22. Agrarian law

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INTRODUCTION

Law could be broadly defined as a set of norms, procedures and authorities regulating multiple aspects of social life. However, starting from different theoretical perspectives, law can be understood and analysed in multiple and even contradictory ways. On the one hand, it is comprehended as a system that reproduces dominant political and economic interests and power structures based on class, gender or race. On the other hand, it is understood as a field of dispute, on which different social and political actors acquiesce to, challenge or resist law enforcement.

For critical agrarian studies, it is crucial to engage with law and its different branches (such as criminal, administrative or private law) and institutions, because of its importance for analysing agrarian change. Legal rules related to land tenure, agricultural trade agreements and agricultural production and labour shape continuous conflicts and transformations in the countryside. Historically, legal instruments served as tools of class domination by facilitating, legitimizing or regulating capitalist accumulation and transition in the countryside. For instance, the 'Bloody Legislation' from the end of the fifteenth century and the 'Black Act' of 1723 in England fulfilled different roles for the development of capitalist agriculture, whether by forcing the mobilization of labour in the case of the former (Marx 2013), or by privatizing common lands through the suppression of use rights formerly entitled to commoners in the case of the latter (Thompson 1975). Furthermore, large-scale land transfers, both current and previous, are/were frequently undertaken while strictly following a government's legal frameworks (Wily 2012). Law has, however, also played a critical role in terms of confronting and imposing effective inhibitions on the power of dominant groups or classes, and there are both historical and contemporary analyses of how rural labour, peasants, women, indigenous peoples and other dominated groups have engaged with legal means to navigate conflicts that have emerged amid different processes of capitalism's penetration into the countryside (Claeys 2015; Monsalve 2013; Thompson 1975).

This chapter explores the role of agrarian law, specifically its feature of regulating land tenure and tenancy systems, and explores its relevance for critical agrarian studies. The next section provides a discussion of what agrarian law is, and why and how this term is used for the purpose of the chapter. Thereafter, theoretical tensions and disputes between two competing approaches to, and the historical emergence and basic principles of, agrarian law are presented. Furthermore, the section surveys the interrelation of agrarian law and environmental and international human rights frameworks, and discusses how they are challenged and contested by agrarian social movements in the context of the expansion of human rights discourses and instruments. In the conclusion, it is discussed why and how scholars from critical agrarian studies need to engage with agrarian law.

WHY 'AGRARIAN LAW'?

Scholars from critical agrarian studies recurrently engage with the analysis of national and international regulations, legal pluralism, customary law, judiciary rulings and their multiple interpretations for various reasons, including problematizing the interaction between law and space (von Benda-Beckmann and von Benda-Beckmann 2009) or in understanding the role of international regulations regarding the global land rush (Franco et al. 2015). One major challenge here is to decipher and understand the complexity of legal structures and to know what we are all talking about. The delimitation of a specific branch of law dedicated to attending to a particular issue varies from country to country and from one legal tradition to another. Likewise, branches of law are named differently in different countries, although they may refer to the same thing: what in one country is understood as agrarian law or land law, in others is considered agricultural law or civil law.

Legal scholars from the United States, for instance, have defined agricultural law 'as the study of the network of laws and policies that apply to the production, marketing, and sale of agricultural products' (Schneider 2010, 935). Their Mexican counterparts use the notion of agrarian law to define something fairly similar: agrarian law is the sum of norms and institutions allocating property rights over rural land and resolving disputes and conflicts related to what is needed for food production and agriculture, including land, water and labour (Chávez 2004; Vivanco 1962). In addition, each country has developed its own agrarian or agricultural legal framework dependent on the traditions of the legal system in force. In countries with a common law (Anglo-Saxon) system, the issue is generally named land law, while in countries under a continental law (civil law) system, the same legal framework is usually called agrarian law. In many Latin American countries, it is possible to find so-called agrarian law (*Derecho Agrario*) codes and legal doctrines.

The choice of using one notion instead of another remains a major methodological and theoretical challenge. However, for this chapter, the concept of agrarian law is preferred over agricultural or land law. The reason for this relates to the importance of highlighting how such concepts have been significantly influenced by the broader political transformations that took place during the twentieth century, which introduced social justice and redistribution as overarching criteria for governing land tenure systems and allocating land rights. In some countries, peasant rebellions and revolutions shaped entire bodies of what is known today as agrarian law. Thus, in many of these countries, agrarian reform acts, laws or decrees were appointed as pivotal pieces of agrarian reform policies.

