Non-Market Approaches to Land Reform: A Review of the International Experience

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INTRODUCTION

7 I have been asked to make some comments about the international experience with "non-market" approaches to land reform, as potentially relevant to the situation in South Africa today. 4

The brief seems to call for a rapid.appraisal of the main approaches that either eradicate the land market altogether (at least for a fixEd period of time), or at least imply such strong intervention in systems of land rights and allocation as to interfere with normal market principles. These range from the experience with total or partial nationalisation, collectivisation and other forms of agrarian socialism; to land ceilings and "land for the tiller" approaches; to restitution; to tenancyi protection; and finally to other' mechanisms for limiting the rights of'private landowners, for example through the principles of labour or environmental law which weaken the rights of landcwners to use their land and labour at random, while enhancing' the land. and labour securityi of the 'weaker partners in the land-labour relationship.

This is, a large brief, which needs some introductory observations if the comments are to be of any practical value to South Africa.

First, as any South African who has done the rounds of the international development and financial agencies will know well enough, there is tremendous scepticism today about the viability of non-market_approaches to land reform as effective instruments for rural poverty alleviation. The need for land reform is widely recognised in exceptional circumstances, usually in the Latin rAmerican countries with high levels of land concentratian and rural landlessness, and most particularly in Southern Africa. However, as land distribution has been off the international and most national. development agendas for at least, a couple of decades (except in the case of decollectivisation and ireprivatisation in former socialist economies) there is no recent international experience on which to draw.

Second, it is easy enough to mention non-market approaches ' which were successful in their own national context several decades ago, reconciling equity and efficiency objectives, but they may be of very little relevance to South Africa today. This seems particularly true of the "land for the tiller" approaches of the East Asian countries, usually cited as the most successful

non-market model, which aimed essentially to conVert tenants and share-croppers into small owner-occupiers. These reforms were applicable to the .Asian feudal economies of’ the 1940’s and 1950’s, but they are very difficult to replicate in countries that haVe now seen the development or large-scale commercial agriculture, together with’rising rural landlessness and the casualisation of rural labour;

Third, it is important to identify the real goals of a "non-market" approach to land reform. Is it to have a temporary "aberration" or departure from market principles, in order to redress past injustices and level the playing field for the future operation of market forces in land allocation? Or is it rather to have a more permanent intervention in land markets, to establish new principles which limit the rights of private land ownership by reference to equity and other considerations?

Fourth and related to this, we need to consider the international experience with "special rights" or customary rights to the land, when countries are trying to develop a national land law on the basis of very diverse forms of land law and land use deriving frbm their colonial and historical legacies. It is interesting to note that, at precisely the time when market approaches to land use are prevalent, there has been a resurgence of interest in special rights to the land for certain.popu1ation groups, empowering them or even requiring them to regulate their land use on non-market principles. In much of Africa, where there is such strong pressure to introduce private land titling and registration in the interests of greater agricultural efficiency, there are now vibrant debates concerning the nature of communal tenure regimes? Are they a colonial fiction? To what extent have private land markets and transfers existed in practice, despite legal restrictions? How can customary land tenure regimes be reconciled. with statutory regimes operating on imarket principles, without prejudicing rights of equal opportunity to agricultural development?

Fifth, we need to distinguish between mechanisms for the physical redistribution of the land itself, and mechanisms for the reallocation of land rights. I would argue that this is a vitally important issue in the long term, not only in South Africa itSelf but in other parts of the world where the land reform movement is now undergoing some kind of political and conceptual crisis. The basic point is that a demand for land security is not necessarily a demand for land ownership, and certainly not for ownership of an individual parcel of land with all the concomitant production responsibilities. As land reform has te be largely a bottom--up and political process, policy makers need to be familiar with perceptions at the grass-roots level.

These introductory comments set the stage for the kind of approach taken in this paper. I will not be trying to pit non-market paradigms rigidly against market ones, because the distinction is always rather tenuous. As Solon Barradlough has written in a compelling book on land reform and food strategies,

"There will always have to be state intervention in markets. The issue is how to devise economic policies and interventions to direct market forces towards social goals, such as poverty alleviation, full employment and food security....Debates over whether the state should rely on free markets or state planning and interventions usually pose a false dilemma. The issue is never one of intervention versus non-intervention, but what kind of interventions and how much".

MECHANISMS FOR LAND DISTRIBUTION: AN OVERVIEW

Nationalisation

Nationalisation often conjures up the image of arbitrary state intervention, expropriating privately’held landlwith little or no compensation, and establishing new ltenure regimes of collectivised or cooperative ownership under rigorous state control. At one extreme, it can involve the complete eradication of the land market.

The historical reality has often been very different. In some countries nationalisation has been total, more often it has been partial. In the latter case, it has often affected foreign-owned.agribusiness enterprises. Among the examples throughout the developing world are the nationalisation of the former Dutch plantations after Indonesian independence, British tea plantations in Sri Lanka, sugar plantations in Guyana, US owned plantations in Cuba, Guatemala and Peru, sisal plantations in Tanzania, and_many others. In most of these cases the experience with state management of nationalised lands has been fairly dismal, and there has been a recent trend towards reprivatisation and the renewed encouragement of foreign investment under joint ownership.’

