

Human Rights Based Approach to Land Reform

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Abstract - Many rights, most especially of the second and third generations, are taken as human rights because they constitute a prerequisite to secure recognized other human rights of previous generations. Access to land falls typically under this category and can therefore be regarded among these rights. Indeed, access to land is a precondition for an equal access to food and housing; as an item of cultural liberty, especially critical for indigenous peoples; and as a requirement for gender equality, for instance. Securing access to land often means transferring land rights, in other words reforming the agrarian structure. Land reform, thus, ends up being converted into an instrument to secure human rights. As usually in human rights discourse, responsibility is a key issue. In other words, one must determine what institution should conduct land reform. This essay tries to show that despite the fact that markets have somewhat been claiming for a more active intervention, the state is yet the most eligible institution to do it.

Keywords - Human Rights, Land Reform, Development, State, Markets

1. Introduction

The Universal Declaration on Human Rights (UDHR) states in its Article 3 the unalienable right to life; a life which other articles take to be more than just plain survival, demanding that it should meet the minimum standards of human dignity and that it should be enjoyed with freedom and safety. This right to life demands access to both the natural resources and the manufactured goods that are considered to be indispensable to life according to the requirements described above. Natural resources that fall into this category should, then, be considered as some sort of common capital for human existence (see Petrella 2004). Land in almost all of its uses, should probably be one the first of these resources to be listed among common capital items. A human rights-based approach to both its exploitation and its distribution seems, therefore, quite pertinent.

According to the United Nations Organization (UN), a human rights-based approach is a conceptual framework that is normatively based on international human rights standards and operationally directed to promoting and

protecting them. A human rights-based approach to development, for example, integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development (HCHR 2014). These standards can be found chiefly within the Universal Declaration on Human Rights and in what have been called the seven core treaties, of which the most relevant for our purpose are the two binding Covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The scope of these rights range from the fulfilment of material aspirations, such as the right of everyone to an adequate standard of living for themselves and their family, to the enjoyment of immaterial amenities such as freedom of speech or of religion.

Claims for a right to land have emerged from the recognition that access to land is a precondition for an equal access to food and housing; for the enjoyment of cultural liberty, especially critical for indigenous peoples; and a requirement for gender equality (Gilbert 2013: 117). Indeed, land is vital to produce food and other goods necessary to satisfy vital human needs such as shelter and clothing. Without access to land many people find themselves in a situation of great economic insecurity (Gilbert 2013: 115). Land is also critical to satisfy a wide range of cultural needs such as the performance of religious rites or the plain enjoyment of leisure without which peoples have argued that their culture may disappear and themselves prevented from enjoying their cultural liberty, in other words from leading the lives they value (see UNDP 2004).

2. The Human Right to Land

Prevailing international human rights law does not recognise a human right to land as such: no treaty affirms such a right in general terms (Cotula 2014: 17). This being said the necessity of providing access to land in order to secure the realization of human rights has been considered in several international principles and interpretive documents (Wickeri and Kalhan 2010: 18). In many proclamations, human rights have been considered as such on the basis of a substantive implication of the implementation of other human rights.

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) proclaimed in November 2002 the Right to Water, for example, as a substantive implication of the implementation of the ICESCR, resulting from an extensive interpretation of its articles 11 and 12. The human right to social security, listed in both the Universal Declaration on Human Rights (UDHR) and the ICESCR rests precisely on this argument. Indeed, social security is considered a human right because it constitutes a prerequisite to the realisation of other rights such as the right to health, the right to an adequate standard of living or the right to the protection of motherhood (CESCR 2006), all concurring to the assertion of the most important of all rights, the right to life.

Admittedly numerous economic, social and cultural rights in the UDHR and the ICESCR are intimately connected to access to land, such as the rights to housing, food, health, and work, as accessing land constitutes a prerequisite to the realisation of these rights. In the ICESCR, articles 1, 6, and 11 are particularly concerned.

Article 1

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources (...). In no case may a people be deprived of its own means of subsistence.