During the last decades of the twentieth century and the first decades of the twenty-first century, however, what is known as agrarian law experienced a shift from a redistributive approach to an efficiency approach based on theoretical foundations from new institutional economics. With regard to the latter, agrarian law has once more been subsumed under civil law regulations, eroding the redistributive paradigm. Therefore, despite agrarian law having been shaped in different national contexts throughout the twentieth century as a means for achieving land redistribution, it has been challenged and redefined in recent decades. Currently, there is renewed interest in critical legal scholarship because of the challenges posed by global resource grabbing and climate change, amid the emergence of new human rights instruments pushed by agrarian social movements.

COMPETING APPROACHES TO LAW AND AGRARIAN CHANGE

Throughout history, law has played a crucial role in agrarian change. Law is critical for land privatization, understood as the process through which private property rights over land are allocated by transferring public or uncultivated land to subjects, particularly individuals. Legal procedures legitimize private property rights that are subsequently certified by state authorities (notaries, registers, judges). Entitling private property rights over rural lands could also be a means through which redistributive reforms are enforced, for instance when large-scale landed properties formerly in the hands of only one holder are distributed to many.

Tensions between mainstream (for example, new institutional economics) and critical approaches to agrarian law are centred on the theoretical foundations guiding the rule of law and on the policy implications in terms of the allocation of property rights over rural land. Regarding land rights, these are framed in terms of efficiency versus redistribution. For new institutional economics, the main objective of the formalization of property rights, particularly ownership rights over land, is to trigger a process of commodification. For critical approaches, the formalization of land rights aims primarily for redistribution and the restitution of land rights to people who depend on them to make a livelihood. The contradictions between the efficiency and redistribution approaches are played out in disputes between private and public law. Civil law follows a private law approach, in which private property over rural lands is an absolute right.

Theoretically, for new institutional economics, well-performing land markets require previous processes of privatization and commodification. Law plays a critical role in the making of land markets: civil and land law facilitate land commodification by legalizing private property rights. By following this approach, legal systems aim to facilitate transactions and trade regarding property rights over rural land. For land to be considered a commodity, a process of entitling rights over land to private individuals, rights which are enforced by the legal system, is required.

Scholars such as Deininger and Binswanger (1999) and de Soto and Cheneval (2006) usually see the privatization of property rights over rural lands as the optimal institutional arrangement, because it reduces uncertainties and transaction costs. Moreover, scholars from this theoretical perspective often consider land privatization and the allocation of rights over rural land through the market as the optimal alternative for reaching efficient land use, because they consider that markets can and will allocate land rights to the most efficient users (Vendryes 2014). The process of privatizing rural lands and their further commodification through the consolidation of land markets involves for some (such as stakeholders interested in a well-functioning market) the expectation of a reduction in the transaction costs for property rights over land. Moreover, the individualization and commodification of property rights are both considered necessary for the development of agriculture. This is because ownership rights can operate as collateral for producers in order to access credit and other services, whether offered by the state (as subsidies) or by the market (as loans).

Land privatization and further commodification are thus expected to trigger rural development in an alleged virtuous cycle that begins with the formalization of private ownership rights. However, since land is a finite and extremely coveted asset for agricultural production, the extent to which the individualization, privatization and formalization of land rights is possible for all of those who demand it remains unclear, making the privatization approach

insufficient for addressing the issues of land access and concentration. Moreover, commodification processes foster the notion of considering property as an unlimited right.

In contrast, during the twentieth century, different kinds of political transformations shaped a redistributive approach to agrarian law as a means of delivering social justice by addressing issues derived from land concentration. By following such an approach, the goal of different national legislations was to establish effective limitations to private property rights over rural land. The extent of such limitations varies from country to country, and highly depends on the political context and its ideological influence on agrarian law. While in communist regimes private property rights over land were abolished, in other contexts influenced by socialism or egalitarian liberalism, private property rights over land are possible but conditioned towards equity and redistribution (Foster and Bonilla 2011; García 1973).