Nationalisation can also be seen as an attempt by newly independent states to establish a uniform system of land law and administration, when dual and discriminatory tenure regimes were inherited from the colonial period. African examples are the several Francophone countries after independence, in which all rural land became state property. Throughout post-independence Africa it has been fairly commonplace to vest absolute title in the President, with farmers enjoying leasehold rights of ownership. Except in such cases as Tanzania, with its forced collectivisation experience under the Ujamaa programme of the 1970’s, the formal tenure regime has tended to have little impact . on de facto enjoyment of customary rights to the land.

Complete land nationalisation and agrarian collectivisation are rarely seen today as viable policy options. The past experience is associated with revolutionary transformation (China, Cuba, Ethiopia, the USSR and Vietnam, among others), following ’violent upheaval. The criticisms include low productivity and the lack of producer incentives, the forcible

nature of collectivisation, and the arbitrary nature of expropriation without far compensation. ’ ’

While the criticisms are largely justified, it-is still important to assess the origins and legacy of the different collectivisation experiences. Whether in the USSR or China, they began with spontaneous peasant mobilisation against large landlords, whose holdings were nationalised in the early stages of new revolutionary governments. In the USSR for example, the Soviet state owned the land since its 1917 Land Decree, but most peasants farmed their individual parcels and functioned in a free market without government crop seizures until the end of the 1920’s.It was onlylwhen forced collectivisation began after 1929, and state investment and pricing policies discriminated heavily, against agriculture in favour of industry, that production began to fall dramaticallyl .In China significant land reform took place between 1949-52, not so much as a government-administered programme, but rather as a spontaneous process in which Communist party cadres organised landless and small peasants to occupy large landholdings and divide them up on an equitable basis. It was only later that the commune system developed, first organised after 1952 in village cooperatives, and then after 1957 into the-system of production teams, brigades and communesz. The tax burden on agriculture through compulsory procurement by the state was far less than in the USSR, the terms of trade generally favoured agriculture, and with the exception of periods such as the Great Leap Forward years fairly high rates of agricultural growth were registered.

Similarly in Cuba after the 1959 Castro revolution, land reform and land nationalisation proceeded in gradual stages. Cuba’s first land reform law, enacted in May 1959, provided for the expropriation of all farms over 400 hectares. It also prohibited foreign ownership of land, as well as tenancy and share-cropping arrangements. The expropriated non-sugar lands were distributed to the former squatters, tenant farmers and share-croppers, over 100,000 of whom now received titles of ownership. Expropriated landowners were entitled to compensation according to the declared taxable value of their properties. The large sugar estates were nationalised and brought under state ownership, as cooperative or collective farms in which the former seasonal workers were taken on with guarantees of permanent employment. The second major land reform law, enacted in 1963, provided for the expropriation of all rural properties’over 5 gaballezias (approximately 67 hectares). Most og_this reformed land went to the state, though a further 40-50,000 peasants received land titles. Though the reforms of the early 1960’s left approximately one quarter of the land under private ownership, there has been a progressive consolidation of land ownership by the state, and a gradual decrease in private property. Under Cuban law individuals plots could not be inherited, but reverted to the state upon the death of the owner. The long term aim was thus the progressive socialisation of all agrarian property. In the meantime, productive investment in the agricultural sector rose quite sharply after the early 1960’s, though it later declines as of the early 1980’s. As agrarian reform analyst

Rehman ’Sohhan has argued, Cuba is one of the few developing countries to bias its development expenditure in favour of the agricultural sector%

On the positive side, nationalising reforms of the Chinese and Cuban model have served to eliminate social differentiation in the countryside, to create both farm and non-farm rural employment, to eliminate the rural landlessness which plagued both countries in their pre-revolutionary era andiwhich continues to affect nest Asian and Latin American developing countries today. In the Chinese case, the primary victims of expropriation were the feudal landlords of the pre-1949 period. In Cuba, 3 major achievement Was the elimination of rural landlessness in a country where a significant proportion of the workforce had previously been employed on a precarious and seasonal basis on large sugar plantations.