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (ICESCR 1966)

The right to adequate housing is particularly relevant here, land being a critical element in securing this right. Indeed, land is often a necessary and sufficient condition on which the right to adequate housing is absolutely contingent for many individuals and even entire communities (OHCHR 2005: 41). Despite recognizing the fact that the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, the special rapporteur on the right to food also believes that access to land is a key element, necessary for eradicating hunger in the world, and notes that many rural people suffer from hunger because either they are

landless, they do not hold secure tenure or their properties are so small that they cannot grow enough food to feed themselves (OHCHR 2002: 22-23).

Rights to land have also been developed in two key areas of international human rights law, the rights of indigenous people and the rights of women. Land access and use is frequently tied to the spiritual, cultural and social identities of peoples. The ICESCR in its article 15 proclaims that the States Parties to the Covenant recognize the right of everyone to take part in cultural life. The Convention 169 on Indigenous and Tribal Peoples, which was adopted by the International Labour Organization in 1989 also refer to a right to land in order to preserve cultural values.

Article 13 of this convention requires governments to respect the special importance to the cultures and spiritual values of indigenous and tribal peoples of their relationship with the lands or territories that they occupy; and Article 14 establishes that ratifying States shall recognize the rights of ownership and possession of the peoples concerned over the lands that they traditionally occupy, and that States shall establish adequate procedures within the national legal system to resolve land claims brought by indigenous and tribal peoples.

The connection between cultural rights and land rights has again been acknowledged by the Human Rights Committee (HRC) in its interpretation of article 27 of the ICCPR (ICCPR 1966), which concerns cultural rights for minorities. Article 27 does not refer to land rights per se, but emphasizes the connection between cultural rights and land rights. In the general comment on article 27 the HRC recognizes that for indigenous communities, a particular way of life is associated with the use of their lands stating that:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources (OHCHR 1994)

In East-Timor, for example, the *tarabandu* or sacred land, which imposes a wide set of restrictions to the use of land, is a fundamental feature of the national culture and therefore of the people's way of life and of the nation's identity (Henriques et al 2014). People's control of the access to that part of the country's land that is considered sacred is thus a fundamental requirement for enjoying cultural freedom in East Timor, which among other restrictions raises the question of the practicality of private ownership of land.

The right to land can also be invoked in relation to women's rights. The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in its

article 14, for example, requires that State Parties shall ensure that women have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes (CEDAW 1979). Curiously enough, this article contains the only specific mention to land rights in the nine-core international human rights treaties (Gilbert 2013: 122). However, the main objective of the reference to land rights in this article is to ensure that women are not discriminated when land reforms occur. It does not constitute a claim for land reform or for a human right to land.

Although the ICCPR is particularly scant in direct references to land rights, there is an undeniable indirect connection between access to land and the exercise of democracy. In countries where agriculture is still the dominant economic sector, as frequently in many developing countries, land constitutes a major, and very unequally distributed, political resource. On the first hand, extremely unequal land distribution decisively contributes to the unequal distribution of income in rural areas and literature about the economic interactions with democracy, considers income inequality as an obstacle to democratization (see for example Acemoglu 2003; Barro 1999; Engerman and Sokolof 2002; Fitoussi 2004; Przeworski et al 1996). On the other hand, extreme inequality within income distribution is a major source of political instability in rural areas, which can degenerate in violent conflicts that frequently overflow to urban areas, all of this being incompatible with the existence of democratic institutions (Gillis et al. 1992: 496; Barraclough 1999: 8).

Claims for land rights have also emerged as an issue of property rights. Both the 18th century US Bill of Rights and the French Declaration of the Rights of Man and of the Citizen put the protection of property rights at the same level as the right to life (Gilbert 2013: 118). The UDHR in its turn states in article 17 that:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property. (UDHR 1948)

Nevertheless, the reference to the right to property was abandoned in both the ICESCR and the ICCPR adopted in 1966, making property rights one of the only human rights stated in the UDHR which was not incorporated into one of the legally binding Covenants. That is the main reason why this article shall not take the right to property into consideration despite the fact that property is arguably a central issue in access to land.

3. Human Rights Approach to Land

Considering land as a human right requires us to adopt a specific approach to its use and transmission. This is all the

more important as land has become increasingly commoditised, land grabbing being one of the most vivid examples of this global tendency. A human rights-based approach to land may provide an answer to this need, bringing an alternative perspective, where land is a social and cultural as much as an economic asset and, more importantly, a fundamental right. In practice a human rights-based approach is structured around four fundamental principles or groups of principles: 1) universality and indivisibility; 2) accountability and the rule of law 3); participation and empowerment, and 4); equality and non-discrimination.

