



Photo by Robin Hammond, National Geographic.

# LAND CEILINGS

## The magic wand for land reform or a bad idea?

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Land ceilings is a redistributive measure intended to limit the size of landholding to make more land available to subsistence, smallholder or emerging farmers. Several other countries have at some stage, as part of their land reform programmes instituted such limitations on the size of farming units. These include countries such as India, China, Taiwan and South Korea. Some of these have subsequently abandoned this approach. Many studies have been done over the years on the impact on land ceilings, some of those will be cited in this article.

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## 1. BACKGROUND



*Land ceilings is a redistributive measure intended to limit the size of landholding to make more land available to subsistence, smallholder or emerging farmers*

Several other countries have at some stage, as part of their land reform programmes instituted such limitations on the size of farming units. These include countries such as India, China, Taiwan and South Korea. Some of these have subsequently abandoned this approach. Many studies have been done over the years on the impact on land ceilings, some of those will be cited in this article

The proposal of a land ceiling policy for South Africa was raised for the first time in 2011 in the Green Paper on Land Reform. A four-tiered system of landownership is envisaged where private ownership will be of limited extent. The reasoning is that this will be a useful measure to speed up land reform, make more land available to the poor and previously disadvantaged and redistribute wealth. The Department of Rural Development and Land Reform has cited studies that seem to show that this will be the magic wand that the country needs to address the triple challenges of poverty, unemployment and inequality and Minister Nkwinti is seemingly now set on finalising draft legislation on land ceilings and table such legislation in Parliament.

Agri SA, Agbiz, the Banking Association of South Africa and other organisations that have a stake in the farming sector in the country hold a contrary view and are very concerned about the impact that the introduction of land ceilings may have on investment, productivity and the future growth of the sector that is responsible for national food security.

## 2. WHAT IS THE GOVERNMENT TRYING TO ACHIEVE BY CAPPING LANDHOLDINGS?

The 2011 Green Paper on land reform sets out the following vision for land reform in South Africa:

- “A properly re-configured single, coherent four-tier system of land tenure, which ensures that all South Africans, blacks in general and Africans in particular, have a reasonable access to land with secure rights, to fulfil their basic needs for housing and productive livelihoods.
- Clearly defined property rights, sustained by a fair, equitable and accountable land administration system within an effective judicial and ‘governance’ system.
- Secure forms of long-term land tenure for resident non-citizens engaged in appropriate investments which enhance food sovereignty and livelihood security, and improved agro-industrial development.
- Effective land use planning and regulatory systems which promote optimal land utilization in all areas and sectors; and, effectively administered rural and urban lands, and sustainable rural production systems. “

At a ministerial workshop on the proposed Regulation of Landholdings Bill, held on 4 and 5 November 2016, Professor Michael Lipton, from Sussex University, who was invited to speak on the topic of land ceilings, argued that small farms are much more productive and labour intensive than big commercial farms and therefore contribute to job creation and food security in a meaningful way. Many of the participants felt that the “giants and dwarfs” (big and small landholders) was an untenable situation. The Minister expressed the opinion that we must find a way to share the land, as land was a limited resource. The draft policy on the regulation of landholdings cite the provisions of the Freedom Charter that state that South Africa belongs to all who live in it and that the land shall belong to those who work it. The draft policy states that: “The proposed model is based on the following principles:

- Enable a more rapid transfer of agricultural land to black beneficiaries without distorting land markets or business confidence in the agri-business sector.
- Ensure sustainable production on transferred land by making sure that human capabilities precede land transfer through incubators, learnerships, apprenticeships, mentoring and accelerated training in agricultural sciences.
- Establish monitoring institutions to protect land markets from opportunism, corruption and speculation.
- Bring land transfer targets in line with fiscal and economic realities to ensure that land is successfully transferred.
- Offer white commercial farmers and organised industry bodies the opportunity to significantly contribute to the success of black farmers through mentorships, chain integration, preferential procurement and meaningful skills transfer.”