with the exception of Cuba, all the countries which had earlier enacted socialist land reforms are currently undergoing some form of transition to a market economy. China introduced its household production responsibility system after the late 1970’s, in which the land remained under collective ownership but responsibility for actual crop and livestock production was assigned to individual households. Peasant households undertook to produce a fixed quantity of crops and other products for the state at official prices, with freedom to consume any surplus on the open market. The positive effects of these reforms on peasant incomes and agricultural production have been widely attested, the World Bank estimating that agriculture grew by over nine per cent annually in the first half of the 1980’s. These reforms have raised a number of complex issues with regard to land rights. They include the rights to be accorded to individuals and households over their land holdings, whether the rights should be transferable and mortgageable, and whether land distribution should be planned and administered or left to a market in land rights. The absence of explicit legal guarantees on length of tenure has caused reluctance by farmers to invest in land reclamation and development activities. However, a series of reforms since 1982 has served to strengthen individual tenure, and create a limited ability to transfer rights to land. Policy reforms adopted in 1987 urged all farmers who moved out of agricultural employment to transfer their rights to others. And the 1982 Constitution was amended in 1988 to legalise use rights and transfers, apparently opening up the possibility of using land use rights as security for loans. Thus, while the 1982 Constitution still establishes the principle of collective land-ownership, recent reforms seem in practice to recognise and promote the concept of_a market in land rights. While the 1987 Land.Administration.Act requires a registry system.for collective and state ownership of the land, no machinery has as yet been developed for registering private and household rights and transfersa

Land for the Tiller Programmes

Land for the tiller programmes aim to promote small farming systems, essentially by converting tenants or sharecroppers into small owner-operators; They are clearly’ most applicable in regions where small-scale tenancies are widespread, and where there. has been little development, of large-scale commercial agriculture.

South.Korea and Taiwan provide the classic examples of these approaches, redistributing rights of ownership to former tenant farmers. The reforms took place in exceptional circumstances, when the authority of the feudal elites had been undermined by the political events surrounding the Second World War and its aftermath, end the United States pressed for reforms to stem the advance of Chinese communism. Reforms enacted after the early 1950’s involved the compulsory sale of tenanted and leased land, and the eradication of large scale and "feudal? holdings. The Taiwan reforms set a very low ceiling of only three hectares that could be retained by landlords. The subsequent success of these smallholder peasant economies has been widely attested. Factors behind this include the development of effective cooperative institutions for ensuring the delivery of credit and other inputs and marketing the output; rising public expenditure in agriculture (in Korea, an increase of over 350% between the late 1960’s and the early 1980’s); favourable pricing policies; and appropriate policies of small-scale mechanisation. Recently, South Korea was singled out by FAO as a country to achieve significant success in accelerating growth within the context of a small peasant economy, thanks to the earlier land reform measures. And it has virtually eliminated rural landlessness, which affected over half of all farm households in the late 1940’s. According to FAO figures, rural landlessness decreased from 4% in 1980 to only 2% in 1985.

It must nevertheless be questioned whether these reforms are replicable elsewhere, and can provide any kind of model for other developing countries today. The Philippines for example is another Asian country where there have been sporadic attempts in recent decades to implement redistributive land reforms on the- "land for the tiller" model, but where recent approaches have had to take account of the growth of commercial agriculture and aA significant increase in rural landlessness. A Land Reform Act of 1955 aimed to facilitate the acquisition of large estates for subdivision and resale to tenant cultivators. A more comprehensive Agricultural Land Reform Code, issued in 1963, established a ceiling on privately owned land, abolished share tenancy in law, and instituted a leasehold system under which fixed rentals would be paid.

A potentially significant land reform law was enacted by President Marcos in 1972. Limited to rice and corn lands, this ’provided for the transfer of ownership of such lands cultivated under sharecropping or lease tenancy. Landowners were to be compensated and could retain up to seven hectares for self-cultivation, existing tenants now being considered leaseholders

rather than sharecroppers. A11 sharecropping arrangements were to be converted into written leasehold contracts, with fixed rentals. The Marcos reforms altogether excluded the landless and farm workers in the commercial crop sector. Moreover, the practical effects of the reforms were again very limited. In 1986 the new .Aquino government reported that only 13,590 former tenants had actually received land titles under the Marcos reforms. -

Land reform.policies were given far greater prominence after President Aquino assumed office in 1986. The 1987 Constitution provides for land reform as a social right of the Philippine people. A Comprehensive Agrarian-reform Law, Republic Act (RA) No. 6657, was enacted in June 1988. The law now covered all public and private agricultural land, regardless of the tenure arrangement and the crop produced. It provided a retention limit of five hectares per landowner, on top of which adult children actually. tilling the land could retain an additional three hectares each. All landowners were required to register with the Agrarian Reform Department (DAR) within a 180-day period. DAR, in conjunction with local agrarian reform committees, was alSO to register all agricultural lessees, tenants and farmworkers qualified to be beneficiaries of the refcrm programme. The beneficiaries were to be, in the following order of importance: agricultural lessees and share tenants, regular farmworkers, seasonal farmworkers, other farmworkers, actual tillers or occupants of public lands, collective or co-operatives of the above beneficiaries, others directly working on.the land, and other landless individuals. Implementation was to be staggered over a ten-year period in three phases, the first covering rice and corn lands, idle and abandoned lands; the second, private and leased lands in excess of 50 hectares; the third, other private lands below 50 hectares. There was to be a stock distribution option, under which corporate landowners who voluntarily divested a proportion of their capital stock in favour of the workers were deemed under certain conditions to have complied with the law. And there was a production and profit sharing scheme, whereby larger enterprises were to distribute a percentage of gross sales to farmworkers pending final land transfer. v

While implementation was expected to last a full decade, some components were scheduled to be completed within four years. These included the acquisition and distribution of all rice and corn lands affected by the earlier 1972 Decree; all idle or abandoned lands; and all private agricultural lands in excess of 50 hectares.

