constitution of India, art 366, cs 24 and 25 specifically recognizes SCs and STs. See also Behuria (n 62) 142, 164.
[348] Behuria (n 62) 144–160.
[349] Ibid.
[350] Ibid.
[351] Ibid 143; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246.
[352] See, e.g., WBLRA, s 49(1A).
[353] Behuria (n 62) 143; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246.
[354] "Personal cultivation" is defined differently in the respective States' land reform legislation. See also WBLRA, s 1(8).

The West Bengal Land Reform Act sets out principles for the distribution of ceiling surplus land.[355] In principle, the Act provides that local residents who together with their family, own no land or less than 0.4047 hectares of land used for agriculture,[356] provided that in the case of agricultural land specifically, such a person intends to bring the land under "personal cultivation,"[357] will be regarded as eligible beneficiaries.[358] Among eligible persons, the first priority is given to the *bargardar* cultivating the land.[359] Thereafter, preference is given to people belonging to the Scheduled Castes or Tribes or cooperative societies.[360] A person will not be eligible for redistributed land if he or she or a member of his or her family is engaged or employed in any business, trade, undertaking, manufacture, service, or industrial occupation.[361]

Beneficiaries, once settled, acquire ownership of the ceiling surplus land and are prohibited from transferring or burdening the land[362] except by mortgage or through a "Co-operative Society or a Corporation owned or controlled by the Central or State Government or both, and for the purpose of obtaining [a] loan for the development of [the] land or for the improvement of agricultural production or for the construction of a dwelling house."[363] In West Bengal, no period is attached to this prohibition, and it is unclear whether the beneficiary or his/her heirs may ever sell the land.

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[355] WBLRA, ss 49 and 49A.
[356] WBLRA, s 49.
[357] WBLRA, s 1(8) provides for a definition of "personal cultivation." It means cultivation by a person of his own land on his own account by his own labor, or by the labor of any member of his family or by servants or laborers on wages payable in cash and kind. The section further provides that such a person or a member of his family must reside for the greater part of the year in the locality where the land is situated, and the principal source of his income must also be the produce of such land.
[358] WBLRA, s 49.
[359] WBLRA, 1(2) defines a "bargardar" as a "person who … cultivates the land of another person on condition of delivering a share of the produce of such land to that person."
[360] WBLRA, s 49(1). See also Behuria (n 62) 157.
[361] WBLRA, s 49.
[362] WBLRA, s 49(1A).
[363] Ibid.

The 2013 Draft Policy proposes that land be redistributed to marginalized women.[364] The Policy recognizes that 40% of the agricultural workforce consists of women and that households are becoming de facto female-headed households.[365] Furthermore, the Policy recognizes that "agricultural productivity is increasingly … dependent on the ability of women to function effectively as farmers."[366] In this regard, it recommends ensuring effective and independent land rights for women.[367]

However, despite the clear identification of beneficiaries under the land reform program, the ceiling surplus land once identified and acquired, generally remained in the ownership of the state government.[368] Importantly, landownership patterns can only be changed once the land has been allotted and transferred to the intended beneficiaries. The lack of redistribution of ceiling surplus land also contributed to the failure of the implementation of the ceiling legislation in different states. Thus, once land is acquired for redistribution, the land must be transferred to clearly identified beneficiaries of the land reform program for redistribution to effectively take place.

2. South Africa

In terms of the Landholdings Bill, surplus land acquired by the expropriating authority must first be offered to Black persons.[369] However, many Black people may not be able to afford to exercise their right of first refusal. The Bill does not have any provisions for financial assistance to Black people wishing to acquire the ceiling surplus land.

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[364] *Draft National Land Reforms Policy* (n 46) 2. See also Hanstad et al. in Binswanger-Mkhize et al. (n 23) 250–3.
[365] Ibid.
[366] *Draft National Land Reforms Policy* (n 46) 18. See also Hanstad et al. in Binswanger-Mkhize et al. (n 23) 250–3.
[367] *Draft National Land Reforms Policy* (n 46) 18–19.
[368] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246. See *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 27.
[369] Regulation of Agricultural Land Holdings Bill, cl 26(2)(a).