Redistribution in agrarian law considers power asymmetries among rural actors, mainly determined by the concentration of land, wealth and consequently political power. Different studies demonstrate how the privatization of property rights over rural lands and the establishment of land markets ultimately lead to land transfers from the more impoverished to the wealthiest households, instead of the allocation of land rights to those who are uncritically considered to be the most efficient producers (Vendryes 2014). As a response, the redistributive approach to agrarian law offers an alternative to land privatization, commodification and further concentration, by encouraging the intervention of the state regarding land rights and markets. In this sense, agrarian law seeks material justice among rural dwellers through the constitution of different kinds of property rights over land among those in the population who do not have access to land or do not have enough land to develop a sustainable agricultural livelihood.

Furthermore, it encourages the state to intervene by creating a set of institutions and entities, including judges, special procedures and prosecutors, to promote the implementation of such redistributive legislation and to establish limits to land transfers. Within the redistributive approach to agrarian law, arrangements other than privatization are considered for promoting access to and control over land among rural dwellers, for example the protection of use rights over public or state-owned rural lands, the protection of common property rights and the enforcement of practical barriers for keeping those land rights away from the cycles of land commodification.

The implementation of a redistributive approach to agrarian law has been highly contested by the landed classes and conservative forces within different societies. In many cases, powerful actors seek to bring land conflicts out of the influence of redistributive agrarian law. Neoliberal reforms of agrarian law, as enforced, for example, in different Latin American countries during the late 1980s and early 1990s, diminished critical features of the redistributive approach within agrarian law, such as the proactive role of the state as the principal actor enforcing the social function of property, the redistribution of rural lands and the material justice principle. Consequently, the role of the state was progressively reduced to where it is simply considered an arbiter or facilitator in charge of ensuring a well-functioning land rights market. State-oriented agrarian reform was progressively replaced by market-led agrarian reform, enhancing the dominant position of private property as a near absolute right. Conversely, different actors claim that state intervention in land markets based on agrarian law is still valid in countries in which land concentration and land grabbing have overrun rural landscapes, examples that they argue indicate where the limits of market-led agrarian reform have been proved (De Schutter 2010b; Ziegler 2002).

As much as the tensions between neoliberal and redistributive approaches should be assessed in each specific context, some specific principles of agrarian law that date back to the social justice and redistributive approach are currently being reinvigorated through the emergence of human rights and environmental law.

EMERGENCE AND PRINCIPLES

The development of the redistributive approach to agrarian law is intimately related to political transformations in the countryside that have led to the enactment of different pieces of agrarian reform legislation. Mexico was probably the first country to enact an agrarian law after the revolution of the 1910s. The constitution of 1917 marked a watershed in terms of the evolution of agrarian law. Inspired by the peasants' demands for land throughout the revolutionary struggles, Article 27 of the constitution acknowledged the economic inefficiency of large-scale landholdings (*latifundios*) and obliged the executive authorities to distribute land not being used efficiently among the rural population for agriculture and food production (Mora-Donatto 2016). Other countries followed this experience. In Colombia, the first agrarian law, enacted in 1936 by a liberal government after decades of conservative party supremacy, introduced the institution of the social function of property, setting a different scenario for the resolution of land claims deployed by peasant settlers. Nevertheless, the regulation failed, particularly with regard to the establishment of favourable conditions for peasants' land claims (LeGrand 1988). Other countries where agrarian reforms were enacted after significant political shifts include Bolivia (1953), Ecuador (1964), Peru (1969), Indonesia (1960), Portugal (1975) and the Philippines (1988). Whereas until the 1980s agrarian reform legislation was primarily state-oriented, this changed in the 1990s when market-led agrarian reforms gained momentum.

Pivotal principles of redistributive agrarian law nevertheless remain in force in different legal contexts today, and are the result of the historical evolution of this legal field. Two principles are vital to the social justice approach to agrarian law. The first is the social function of property rights, which in agrarian law refers to the idea of considering property as an absolute right. The social function consequently enables a proactive role of the state for making property rights accountable in terms of social justice and food production. This means that despite the legal character of property rights over land, such rights could be limited and alienated by the state for purposes of equity. Currently, the social function converges with the ecological function of property, when considering environmental limitations to the exercise of property rights.