Restitution

The principle of land restitution is of obvious importance in the South African context. The argument is that individuals or groups who were unlawfully or forcibly removed from lands to which they had a strong prior claim have the right either to physical restitution of the land itself, or at the very least to ’compensation. Complex legal and political issues are bound to

arise, because the principle of restitution challenges the legitimacy of current land tenure arrangements even when existing landholders may be in possession of valid legal title. A number of precedents are worth looking at, older ones in Latin America, and the more recent ones in Eastern Europe since 1989.

In Latin America the best examples are Mexico after its 1910-20 revolution, and Bolivia after its 1952 agrarian revolution. Throughout Latin America, the rights of indigenous peoples to their communal lands had been specially safeguarded during the Spanish colonial period before the Republics attained independence in the early nineteenth century. Several indigenous communities were able to secure land titles, inlmuch the same way that a limited number of African communities secured freehold title before the 1913 Act in South Africa itself. In the latter part of the nineteenth century however, as Latin America embarked on an agro-export.model of commercial agriculture, communal forms of indigenous land ownership were abolished in law, with only registered private land ownership now recognised under the new civil codes. Though indigenous peoples (the majority of the rural population in countries including Bolivia and Mexico) enjoyed formal equality under law with full rights to register their lands in private ownership, they generally lost their traditional lands ended up as peons on the large haciendae or landless rural labourers.

In Mexico, the post-revolutionary land legislation provided for physical restitution to indigenous peoples of the lands from which they had been evicted in previous decades, and to which they could prove valid title. Restored lands were referred to in law as the comgnas igdigenas (indigenous communities), with inalienable, imprescriptible and non-mortgageable property rights. At the same time Mexican land reform law placed ceilings on individual farm size, and established its unique ejigo form of communal and inalienable land tenure for agrarian reform beneficiaries, which at the present time affects over 60% of agricultural and forest lands. In practice very limited land redistribution appears to have taken place under restitution mechanisms, and the majority of agrarian reform beneficiaries (whether indigenous or not) received lands under the ejigo model.

In Bolivia, after the 1952 revolution, the new Constitution required that all lands illegally taken from indigenous communities since the year 1900 be resthred to them. Once again however, the actual restitution mechanisms appear to have been of secondary importance for achieving land redistribution.The more important factor was again that agrarian reform laws provided for the expropriation of lands above a fixed limit, and reversed the txend towards exclusively private forms of land ownership by again recognising the legal status of communal indigenous land holdings.

As a postscript it should be mentioned that the restrictions on land use and alienation associated with the gjig2__ have recently come under intensive attack in Mexico, for their alleged negatived impact on agricultural productivity, and that the Mexican Constitution was amended in 1991 to allow fer the

alienation, leasing and mortgaging of ejidg lands. Opponents of the reforms argued that the poor performance of the ejido was due to the discriminatory allocation of credit and support services in favour of the private large farm sector, rather than to any shortcomings in the gjigg model itself.They insist.that the reforms are likely to precipitate a rapid rise in the already high levels of rural landlessness.

Throughout Eastern Europe, legal principles and procedures for the restitution of both rural and urban lands have proved controversial issues since the post-commnnist transition after 1949. The basic principle is that former bwners, whose lands were expropriated without compensation through the collectivisation programmes after 1the late 1940’s, have the right to either physical or monetary compensation. As the World Bank’s Karen Brooks has observed4, the decision to restore rights of former owners has been universal in the Czech Republic, Hungary, Romania and Bulgaria. Land laws passed by parliaments in Romania and Bulgaria in February 1991, in Hungary in April 1991, and in (the then) Czechoslovakia in May 1991 each recognises the rights of land owners just prior to collectivisation, and establishes a procedure for reinstating their property rights.

In Hungary, an initial attempt in 1990 to return land to prior owners was rejected by the Constitutional Court, which ruled that the ownership of agricultural land must be considered together with other assets. A law was subsequently passed in April 1991 regarding restitution and compensation for past confiscation of rural and urban lands after 1949. Up to a maximum of 50 hectares of land may be restored to former landowners or their children.1f the potential beneficiaries do not wish to reclaim their land, they may opt instead to receive vouchers which may be trade in for shares in enterprises or other assets. All claims by former owners had to be filed within a three-month period, the initiation date of which was not determined by the law itself.