Where Black persons fail to exercise their right of first refusal, the surplus land must be acquired by the state.[370] The state will then redistribute the land. The Bill is silent on the redistribution procedure. Instead the redistribution procedure is set out in the National Policy for Beneficiary Selection and Land Allocation Policy.[371] In light of the constitutional imperative to broaden access to land for South African citizens, within available resources,[372] the target beneficiaries under the redistribution program should be Black South African citizens. In particular, the 1997 White Paper provided that land redistribution should assist the urban and rural poor, including farmworkers, labor tenants, and emergent farmers for residential and farming purposes.[373] The White Paper also provided, "[t]he most critical and desperate needs will command government's most urgent attention. Priority will be given to the marginalized and to the needs of women in particular."[374]

In line with the White Paper, the Beneficiary Policy acknowledges that "vulnerable groups and the marginalized have not been given sufficient opportunities to have access to land. It is therefore critical for the state to prioritize the most marginalized and the vulnerable groups."[375]

Accordingly, while both India's and South Africa's ceilings legislation and policies focus on the redistribution of agricultural land for the poor, the South African perspective differs because the redistribution of agricultural land is also linked to race. Therefore, apart from the broad focus on "vulnerable groups"[376] and the emphasis on "previously disadvantaged persons," namely Black people (Africans, Indians and Coloreds, including Khoi-San over the age of eighteen),[377] the Beneficiary Policy lists specific

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[370] Regulation of Agricultural Land Holdings Bill, cl 26(2)(b).
[371] *National Policy for Beneficiary Selection and Land Allocation* (n 28).
[372] South African Constitution, s 25(5).
[373] *White Paper on South African Land Policy* (n 73).
[374] Ibid.
[375] Section 2.1 of the *National Policy for Beneficiary Selection and Land Allocation* (n 28).
[376] Ibid section 2.1, particularly women, youth, persons with disabilities and orphans.
[377] Definitions and interpretations of the *National Policy for Beneficiary Selection and Land Allocation* (n 28) specifically provides that "Previously Disadvantaged South African

categories of beneficiaries for land allocation.[378] They are landless people, especially women in rural and urban areas; farmworkers and their families; labor tenants and their families; residents of urban and peri-urban areas needing land on commonages; residents who wish to secure and upgrade the conditions of tenure under which they live; beneficiaries of the land restitution program; and dispossession cases that do not fall within the ambit of the Restitution of Land Rights Act 22 of 1994. The Beneficiary Policy also provides for target groups for land allocations, in particular[379] women,[380] the youth[381] and unemployed agricultural graduates;[382] people

Citizens" means "a Black Person (Africans, Coloureds and Indians) who is 18 years or older and holds a valid South African Identity document and is a bona vide citizen of South Africa".

[378] Definitions and interpretations and section 6 of the *National Policy for Beneficiary Selection and Land Allocation* (n 28).

[379] Section 6.7 of the *National Policy for Beneficiary Selection and Land Allocation* (n 28).

[380] Ibid section 6.7*(a)*. A female human of any age and race who either has basic farming skills or demonstrates a willingness to acquire such skills and female headed households with no or very limited access to land.

[381] Section 6.7*(b)* of the *National Policy for Beneficiary Selection and Land Allocation* (n 28). Young people are those who are between the age of 18 and 35 years old.

[382] Section 6.7*(b) National Policy for Beneficiary Selection and Land Allocation* (n 28). Specifically, participants in the Department of Agriculture, Land Reform and Rural Development's enterprise development/incubation/apprenticeship programme and 'agricultural para-professionals'.

living with disabilities;[383] military veterans;[384] communal farmers and state land residents;[385] and "industrial and residential development."[386]

Furthermore, the Bill does not regulate situations where the Minister does not want to acquire the surplus land.[387] For example, when the land does not meet the developmental or planning objectives.[388] The Minister is unlikely to transfer surplus land to emergent Black farmers[389] as this would conflict with the State Land Lease and Disposal Policy[390] of 2013 and the Beneficiary Policy.

Under the State Land Lease and Disposal Policy, emergent Black farmers settled on land acquired by the state for redistribution purposes are confined to leasehold tenure and cannot easily obtain individual title.[391] Black subsistence farmers are expected to remain perpetual tenants of the

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[383] Section 6.7*(c)* of the *National Policy for Beneficiary Selection and Land Allocation* (n 28). In this regard the Policy provides that "individuals with a disability working in an agricultural setting will be prioritized."