Respect for the principles of universality and indivisibility imply that no one can be arbitrarily deprived of the enjoyment of human rights and that the value of each human right is intrinsically equal. Beyond the legitimate statutory exceptions, fundamental rights do not admit exclusion, in other words if rights are not guaranteed for all, then they belong to none. If a citizen is arbitrarily excluded from participating in an election, for example, this not only means that he or she is denied his or her right to vote but also that the right to vote is not ensured in the community to which he or she belongs, even if all except one are allowed to participate in the voting. Indivisibility of rights means that they cannot be ranked in a hierarchical order. If one can admit that, in practice, it is hard to avoid prioritizing them, that is to say achieving some rights before others when resources are scarce, one must agree that one part of the overall goal cannot be achieved in detriment of another (Branco 2009).

The second principle of a human rights-based approach to development is accountability and the rule of law. If one endorses human rights then one should also accept that each individual has some sort of credit with society concerning the provision of those goods and services that are needed to secure human rights. If there are not enough water or health services for everybody and therefore the individual's right to these goods and services is not being secured he or she should be able to call for someone's or some institution's responsibility. Indeed, the right of an individual corresponds perforce to the duty of another or of the community at large and if the rights of an individual are not secured, this means that other individuals or institutions have failed in carrying out their duties (Branco and Henriques 2010). In human rights language, the exchange held between an individual and a provider is converted into a relationship between a rights-holder and a duty-bearer, accountability becoming, therefore, a critical issue.

The third principle, participation and empowerment, means not only that every person and all peoples are entitled to active, free, and meaningful participation in the process of designing and implementing development policies (DEZA 2007), but also that the outcome of these policies should strengthen the participation and the

empowerment of these same persons and peoples in other levels of social life. In other words, development policies should also be expected to strengthen substantive democracy. By substantive democracy we mean a democracy which, besides elections, demands wide civil liberties, including freedom of association and expression; citizens to be deeply involved in the decisions on matters that affect them; and institutions to be strongly committed with responsibility and accountability in the running of public affairs; a democracy that not only aims at the interest of the governed but also at their meaningful participation in the process of decision-making (Branco 2012).

The fourth and last principle in our list concerns equality and non-discrimination. Human rights, if they are to be fully taken as rights, must be equally allocated among all those entitled to enjoy them within the community. Basic liberties, for instance, do not admit any allocation other than an egalitarian one (see Rawls 1972). Indeed, it is quite unacceptable for some individuals to deposit more votes in the ballot box than others. One need not be reminded that universal suffrage, as opposed to historical property or tax-based electoral systems for example, confers one and only one vote to every citizen of voting age.

This does not imply that resources necessary to secure human rights must be equally distributed among people, but that everyone must have equal access to them. Otherwise, more than just deprivation we could be facing a violation of a human right. Equality and non-discrimination mean first, that no one can be deprived of their human rights on the basis of ethnic, religious or political affiliation, or also gender and economic status, and, second, that everyone should evenly benefit from the minimum amount of that material provision considered fundamental to secure a given human right.

In the case of the human right to water and sanitation, recognized at the General Assembly of the United Nations through resolution 64/292 (UN 2010), for example, what is at stake is not that people should all benefit of the same amount of water but that everyone should have equal access to that minimum amount of water that is considered necessary to secure the human right to water. People should, then, have equal access to 50 to 100 liters of water per person per day to meet basic personal needs (OHCHR 2011), not exactly to the amount needed to fill up a private pool or wash the family car in the driveway.

What could one say about land along the same lines? When any material provision, such as land, is at stake in securing human rights there is indeed a quantitative as much as a qualitative dimension in its access and in order to secure this human right this issue must be addressed. However, it is not easy to determine the quantity and quality of the provision of land that secures this human right. First of all, it is not possible, contrary to water, to meet the non-

exclusion principle by distributing land to all individuals, not only because there is not enough land on the planet to award every human being the meaningful enjoyment of a stretch of land, but also because meeting the determinations at the origin of the right to land does not actually require such a degree of distribution. Furthermore, the right to land is an individual as much as a collective or group right and, therefore, distribution *per se* might not even be at stake.