The Bulgarian land law of February 1991 restored the right of ownership to former owners who had lost their lands after the 1946 Agrarian Reform Act. Former owners were not to receive the exact lands they had lost, but were instead granted a piece of land of equivalent value and quality in the same village, not to exceed 20 hectares or 30 hectares in mountainous areas. Beneficiaries were required to farm the lend themselves or to lease it to tenants. otherwise they were entitled to monetary compensation,, and the law provided for a three-year moratorium " on land saless. It appears that administrative delay initially slowed the implementation of the Bulgarian law. Claims were to

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be accepted and adjudicated by local land commissions, who would then turn verified claims over to a team of specialists.
The above analysis has aimed only to highlight the basic principles of land restitution,i together with some of the administrative mechanisms. It is clearly too early to assess their real impact on land ownership and security. The reference is made only to show that restitution to former land claimants can be a viable mechanism when the legitimacy of past land tenure arrangements is subject to challenge in a new political dispensation, even when the claims can date back almost half a century. As analyst Karen Brooks has observed, "In surveying the economic options, few outside economists would have chosen physical restitution of rights of prior owners as the preferred solution". As she continues howewer, "It is not surprising, given the reorganization and turmoil that has characterised the agricultural sectors of the region, that the paper trail of prior property rights has in some areas been lost. The more unexpected fact is how well preserved it is in many places, testifying again to the political inevitability of restitution. The emergence of yellowed but carefully preserved land titles, tax documents, and registries of property brought into the collective farm suggests an enduring conviction that these documents would some day be important"f Could these comments also be applicable to South Africa?
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Tenancy protection and rural labour rights
So far the analysis has focused on measures to restore or redistributeh the land itself. In many national situations however, today’s concerns are with land security and security of rural employment, rather than with physical ownership of the land. since the 1950’s a global phenomenon has been the expulsion of tenants from lands brought under commercial and mechanised forms of protection, together with the oasualisation of rural labour. Myself I believe that these trends have changed the nature of the land reform debate, at least in the areas where modern. and commercial agriculture is firmly entrenched, and largely explain why redistributive land reformlhas been virtually off the international agenda since - say - the mid 1970’s.
h It is possible to point to theoretical economies of scale ’ for small-farming systems, to argue that large farming systems have only flourished thanks to highly subsidised meohanisation and other inputs. But it is unlikely that state policies will aim to break up efficiently operated agro-industries. More importantly; it is sometimes questionable whether farmworkers who have lost their direct relationship with the land as small owner-operators have an active desire to achieve a status as independent farmers. These questions can only be determined at the grassroots level, through attitudinal surveys. But much available evidence suggests that the primary concern of salaried rural workers is with permanency of employment together with improved conditions of life and labour. At the same time a key demand of many farmworkers in the large-scale and commercial

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sectors of agriculture has been for access to a subsistence plot, in particular when wage employment is not available on a year-round basis.

Tenancy and rural labour laws may not lead to physical land. redistribution (though this may be an implicit intention). But they do necessarily redistribute rights to and over the land, by limiting the landowners' power over the work force, and correspondingly strengthening the position of the latter. A longstanding problem in South Africa itself, as in the other countries of Southern Africa, has been the excessively strong nature of private land rights under Roman Dutch law, the virtual absence of tenancy protection, and the weakness of rural labour law and its application. In these areas, what can be learned from the international experience.

Legal reforms for the protection of tenants and sharecroppers were an important component of South Asian land reforms after the 1950's, linked with land ceilings. However, there is evidence of massive tenant evictions as a preventive measure, sometimes prior to the adoption of the laws. It has been estimated that such evictions affected almost half of the share-cropping area in certain states of India, for example. In the development literature it is the land reform experiences in only two Indian states, Kerala and West Bengal, that are usually singled out as partial successes. Kerala legislation of the late 1960's provided for a low land ceiling of between-6 and 20 acres. It provided for'immediate security of tenure for all kinds of tenant, with or without formal contracts, and required landowners to pay full compensation to tenants before the land could be resumed for personal cultivation. In any event, tenants could not be left with less than a subsistence holding, unless the owner held less than five acres. Arrears of rent were dramatically reduced, and special tribunals were established to determine the equity claims_of small owners and tenants. Commercial farms were however excluded from the reform laws. And there were severe problems of implementation, with the Kerala High Court rejecting as illegal some tenancy protection provisions which were seen to encourage trespass on private lands.

The main components of the West Bengal land reforms have been the abolition of absentee landlordism; a low ceiling of between 2.5 and 9.8 hectares, depending' on family size and irrigation; recording of sharecroppers, with a VieWitO preventing their unlawful eviction; provision of special credit facilities; and.implementation of a minimum wage rate for casual agricultural labour. In a state with exceptionally high population levels, the programmes appear to have met with much success in redressing rural landlessness. Concerns have nevertheless been expressed at the degree of land fragmentation, in the absence of land consolidation programmes.

Latin America's main agrarian reform era can be dated, very approximately, between the early 1960's and the mid 1970's. During this period, agrarian reform laws were adopted in almost every Latin American Republic, often complemented by labour laws

extending the benefits of labour legislation to the countryside. The links between new land and labour laws were often very direct, in that violation of minimum wage and other labour laws could be one of the reasons for expropriating land. Some of the reforms actually abolished sharecropping and share tenancies by law, pursuing a land for the tiller approach. In all too many cases however, landowners were able to react to the new legal framework by evicting tenants and permanent estate workers before the legislation could-take practical effect. Thus many sceptical analysts have argued with some justification that agrarian reform programmes imposed "from above" aimed to modernise traditional agriculture rather than to break up the large land holdings, and to replace semi-feudal and servile labour arrangements by wage labour systems.-The adoption of a Rural Labour Statute in Brazil in 1963, of a 1968 law in Colombia aimed at the gradual abolition of sharecropping and tenancy arrangements, and the extension of minimum wage and other labour legislation to the countryside in El Salvador during the same period, all had the perverse effect of accelerating land eviction.