The question is whether the introduction of land ceilings will achieve these outcomes?

### 3. ARGUMENTS AGAINST LAND CEILINGS

#### 3.1 How will the concept affect the profitability of the sector

During the three-year consultation process following the publication of the Green Paper on Land Reform, research was commissioned by the Department of Rural Development and Land Reform on request of stakeholders on various topics, one of these being on the implications for the agricultural economy. A study was done by Prof Herman van Schalkwyk and Andrew Makhane. They looked, amongst other things at the international experience with ceilings and concluded that land ceilings had very many negative impacts, including:

- The fragmentation of agricultural land;
- Affecting productivity adversely;
- Contributed towards agricultural being a low-profit venture in several parts of the world;
- It had neutral or negative effects on poverty;
- Unsatisfied levels of equity and efficiency;
- To large extent; failed to change agrarian structures - large inequalities continue to exist;
- Negative impact on functional land rental markets;
- Proved costly and difficult to administrate;
- Was characterised by circumvention, contestation, corruption and litigation;
- It led to tenure insecurity; and
- It discouraged land-related investment.

Makhanete and Van Schalkwyk found: *“The outcome of land ceilings in other parts of the world as well as the potential impact locally argues against any optimistic expectations.”*

Maitreesh Ghatak and Sanchari Roy in an article entitled *“Land reform and agricultural productivity in India: a review of evidence”* in the *Oxford Review of Economic Policy* (2007), comes to the following conclusion regarding land ceilings: *“Our empirical analysis reveals that overall land reform legislation seems to have had a negative and significant effect on agricultural productivity in India. However, this hides considerable variation across types of land reform, as well as variation across states. Decomposing by type of land reform, the main driver for this negative effect seems to be land ceiling legislation, which in turn might be capturing the effect of fragmentation of land holdings.”*

Stats SA’s agricultural surveys indicate that farming units are increasing and the number of commercially producing legal entities are decreasing. This is a global trend caused by economic realities, but could also be policy induced (i.e. labour laws forcing mechanisation!). It will require a different economic paradigm with huge cost to the fiscus to reverse or even slow down this trend. The 2015 ILO report on *“Farm Workers’ Living and Working Conditions in South Africa: key trends, emergent issues, and underlying and structural problems”*, also concluded that expanding farm size was a survival strategy for farmers in a competitive global marketplace.

### **3.2 Will the administration costs not outweigh any potential benefits?**

The system of land ceilings presupposes that a single, integrated land information system exists where cadastral data is captured outlining the physical details and legal ownership of each private land parcel in South Africa, this is not so. The policy recognises this and proposes to establish a

'Land Commission' to receive compulsory disclosures of all landholdings, but will the costs involved in running this commission be worth it?

The land commission will be chaired by a retired judge and will need to employ a panel of highly educated experts to achieve this, not to mention a large contingent of support staff. One cannot help but wonder how many ha of farmland could be bought and redistributed each year with the funds required to run this establishment whose sole purpose it is to establish which land must be purchased in the future. Considering that the land is chosen merely on the bases of its physical size, there is no guarantee that the current owner will be willing to sell, therefore leading to protracted negotiations that all costs time and money. Should willing sellers merely be prioritised, the process of acquiring land will be greatly streamlined and the costs reduced. This can be done through a right of 1<sup>st</sup> refusal system as proposed, coupled with speeding up the time lag from offer to purchase (which currently exceeds 2 years, making it impossible for distressed farmers to sell to the state, hence the state always paying more for land than current market prices). Better yet however, a market based soft/subsidised loan system administered through the Land Bank, where real PDI farmers are able to buy the land at a low interest rate with easy/flexible terms. Here a cap can be placed on the amount of soft loan any individual can access!