[384] As defined in the Military Veterans Act 18 of 2011, however excluding those who served in the Union Defence Force (prior to 1961) and the South African Defence Forces (prior to 27 April 1994). In other words, "military veteran" means: any South African citizen who rendered military service to any of the military organizations, statutory and non-statutory, which were involved on all sides of South Africa's Liberation War from 1960 to 1994 and has completed his or her military training and no longer performs military service, and has not been dishonorably discharged from that military organization or force. Section 6.7*(d)* of the *National Policy for Beneficiary Selection and Land Allocation* (n 28).

[385] Namely, individuals who are currently living on State-owned properties and communal land whose livelihoods depend on subsistence farming. Section 6.7*(e)* of the *National Policy for Beneficiary Selection and Land Allocation* (n 28).

[386] "Industrialisation and changes in spatial development with the focus towards township economies and the creation of special economic zones and industries in rural areas." Section 6.7*(f)* of the *National Policy for Beneficiary Selection and Land Allocation* (n 28).

[387] Pienaar (n 13) 4.

[388] Ibid 4.

[389] South African Government, 'State of the Nation Address' (*South African Government* 20 June 2019) <https://www.gov.za/speeches/2SONA2019>. In President Cyril Ramaphosa's State of the Nation Address, he reiterates the promise to provide funding to emerging farmers.

[390] *State Land Lease and Disposal Policy* (n 106) 12–21.

[391] R Hall 'What's wrong with government's state land lease and disposal policy, and how can it be remedied?' Institute for Poverty, Land, and Agrarian Studies, PLAAS Position for National Land Tenure Summit, 2014: State Land Lease and Disposal Policy, 8 September 2014.

government.[392] Large-scale Black farmers with commercial production capacity must lease their farms for thirty years and thereafter for another two decades.[393] Only after fifty years have passed can these farmers purchase their farms. In the interim, their leases may be terminated at any time for what the Land Lease and Disposal Policy describes as a lack of "production discipline."[394] Similarly, the Beneficiary Policy only deals with the leasing of land.[395] This means that ownership is not transferred when land is allocated to beneficiaries.

While leases can constitute secure tenure if the lease agreement is sound, and enforced fairly and reasonably, the profile of landownership would not be altered by the Beneficiary Policy. Put differently: previously disadvantaged persons would remain tenants of the state and would not become landowners. The landownership patterns would have changed from *private* landownership, in instances where private individuals donated their land to the state for this purpose or where land was purchased or expropriated from such individuals to *state* land. That is the only change in the landownership pattern.

The profile of landownership of the category of "previously disadvantaged" South Africans would thus not change. Access to land, as envisaged by section 25(5) of the Constitution, would indeed have been broadened but the landownership patterns of South Africa would not have been altered. In this regard, the Landholdings Bill, the Land Lease and Disposal Policy, and Beneficiary Policy may not assist in redistributing (in the sense of providing ownership) of agricultural land to Black people. The implementation of the Bill and the Land Lease and Disposal Policy may bring about a system that closely resembles nationalization. The idea of nationalization of land is in line with the recent Amendment Bill, which seeks to amend sections 25(4) and 25(5) to read:

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[392] Ibid 12–21.
[393] Ibid.
[394] *State Land Lease and Disposal Policy* (n 106) 25.
[395] Section 10.1 of the *National Policy for Beneficiary Selection and Land Allocation* (n 28).

> The land is the *common heritage of all citizens* that the state must safeguard for future generations. The state must take reasonable legislative and other measures, within its available resources, to foster conditions *which enable state custodianship of certain land in order* for citizens to gain access to land on an equitable basis.[396]

The South African government should, therefore (1) provide financial assistance to Black persons wanting to acquire ceiling surplus land in terms of the Landholdings Bill, (2) provide guidelines or criteria according to which "replacement" beneficiaries may be identified where no Black person exercises their right to first refusal to acquire ceiling surplus land, and (3) transfer ownership of the land[397] to the identified beneficiaries promptly. These actions may contribute to the success of the implementation of the Landholdings Bill in South Africa.

G. The Quantity and the Quality of Redistributed Agricultural Land

1. India

A distinction needs to be drawn between (1) the quantity of land redistributed and the number of beneficiaries who receive the land on the one hand and (2) the quality of land redistributed and the number of beneficiaries on the other hand.