There is a continuing debate among Latin American scholars as to the extent to which the spate of land evictions from the ’1960’s onwards was actually precipitated by protective tenancy and rural labour legislation, rather then being a response to economic factors independent of the legal framework. A range of factors (including new markets for agro-export crops; and state subsidies for agricultural mechanisation) encouraged landowners to bring the land under more intensive cultivation, to rid themselves of labour which had previously occupied subsistence plots on the fringes of plantations, and to make increasing use of seasonal and migrant labour during the peak harvest season. It must also be remembered that the process of land evictions was a very violent one, facilitated by the military governments that took power throughout Latin America after the early to mid 1970’s. Peasants and rural worker organisations mobilised extensively to demand enforcement of their labour and tenancy rights, but suffered intensive repression at the hands of rural paramilitary groups often aided and abetted by government security forces. The period ’of repressive militarisation, intensely felt in_rural areas, has left a difficult social legacy as Latin.America has returned to formally democratic and civilian rule by the 1980’s. In Brazil there are an estimated eight million seasonal migrant workers, and in.Mexico an estimated five million, who are either completely landless or who supplement their sub-subsistence agriculture on tiny farm plots with’regular periods of migratory labour to commercial plantations.

In mainstream development thinking (influential within the World Bank, for example), there is now a reaction against the use of tenancy legislation as a "camouflaged" means of distributing rights of ownership. Tenancy is increasingly seen as sociallyi useful, and perhaps as a bottom step on the ladder to full ownership rights, rather than as the exploitative and "feudal" i form of land-labour relationship that it was widely construed to be in the 1950’s and 1960’s. Otherwise put, tenancy protection falls within the range of non-market mechanisms if the protection

is so strong as to amount virtually to full ownership, and the long-term objective is to transfer tenant rights into those of full ownership. It is obviously compatible with market approaches, if the aim is only to clarify the terms of contractual relationships along the lines of leasehold arrangements in Western European agriculture.

Protective labour legislation is similarly compatible with market principles - at least those of the social market economy - while certain labour standards have been under increasing attack from the advocates of neo-liberal development orthodoxies. The main arguments against labour standards are first that they constitute "rigidities" or "distortions" to the freer operation of labour markets; and second that they tend to be selectively applied in the formal sector of the economy, constituting privileges for formal sector workers at the expense of those in the informal and rural sectors. The extensions of labour legislation to the countryside can be a limited or strong non-market mechanism, depending on the extent of coverage and the issues covered. In much of Latin America, the extension of rural labour legislation to the countryside after the 1950’s had a strong potential impact on land and labour security, and on freedom of association, but also on wider aspects of social protection. Landowners were under a legal obligation to provide housing, education, paid leave, social insurance and a range of other non-salary benefits as well as the payment of minimum wages etc. The problem, as noted above, has been the emergence of a labour market dualism where only a small proportion of the rural labour force represents permanent and unionised workers. There has been a generalised failure to extend the benefits of labour and social legislation to the casual and seasonal workers who constitute such an important proportion of the rural labour force.

The role of the judiciary in land redistribution

Any redistributive land reform programme requires agrarian or land claims courts as part of the implementation mechanism. Tasks include the adjudication. of competing claims, appeals procedures, and in some cases the resolution of compensation claims.

The more successful of the Latin American models developed new judicial procedures, through the guero agrario or agrarian jurisdiction. Under the Peruvian model, Agrarian Tribunals were established at all levels of the judiciary up to the Supreme Court. Peasant farmers were granted free legal assistance to register their land claims and have effective access to the legal imachineryx The creation of the agrarian tribunals, and the interpretation given by agrarian judges to their responsibilities, had a major impact on the land reform process. In accordance with instructions given by the President of the Agrarian Tribunal, agrarian judges were to apply existing legal norms in favour of the peasant whenever there were ambiguities in the law itself. Before then, the decisions of both civil and

criminal courts hadvgenerally been biased towards landowner interests, usually resulting in the eviction or eVen imprisonment of the peasants involved in litigation. But forgotten laws dating as far back as the 1820's were now invokedf to support land claims based on possession rather than written title. As-the President of the Agrarian Tribunal argued, it was a well known fact that many landowners had used force and falsified titles to gain control of vast extensions of communal land.

"Special" rights to the land: exceptions from the market I principle '

The concept of special rights to the land means that the tenure regime for certain groups will be governed by principles different from those prevailing for the rest of the population. Ideally it should constitute special protection for vulnerable groups, maintaining their ethnic and cultural diversity. It can also potentially constitute discrimination.