The second influencing principle in agrarian law is the material justice principle, which is an alternative to the formal justice principle: 'Formal justice is the impartial, consistent and strict application of established rules or laws; material justice concerns the justice or injustice of the contents of rules of law' (Campbell 1974, 445). It could also be defined as the obligation of different state actors to interpret legal frameworks by following a social justice approach. Regarding agrarian law, material justice implies favouring the rural poor, instead of the enforcement of mere formal justice, meaning the impartial enforcement of the law. In pursuing social justice, agrarian law allows the state and its judges to interpret legal frameworks accordingly in order to protect the weakest parties in land conflicts, namely those who depend on land for their livelihood. Consequently, the state must consider and assess each land conflict not only in terms of fulfilling legal commands but also protecting the rights of a specific

section of the population. Therefore a set of instruments can be enforced, including, among others, the expiration of ownership rights over uncultivated lands, and the protection against eviction for tenants and occupants who directly till rural lands, particularly in cases where they lack certificates of land ownership (Ramos 2004). This principle has at least two institutional implications: first, the creation of specialized agrarian judges who address land conflicts by following material justice criteria; and second, the empowerment of the executive branches to enforce particular policies to bring about a more egalitarian distribution of agrarian land among the rural population.

Critical nuances must be considered in the enforcement of the redistributive approach to agrarian law. For instance, keeping people on the land by entitling land rights is not always the best option in cases of environmental risk. In other cases, entitling land rights to the rural poor can encompass significant challenges, for instance when this involves displaced persons who have been living in urban areas for years, or where the rural areas in question lack the necessary infrastructure and access to social services. In addition to solving disputes over land, agrarian law also covers a complex web of rights and interactions related to food production and the enforcement of agrarian reform policies. Concerning the latter, agrarian law defines who is entitled to be granted land ownership rights, by defining who is, and who is not, an agrarian reform beneficiary, and under what conditions the state can interfere in the exercise of private ownership rights. Agrarian law is therefore not only concerned with an objective definition of the legal status of the land, but also classifies and differentiates between different subjects that can be considered, or not, landed property rights holders through different rights (use, tenancy, usufruct, ownership), and defines the uses of those lands.

AGRARIAN LAW IN DIALOGUE WITH HUMAN RIGHTS AND ENVIRONMENTAL LAW

Since the end of the twentieth century, not only has a decline in the redistributive approach to agrarian law institutions taken place, but also the enforcement of international environmental and human rights law. For instance, in several Latin American countries, constitutional reforms took place, and one distinct characteristic was the incorporation of international human rights agreements into national legal frameworks. The recognition of instruments such as the International Labour Organization Indigenous and Tribal Peoples Convention Number 169 (1989) reinvigorated social and environmental dimensions of the bill of rights already protected by each country's constitutional framework.

The emergence of environmental and human rights law poses significant challenges for the implementation of agrarian law. On the one hand, global environmental crises raise awareness of the limits of the expansion of agricultural production and the severe deterioration of soils, water sources and forests caused by the expansion of the agrarian frontier worldwide. Conversely, the promotion of agriculture production, particularly subsistence agriculture, as a human right and as a goal to be fostered as soon as possible, comes up against environmental limits. The enforcement of agrarian law today is therefore continuously challenged by the limits of nature, partially imposed by environmental law through legal protections of endangered ecosystems and species. However, both normative frameworks must be harmonized in the pursuit of sustainable food production and agriculture, as proved by different agroecological experiences. Peasant and indigenous movements have constructed alternative approaches

to achieving the harmonization of agrarian and environmental legal frameworks. For instance, the struggle of rubber tree trappers or *seringueiros* in the Brazilian Amazon rainforest demonstrates how an initial claim for labour and land rights, amid the pressure exerted by cattle ranchers to enlarge their properties over forested areas, was transformed into demands for the establishment of extractive reserves, spaces created to protect sustainable uses of the forest by the rural poor; a proposal that was articulated within the official system of environmental protection (de Almeida 2002). Such experiences facilitate the articulation of both the social function and the ecological function of property, and contribute to building bridges between environmental and agrarian law.