Where land was redistributed, the Indian states distributed the land in relatively large parcels, which meant that only a small percentage of landless families benefitted.[398] Unlike most states, West Bengal focused on distributing surplus land to as many landless families as possible instead of aiming to provide each beneficiary with a large farm.[399] It is unclear whether the quality of land was conducive to cultivation.[400] Many

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[396] Constitution Eighteenth Amendment Bill (emphasis added).
[397] Advisory Panel on Land Reform and Agriculture (n 9) 26. See, eg, the *National Policy for Beneficiary Selection and Land Allocation* (n 28).
[398] Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246, 255.
[399] Ibid 247–9.
[400] Appu (n 50) 178. See also *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 28. See further Hanstad et al. in Binswanger-Mkhize et al. (n 23) 250.

recipients of low quality land would want to sell or transfer it. However, some states prohibited all transfer[401] while other states prohibited transfers for a limited period (ranging from ten to twenty years).[402] In West Bengal, no time period is attached to this prohibition and therefore, it is unclear whether the beneficiary or his/her heirs may be allowed to sell the land in future once it is acquired. Accordingly, the quantity and quality of the land and whether the transfer of ownership is prohibited once intended land reform beneficiaries have received land should also be considered in the South African context.

2. South Africa

The Landholdings Bill requires consideration of land capability factors and climatic conditions when setting land ceilings.[403] The Bill is silent on how much land and what type and/or quality of agricultural land will be redistributed to the beneficiaries. It is also unclear what type of land rights, whether ownership or land use rights, beneficiaries will acquire.

Based on the experience in West Bengal, surplus land should, as far as reasonably possible, be distributed to as many landless families as possible instead of aiming to provide each beneficiary with a large farm. This will ensure a higher percentage of transfers and ultimately a higher success rate of redistribution in South Africa. However, the quantity of the land redistributed should be determined by the quality of the land. For example, a larger parcel of land may be redistributed to a beneficiary where the land is dry or arid. However, where the land is or can be irrigated or is fertile, a smaller parcel of land may be appropriate. Regardless of the quality of land, financial assistance should be provided. Where beneficiaries receive land suitable for agricultural production, they will be less inclined to transfer ownership. Where this is not the case, a prohibition to transfer of ownership

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[401] See, e.g., WBLRA, s 49(1A).
[402] Behuria (n 62) 143; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246.
[403] Regulation of Agricultural Land Holdings Bill, cl 25.

for a certain period, similar to the position in West Bengal, should be considered in the South African context.

V. (Re)formulating Agricultural Land Ceiling Legislation in South Africa: Lessons from India

Land ceilings have not resulted in any effective land redistribution in India. Apart from the fact that little land has been transferred over the last sixty years, land ceilings also aggravated India's existing problem of uneconomically fragmented landholdings. This, in turn, led to a decline in agricultural productivity[404] and the subsequent call to consolidate land parcels and abolish ceilings legislation. This agrarian crisis is a direct result of the poor formulation and implementation of land ceiling legislation in most Indian states. West Bengal is one of the few states that has proven that land ceilings can, in principle, be an effective redistributive measure. The success in West Bengal is largely attributable to the structure of the legislation and effective implementation.

The Landholdings Bill should be reconsidered and reformulated in line with the lessons learned from the experience in West Bengal. Several provisions in the Landholdings Bill require further amendment.

First, the inadequate definition of agricultural land, which allowed landowners in India to reclassify their land to fall outside the scope of ceiling legislation, should be addressed.[405] Agricultural land should be defined in accordance with its (potential) use and not in relation to where it is situated. It would be ineffective if a land ceiling were imposed on agricultural land as a residual category, but the surplus land was nonarable. The wide formulation of agricultural land will prevent landowners from reclassifying their land to fall outside the scope and application of the ceiling legislation.[406]

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[404] Ashokvardhan (n 57) 9; Hanstad et al. in Binswanger-Mkhize et al. (n 23) 246–8.
[405] Hanstad and Brown (n 46) 26; Besley and Burgress (n 47) 389, 394.
[406] Besley and Burgress (n 47) 394.