Over the past decade in particular there has been a strong resurgence of indigenous and tribal peoples' land .claims throughout the world, already having its impact on national and international law. A Convention was adopted by the International Labour Organisation in 1989 (so far ratified by countries in Latin America, Europe and the Pacific, and widely discussed in other countries including Russia) which inter alia recognises the collective aspect of indigenous peoples' relationship with their land, stresses that their rights of ownership and.possession over traditional lands shall be recognised, calls fore adequate procedures within the national legal system to resolve land claims by the peoples concerned, and contains other provisions concerning natural resource management and mineral exploitation. It also calls for equal treatment for these peoples under agrarian reform programmes. At " the same time many national Constitutions and special laws, most particularly in Latin America, provide for the demarcation of indigenous lands and territories under -.inalienab1e, imprescriptible and non-mortgageable forms of ownership.

Few questions arise when the peoples concerned are forest-dwellers, bushmen or other traditional cultivators who need a large and contiguous territory to preserve their traditional lifestyles, and who obviously require special protection against encroachment. Different issues arise when_1as in parts of Latin America) indigenous peoples form a large proportion or even a majority of the rural population, are intermingled with other peasants, or have been reduced over time to a state of landlessness. How do they express their land claims? And to what extent are they demanding a separate land regime with the ensuing restrictions on land use, alienation and transfer? .

Different issues arise where, as in.much of Africa, communal tenure regimes have been in part a colonial imposition, preventing indigenous farmers from participating in settler land markets, and even refusing to recognise private land transactions

among African farmers themselves. As private land markets grow under technically "communal" tenure regimes, with an adverse ’impact on the land security of women cultivators in particular, the role of chiefs in land allocation has been criticised even by the advocates of customary tenure. There are arguments for Land Boards on the Botswanan or emerging Namibian model, which reduce the powers of chiefs or headmen in land allocation, and give a greater role to state bodies and participatory local institutions including in particular the representatives of women cultivators. A major issue in southern Africa is whether or not land distribution programmes should aim to extend these communal tenure. regimes, and what should be the degree of state intervention regarding land use and allocation within them.,

LESSONS ?OR SOUTH AFRICA?

In conclusion, I have been asked to assess the implications of international experience for the current land policy process in South Africa itself. It would be presumptuous to make any specific recommendations, given a limited acquaintance with South Africa. I prefer to focus on the policy issues which seem to be arising from the recent international experience, as potentially relevant to current land distribution debates in South Africa.

The need for land reform, objectives and beneficiary target groups -’

The arguments for land reform are in many ways the same as some three or four decades ago, in the heyday of the classical land reform period. Economic arguments are that small and intensive farming systems provide the best basis for balanced industrial and agricultural growth. Moral arguments are that people have a general right to the land, at least in terms of secure access to land, when they have no alternative means of subsistence. There is the combined Wmoral argument that people have a right to land restitution, when they ’have suffered forced eviction without due process of law or adequate compensation. .

Whether land reform has failed in most developing countries, or why it may have failed, remain open questions. Much land has been distributed throughout Asia and Latin America in.particular. A new class of medium farmers has emerged - using new seeds, limited mechanisation and some ’though usually casual labour inputs. In some countries these produce the bulk of food for domestic consumption and are the most important sector of the farm population. In others they coexist with large farms, which often produce mainly for the export market. The major problem of the limited non-market land reforms, based on ceilings or tenancy reform, has been their failure to address the problems of absolute rural landlessness. While they professed both equity and efficiency objectives, they have tended to give more emphasis to the latter. It is only that radical socialist reforms, and the ’East Asian land for the tiller programmes, that have had a real

impact on landlessness.

At the same time, in all developing regions the proportion of the economically active population engaged in agriculture has been steadily decreasing. Most state policies assume that a further reduction of the agricultural labour force is necessary for improved agricultural efficiency. Yet bthe number of unprotected rural workers, usually engaged on a seasonal or casual basis, is clearly growing. As profit margins are falling in much commercial agriculture - due to unstable world markets, and also the strong pressures to reduce agricultural subsidies - ’the existence of a sizeable reserve of unprotected rural workers is becoming structurally necessary for the survival of much large-scale commercial agriculture. It is becoming socially unsustainable.

The pressures for land reform, and the objectives of a land reform programme, obviously depend on the extent of agricultural commercialisation, employment patterns within the commercial sector, and longterm perspectives for rural and.urban employment. And in lmany countries there are huge regional differences, affecting the perceptions of the peasant and rural worker movements. In Brazil for example, the southern states are the poles of commercial agricultural growth, while in the north-easta labour relations in agriculture are more feuda1.In the south the main demands of the peasant movement are for permanency of employment, together with profit-sharing. In the north-east peasant struggles tend to be more directly for the land itself. While some parallels can be drawn with the South African situation, the proportion of the economically active population engaged in agriculture appears to be significantly higher in Brazil.