The emergence and consolidation of an international human rights framework is, furthermore, changing the conditions of action for agrarian movements, at both the national and international levels, invigorating demands for land redistribution in a context of widespread market-led agrarian reform. In recent years, agrarian law has been profoundly influenced by human rights law. The International Covenant on Economic, Social and Cultural Rights (1966), the International Labour Organization Indigenous and Tribal Peoples Convention No. 169 (1989) and the United Nations Declarations on the Rights of Indigenous Peoples (2007) and on the Rights of Peasants and Other People Working in Rural Areas (2018), among other human rights instruments, are influencing current interpretations of existing agrarian legal frameworks at the national level, where such rules are enforced. Other human rights sources also enhance the material justice approach to agrarian law. The United Nations special rapporteur on the right to food has urged national governments to '[p]rioritize the titling of land for those who are dependent on land for their livelihoods and are more vulnerable to land-grabbing, rather than for those who claim to be the formal landowners' (De Schutter 2010a, 21).

The articulation of human rights law with agrarian law permits the introduction of a *pro-homine* principle for the interpretation of legal frameworks to resolve conflicts over land that are overarched by asymmetrical power relations in terms of property, capital and labour. The *pro-homine* or *pro-personae* principle guides the interpretation of legal norms, inviting judicial or administrative authorities to prioritize those interpretations and rules that are more favourable to the protection and realization of individuals' human rights:

> According to this, human rights norms should be interpreted as extensively as possible when recognising individuals' rights and, by contrast, as restrictively as possible when the norm imposes limits on the enjoyment of human rights. At the same time, the principle commands that in case of conflicts between human rights norms, the norm that better protects the individual's rights should prevail. (Rodarte 2017, 9)

Agrarian law is a field of constant development and evolution, highly informed by international human rights instruments. Such instruments envision land as the site of food production and shelter provision, thus bringing a human rights approach to land rather than an economic asset interpretation (Assies 2009). Moreover, such an approach demands the recognition by legal institutions of the special protection of subordinate and non-recognized groups, such as peasants, indigenous peoples and rural women (Edelman and James 2011; Via Campesina 2018).

CONCLUSION

Why should scholars from the field of critical agrarian studies take agrarian law into account? Two overlapping areas of inquiry are crucial for critical agrarian scholars: first, the critical analysis of the historical interactions of legal forms with capitalist advancement in land and agriculture; and second, the interaction between agrarian social movements and legal systems. While the first emphasizes the analysis of institutions and the role fulfilled by them in terms of facilitating or enabling land commodification and dispossession and the penetration of capitalism into the countryside, the latter makes a more considerable effort to understand the multiple reactions of agents facing the consequences and implications of such processes.

Studies addressing the dilemmas of the engagement of agrarian social movements with legal struggles over land and other agricultural inputs have been conducted profusely over the last decades (de Sousa Santos and Rodríguez 2005). The disputes over the legal field are relevant for social movements because the majority of legal debates, including that over property rights over rural land, have direct consequences for the distribution of power and goods in the political field (Garcia Villegas 2006). Houtzager (2005, 218) demonstrates how the peasant movement in Brazil deployed juridical strategies that 'helped to produce watershed precedents [that] contributed to a broader process of constitutionalizing law and made access to land more equitable in parts of Brazil by redefining property rights in practice'. In the Philippines, constitutional changes created unprecedented opportunities for the landless to claim ownership rights to the land they tilled (Franco 2008). These processes could be considered expressions of a counter-hegemonic reinterpretation of human rights, and constitutional and agrarian law. The confrontation between hegemonic and counter-hegemonic interpretations of law and human rights takes place in multiple fields, mainly when the law is put in motion through adjudication.

In practice, however, the interactions between agrarian social movements and the legal field are complex and contradictory. The effects of the use of legal means are not always the same. In some cases, such a process could even lead to the reinforcement of the power of dominant groups over the powerless; this could also be explained by the intrinsic relationship between human rights, constitutional democracies and the development of capitalism (Krever 2018). Understanding the interactions between law and social movements implies an analysis of the material implications for social actors excluded from the distribution of wealth, land and political power, who are engaged with law and social justice struggles. The evolution of agrarian law institutions towards its redefinition through human rights lenses and instruments enhances the idea of this branch of law as a vehicle for material justice and for the protection of the interests of the rural poor.

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