Second, the large number of exemptions listed in the land ceiling legislation in India, should be considered.[407]

The list of exemptions should be short. However, "protected agricultural areas"[408] should be exempted from the operation of the land ceiling legislation to address concerns over food security and agricultural productivity. The Landholdings Bill could adopt the definition of "protected agricultural area" from the Preservation and Development of Agricultural Land Bill,[409]

> (a) an agricultural land use zone, protected for purposes of—(i) food production; and (ii) ensuring that high value agricultural land are protected against non-agricultural land uses in order to promote long-term agricultural production and food security; (b) includes all areas demarcated as such in accordance with section 15; and (c) may include high value agricultural land and medium value agricultural land.[410]

Although these protected agricultural areas may not be subdivided and should be exempted from the operation of land ceilings legislation, they may still be expropriated and redistributed to competent beneficiaries, provided that the land is used for agricultural purposes. In this way, redistribution is still effected without fragmenting prime agricultural land.

Restricting the subdivision of agricultural land also plays an important role in the implementation of land ceilings. These restrictions ensure that landowners do not transfer surplus agricultural land to unintended beneficiaries, such as relatives. In other words, if subdivision is allowed, as

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[407] Appu (n 50) 154; *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 15, 28.

[408] Preservation and Development of Agricultural Land Bill, cl 1.

[409] Preservation and Development of Agricultural Land Bill.

[410] Preservation and Development of Agricultural Land Bill, cl 1 defines "high value agricultural land" as "land best suited to, and capable of, consistently producing acceptable levels of goods and services for a wide range of agricultural enterprises in a sustainable manner, taking into consideration expenditure of energy and economic resources" and "agricultural land use zones" as "zones, based on the—(a) agricultural potential; (b) agricultural capability; (c) agricultural suitability; (d) conservation status; (e) use; and (f) geographic location."

proposed by the Land Reform Report,[411] then landowners can circumvent the ceiling limit. Accordingly, in formulating a new Landholdings Bill it is important that restrictions on the subdivision of agricultural land as proposed by the Preservation Bill and set out in Subdivision of Agricultural Land Act be kept in place.

Third, where the land ceiling legislation did not have a retrospective effect, landowners in India resorted to partitions and fictitious transfers to circumvent the ceiling limits and consequently the legislation. The land ceiling legislation in South Africa should prohibit transfers retrospectively. The question remains from what date the legislation should operate retrospectively. Other South African land reform legislation may provide guidance pertaining to the retrospective date for the operation of the Landholdings Bill. For example, the Land Reform (Labour Tenants) Act 3 of 1996 was assented to on March 22, 1996. However, "to protect labour tenants who might have been evicted or who might have suffered a reduction of rights in anticipation of the enactment of the Act"[412] the Act has a retrospective effect to allow protection for persons who were labor tenants on June 2, 1995.[413] This date marks the date on which the Labour Tenants Bill was first published for comment. Similarly, the Landholdings Bill in relation to the operation of land ceilings specifically, may provide that it operates retrospectively from the date it was published for comment, namely on March 17, 2017. In this way, the land transferred from the date March 17, 2017 to the date of commencement of the Bill shall be taken into account in determining the ceiling area, as if the land had not been transferred.[414] The Bill should also provide for bona fide transfers. This may

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411 Advisory Panel on Land Reform and Agriculture (n 9) 58.

412 M Cowling, D Hornby and L Oettlé Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, An Initiative of the Parliament of South Africa: Research Report on the Tenure Security of Labour Tenants and Former Labour Tenants in South Africa (South African Parliament, June 2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Tenure_Security_AFRA.pdf> 5.

413 Land Reform Act, s 3(1).

414 WBLRA, 14P(1).

prevent landowners from resorting to mala fide partitions and fictitious transfers of agricultural land before the promulgation and implementation of the Landholdings Bill.

Other concerns—such as (1) setting the ceiling limit too high and (2) whether the ceiling limit should apply to individual or family holdings as a unit—should also be considered in formulating the land ceiling legislation. The higher the ceiling, the less land available for redistribution.[415] In this regard, the Bill in its current form does not provide for one ceiling limit applicable to all agricultural land in South Africa. Instead, the ceiling limit is determined per district or region, having regard to the various criteria and factors. It remains to be seen what the ceiling limit, per district or region, will. However, in general, and in line with the approach in West Bengal, the ceiling limit should be low, rather than high, provided that the criteria and factors listed in the Bill for the determination of the ceiling limit allow for it. In relation to the latter concern, the Landholdings Bill provides that the ceiling should apply to individual private and public landowners, including natural, juristic, and foreign persons, and not to a family unit or holding. As suggested previously, it may be too difficult to formulate a standardized concept of "family" in South Africa or to limit the number of family members to five to constitute a unit or holding, as is the case in West Bengal.[416] Further research and consideration of this aspect in formulating land ceiling legislation in South Africa is needed before such legislation is promulgated.