In addition to the costs of administration, one should consider what the costs of subdivision will be. According to the Subdivision of Agricultural Land Act, a formal application must be prepared for the Minister of Agriculture, Forestry and Fisheries' approval where an agricultural landholding is to be split. If a land owner is less than 10 ha over the designated limit, is it really worth it to spend funds earmarked for land reform to pay for the costs of this subdivision process? These are practical questions that must be considered when a cost-benefit analysis is done.

### **3.3 Will it truly benefit land reform?**

One of the central shortcomings of this proposed policy is that it places the identification of land before an assessment of the beneficiaries' needs. The current system working on the Proactive Land Acquisition Strategy (PLAS) has a similar approach whereby the state buys up land and then tries to match it with a suitable beneficiary. The challenge experienced by this 'supply-led' land redistribution is that the nature of the land acquired informs the type of beneficiary you need, and if there is no such beneficiary available, the land is allocated to someone who may not be ready (capable) or willing to take charge of it. This process leads to a situation where beneficiaries who aspire towards a small plot of land for household subsistence gets tasked with running a commercial farm, and the opposite is equally likely where an aspirant (and potentially capable)

commercial farmer is given a small plot of land on leasehold. In both scenarios, the need of the beneficiary is not met and he or she is set up to fail.

Should land ceilings be applied to 'free up land for redistribution', it would also follow a supply-led programme but worse still, the 'supply' would entirely depend on the size and orientation of large land holdings in the area. This policy would therefore deliver fragmented pieces of land spread across the furthest reaches of a district. Small parcels may end up being 'sliced-off' larger landholdings with little or no access to natural resources, infrastructure or services. To make matters worse, the identification of the land would be based on little more than the size of the parent landholding, which in turn completely contradicts the Department's new approach of identifying 'strategically located land'. There is no guarantee that the land delivered will be economically or socially viable as it would merely be the 'off-cuts' left over from landholdings that exceeded the regulated size. Surely the beneficiaries of land reform and our future farmers deserve more consideration than this?

The fact is that unless the land redistribution programme is redesigned to operate demand-led, the beneficiaries will be set up to fail and expectations will never be achieved. Hence the market based soft/subsidised loan system administered through the Land Bank as previously proposed.

### 3.4 Is the proposal constitutional?

Questions have been raised regarding the constitutionality of a ceilings approach. In the judgement in the case of **First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another, First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) (2002 (7) BCLR 702 [2002] ZACC 5 paragraph 57**, the Constitutional Court held that any interference with the use, enjoyment or exploitation of private property is a deprivation of that property. Arbitrary deprivation of property is not allowed in terms of our Constitution. A deprivation will be "arbitrary" if the law in question does not provide sufficient reason for the deprivation or is procedurally unfair. In considering whether an interference with property is arbitrary, the courts will, amongst other things look at the relationship between the means employed and the ends sought by the legislative scheme. Section 36 of the Constitution also requires the courts to consider whether there are less restrictive means to achieve the purpose. We would argue that in this case there most definitely are less restrictive means and that the means envisaged will not achieve the stated purpose of the measures contemplated.

## 4. POSSIBLE ALTERNATIVE APPROACHES

No one size fits all instrument can address land needs in South Africa meaningfully. In a demand-led approach, a needs assessment could be conducted in each area to inform what the demands for land are. The need for land should be a categorised and targeted approach formulated or fine-tuned to cater for different needs such as:

1. Housing;
2. small plots for subsistence where very rural and high-value very intensive farming where close to urban areas or utilizing precious water resources;
3. economically viable smallholders, (minimum “cap” income / productive potential required to determine this);
4. emerging commercial farmers; and
5. commercial farmers.

Judging by the discussions at the recent ministerial workshop, it is primarily aimed at the poorest of the poor.