These fundamental questions have to be addressed in South Africa, before any major programme of land redistribution can be envisaged. In certain regions and sectors, demands for land, employment and housing security mayuwnotn.amount to strong pressures for physical distribution of the land itself.

Linking land rights and rural labour rights

The link between.rura1 labour rights, tenancy protection and land rights is an obvious one, as has been demonstrated above. Labour rights and labour law are essential aspects of property relations, and can play a direct rule in land redistributign policies. In some of the successful cases, legislation in these areas has been adopted simultaneously. But there have also been cases where, for both economic and political reasons, they have had the "perverse" effect of undermining land and employment security. Historically, it has been commonplace for landowners to rid themselves of protected labour, having greater recourse either to mechanisation or to unprotected labour. And there has been very little success anywhere in extending the protection of rural labour law to seasonal, casual and migrant wquers.

It seems fairly obvious that South Africa needs new and stronger legislation in these areas, covering different forms of farm tenants as well as salaried rural workers. But legislation will have limited impact; without an affirmative action.programme to promote strong and independent rural workers' organisations. Some of the ILO's Conventions can provide useful guidelines here, particularly its Convention No. 141 of 1975 concerning organisations of rural workers and their role in economic and social development.

' The pace of land reform

. It is common wisdom that land reform needs to be enacted speedily. This is true in that, the longer a government delays, the more likely it is that landowners will use their political influence to impede the process. But how can rapidity be blended with due process of law, in accordance with democratic .principles?

' The East Asian land reforms were carried out quickly, under effective external military occupation. The El Salvador land reforms of 1981 (seen as the first stage of a phased programme over several years) were carried out through military occupation of estates under US pressure.The later stages were successfully resisted by landowner lobbies. v

But other and arguably successful land reforms have been carried out over a lengthy period. The Chilean and Peruvian land reforms of the 1960's and 1970's were gradual processes. New agrarian and rural labour legislation was enacted, which permitted land expropriation and actively encouraged peasant mobilisation, and which in turn persuaded governments to accelerate the pace of land reform. The Mexican land reforms after the 1920's also took place in fits and starts, with the emost significant phases of redistribution occurring many years after the enactment of the first land reform law.

The arguments for a swift approach are fairly Obvious. Uncertainty over land rights reduces the confidence of existing producers, and breeds disinvestment. This was a clear problem in Nicaragua after 1979, when the Sandinista government held lengthy gebates about the desired form of landownership, and at one stage alienated both small farmers and the large commercial farmers over whom the threat of land expropriation was hanging.

It conclusion it can only be said that swift action should be taken when the claims are specific and clear, the feelings expressed on the ground'are strong, and the sense.of injustice is flagrant. In South Africa this-is the case with the "black, spot" removals where the land areas and claimants are easily identified, and specific mechanisms for addressing the claims have already been formulated by the ANC and others.

Land rights and land distribution: questions of principle_

Not surprisingly, given the legacy of apartheid, much South African policy analysis focuses on basic principles of land rights in_ a new political dispensation, together with the procedures for resolving a host of competing claims to specific land areas, or to the land in general. And the problems are seen not only as the legacy of apartheid itself (with the black spots, forced.removals, and grossly inequitable land.distribution along racial lines) but also as the legacy of the Roman Dutch legal tradition with its excessively strong recognition of private land rights.

There is some interesting ’work by South hAfrican legal scholars on the concept of the "social function of property", drawing on international experience from Western Europe and Latin America, among other regions. The concept underlies the social constitutionalism of Latin America, and is also embedded in the post-independence Constitutions of many Asian and African countries. It is no more than a legal concept, seeking the middle ground between unfettered market approaches and socialist options. It enshrines the constitutional principle that private land rights are not sacrosanct, but have to be tempered by other social considerations. In its origins, inspired. by Catholic social philosophy, it is a reaction against the excesses of nineteenth century liberalism and its civil law tradition, which saw unprecedented patterns of land accumulation and dispossession. Without such constitutional principles, it would have proved impossible in the countries with civil code systems to carry out the range of interventions in the land market within a democratic framework. These are obvious arguments against incorporating a blanket protection of property rights within a new South African Constitution.

NOTESrAND.REFERENCBS

1. Roy Prosterman et.al. Aggagian Reiorm Lg gussig, Rural Development Institute, Seattle, May 1993.
2- Solon Barraclough, WWW
299d gtrategies, Zed Books, London, 1991.
3 . Rehman Sobhan, "Agrarian Reform and its Alternetives" , paper prepared for Workshop on the Inter-relationship between Macro-Economic Policies and Rural Development, ILO, Geneva, December 1989.
4. Karen M.Erooks, "Decollectivisation and the Agricultural Transition in Eastern and Central Europe", Agricultural Policies Working Papers, The World Bank, October 1991.
5. Mark Lundell and Jason Lamb, "Privatisation gathers steam in Central and Eastern Europe", Centrally Planned Economies Agriculture Report, Us Department of Agriculture, May/June 1991.
6. Karen Brooks, Op. cit., as above.