Coupled together, these submissions will act as a safeguard against landowners trying to circumvent the operation of the land ceiling legislation in South Africa, which will contribute to more land being made available for redistribution. In the long run, these recommendations concerning the formulation of land ceiling legislation could very well prevent South Africa from making the same mistakes experienced with the land ceiling legislation in India. Ultimately, the formulation suggested

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[415] See *Report on State Agrarian Relations and the Unfinished Task in Land Reforms* (n 46) 28.
[416] Behuria (n 62) 133.

above may help to ensure that agricultural land is redistributed effectively, without impacting negatively on agricultural productivity and ensuring food security for present and future generations in South Africa.

Other sections of the Bill are valuable for the overall redistribution program, particularly the establishment of a national register under the supervision of a national institution that reflects the race of private and public landowners. Such a register will, at least in principle, assist in monitoring and evaluating the distribution and redistribution progress of agricultural land.[417] Furthermore, the criteria used to determine the land ceilings are also useful as criteria to identify suitable agricultural land for acquisition.[418] In other words, these aspects are valuable not only for the implementation of land ceiling legislation but also for other land reform measures and methods aimed at identifying, acquiring, and redistributing agricultural land.[419]

VI. Conclusion

Land redistribution is difficult, time-consuming, and expensive, but a necessary endeavor in India and South Africa. To address the disparities in landownership, India imposed land ceilings at a national scale. This Article critiqued the envisaged 2017 Landholdings Bill, in view of the experience in West Bengal.

To this end, the Article explored the general reasons for the failure of land ceilings as a redistributive measure in India. Various reasons, including the formulation of land ceiling legislation, lack of implementation of the legislation, the existence (or not) of accurate land records, the

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[417] Regulation of Agricultural Land Holdings Bill, cl 8.

[418] T Kotzé 'Developing Criteria for the Identification of Suitable Agricultural Land for Expropriation and Redistribution in South Africa: Lessons Learnt from Namibia' (2021) Stellenbosch Law Review in general.

[419] See, eg, Kotzé (n 418) 185–214. See the Constitution Eighteenth Amendment Bill, read with the Expropriation Bill, cl 12(3); *National Policy for Beneficiary Selection and Land Allocation* (n 28). See further T Kotzé and JM Pienaar 'Reconceptualising Redistribution of Land in South Africa: A Possible Legal Framework' (2021) South African Law Journal 287–322.

compensation awarded to landowners for the surplus land, the actual redistribution (transfer) of land, and the quality and quantity of land redistributed exist for the general failure of agricultural land ceilings in India. However, West Bengal is regarded as one of the few states that managed to formulate, implement, and redistribute surplus land to beneficiaries successfully to some extent. Accordingly, the (relatively) successful use of land ceilings in West Bengal are contrasted and examined in relation to the general failures in other states. Such an examination has shown the success of West Bengal can largely be attributed to the formulation of the ceiling legislation.

To this end, the comparative analysis was useful in gaining insight and deriving lessons from India's experience with land ceiling legislation for the improvement and amendment of the envisaged land ceiling legislation in South Africa. The Article therefore concludes with recommendations centered on the formulation (or amendment) of ceiling legislation in South Africa, having regard to the need to preserve prime agricultural land for food security purposes. In particular, aspects such as formulation of "agricultural land," listing exemptions to the operation of land ceilings, and the retrospectivity of the Act, should be considered carefully to ensure that landowners do not reclassify or sell off portions of their land before the implementation of the Act. To ensure agricultural productivity of land, prime or "high value agricultural land" should be exempted from the operation of land ceiling legislation. Provided that the necessary amendments are made to the Landholdings Bill, land ceilings may (at least theoretically) ensure that land is redistributed to beneficiaries of the land reform program while ensuring that agricultural productivity and food security is not jeopardized.