It is not clear at which group the land ceilings approach is aimed and it will be impossible for the approach to cater for various land needs as it is a supply-led programme design. Judging by the discussions at the recent ministerial workshop, it is primarily aimed at the poorest of the poor. However, land parcels in deep rural areas far from any infrastructure will not do much to empower the poor. Proper planning and zoning is required to establish where the most suitable land for small plots exist and these areas should be earmarked for this purpose in the Municipality’s Integrated Development Plan. Existing legislation such as the Spatial Land Use Management Act (SPLUMA) can be used to zone peri-urban areas for subsistence/intensive or smallholder agriculture whilst other areas further away from towns and cities can be zoned for exclusive commercial agricultural use. SPLUMA provides for national-, provincial- and municipal spatial plans to be drawn up to map and cater for the zoning of different land needs. One can avoid competition for productive agricultural land with township or commercial development by reserving the most productive areas for smallholder/intensive agricultural development, thereby also making the land more affordable for the state.

Joint ventures/ partnerships between existing large commercial farmers and small emerging farmers is a real possibility which should be incentivised. Commodity organisations are already rendering a lot of support and providing services to thousands of small scale / new entrant farmers. If funding was made available these programmes could be rolled out on a much wider scale.



## 5. AN ARGUMENT FOR LAND CEILINGS IN VERY SPECIFIC INSTANCES

The DRDLA's current Proactive Land Acquisition Programme (PLAS) is a case in point. DRDLA purchases land in the name of the state, recapitalizes it (RECAP) and then lets it to caretakers for a 5-year trial period max, but if successful earlier, converted to a 30-year lease. The caretaker can at any time purchase the land outright from the state (but this wouldn't make financial sense if the very cheap lease with state was secure). The result is that some beneficiaries have been handed farms of many millions, RECAP'ed way beyond market productive value at the states expense and once lease is secured, have a productive asset capable of generating millions per annum for one owner. Land area aside, the reasoning of pumping millions to capacitate one farmer flies in the face of the equitable redistribution of wealth in a developmental state argument.

On the issue of capping, the productive potential of a state asset (be it land, water, tenders or mineral resources) should be capped so as not to generate undue wealth for any one individual. So as not to limit innovation and entrepreneurship, excessive / windfall gains beyond this cap should be heavily taxed (50% +) to assist to redistribute the gains form a state asset.

Conversely a minimum productive potential cap should also be calculated to ensure a minimum size land to a specific commodity to ensure a decent living. This, so that if the state budget can only afford a certain amount for land acquisition that this land be divided into as much productive units as possible to give as many people as possible a decent chance of success. Those that succeed have the option of buying out those that failed or can enter the open market. Currently large productive units are transferred to one new entrant farmer. If all 40 000 productive units in SA were transferred to 40 000 new entrant PDI farmers, this would still not meet our constitutional mandate to redistribute land. Even if all land was capped at the initially proposed limits of 1000 ha for smallholders, 2500 ha for medium sized farmers, 5000 ha for large commercial farmers and 12000 hectares in special circumstances and we divided and redistributed economically viable units to say 160 000 PDI beneficiaries, we would still not have solved our land problems!

Until government budgets enough to buy land available on the open market (using the proposed Right of 1st Refusal approach so that market price is not distorted), there is no good reason to put a cap on large highly productive commercial farms contributing job creation, food security and much needed tax revenue!

Furthermore, a capped market based soft loan approach, coupled with a real-time land audit system and proper implementation of SPLUMA (and possibly PDALP) will meet the initial Green paper objectives are met:

1. That all South Africans, have reasonable access to land with secure rights, to fulfil their basic needs for housing and productive livelihoods;
2. Clearly defined property rights, sustained by a fair, equitable and accountable land administration system within an effective judicial and 'governance' system;
3. Secure forms of long-term land tenure for resident non-citizens engaged in appropriate investments which enhance food sovereignty and livelihood security, and improved agro-industrial development; and
4. Effective land use planning and regulatory systems which promote optimal land utilization in all areas and sectors; and, effectively administered rural and urban lands, and sustainable rural production systems.