The amount establishing the minimum provision of land to secure the human right to land is also not easy to determine. The minimum of both the quantity and the quality of land depend on myriad criteria such as soil characteristics, geographical location or cultural idiosyncrasies of the population concerned. It would, therefore, be pure speculation to say much more than just that this minimum should be such that it allows the tenants a dignified life, as stated in many economic and social rights.

Other aspects of land tenure, such as the right to exclude others, to plant and harvest crops, to sell or lease land, the length of time for which tenure rights are valid and assurance of these rights are quite relevant in securing a human right to land. However, they are as hard to circumscribe as quantity and quality and, likewise, will not be further developed. At this stage, therefore, more than determining why and how to implement the human right to land we must ask ourselves who should bear the responsibility to secure this same right.

4. Land Reform and Human Rights

Acknowledging that the amount of land is limited on earth, one is forced to assume that securing a community or an individual his or her right to land may imply that some other community or individual will end up being deprived of this same right. Thereby, land reform becomes logically an instrument for securing human rights. However, some may sustain that by doing so the very essence of human rights is questioned, that efforts to acquire rights should not infringe on the individual rights of others, this being particularly relevant to the case of accessing land where land reform has often meant land redistribution (Tapscott 2012: 31).

According to Hillel Steiner (1994) the only rational theory of human rights is the one that avoids conflict, namely with property. Land reform would therefore, be contradictory to human rights. This is not the opinion of Norberto Bobbio, though. He sustains, on the contrary, that one cannot always assert a new right in favour of a group of individuals without suppressing some old right in detriment of another group of individuals (Bobbio 1992: 20). Actually, within the International Human Rights Legislation land reform is explicitly mentioned. The ICESCR, for example, recognizes the legitimacy of land

reform for securing human rights in its article 11 when declaring that:

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

The FAO Voluntary Guidelines adopted in 2004 also recognizes land reform as an instrument for securing human rights when proclaiming that:

States should consider establishing legal and other policy mechanisms, consistent with their international human rights obligations and in accordance with the rule of law, that advance land reform to enhance access for the poor and women (FAO 2004).

Several arguments can be put forward to substantiate the connection between land reform and human rights. We have already argued that land can be considered a human right as access to land is a prerequisite to the realization of other rights, as for example the right of everyone to an adequate standard of living, including adequate food, clothing and housing. From this one can easily deduce that being land reform an instrument to secure access to land, land reform becomes thereby an instrument in securing human rights. A World Bank analysis of land policies in 73 countries between 1960 and 2000, for example, sustains that, countries in which the distribution of land was initially more equal achieved economic growth rates two to three times higher than those in which land distribution was initially less equal (World Bank 2006).

Land reform is also an instrument to reduce poverty. A statistical analysis of comparable data on 21 developing countries shows that a decrease of one third in the land distribution inequality index results in a reduction in the poverty level of one half in about 12-14 years, whereas without changing land distribution inequality this same level of poverty reduction can only be obtained in 60 years (El-Ghonemy 2003/2: 40). Post Second World War land reforms in Asia, on the other hand, resulted in a 30 per cent increase in the incomes of the bottom 80 per cent of households (Penciakova 2010: 8).

Finally, land reform appears to be a decisive act towards democratization and the consolidation of democracy in

many countries as, first, unequally distributed land constitutes an obstacle to democratization as we have seen above and, second, other things being equal, if a democratic government transfers property rights from a minority of privileged land owners to a majority or poorer farmers, this will understandably reinforce their adhesion to democracy and because the benefited will largely outnumber the impaired, this will in turn reinforce democracy's social basis..

As we have already stressed, in the language of human rights the rights of individuals correspond to duties of other individuals, in other words human rights represent the rights that individuals have over the conduct of others. Therefore, if the rights of some individuals are not secured, this is due to the fact that other individuals or institutions have failed in carrying out their duties. In human rights language, responsibility is therefore a key issue. Who should conduct land reform as instrument to secure human rights, then?

In human rights literature in general, the right of an individual constitutes a duty of society, usually embodied by the state. Thus, wherever there is a right of an individual, there is a duty of the state to provide institutional protection to this right (Canotilho 1984; Bobbio 1992), even if in some cases, most particularly, concerning economic, social and cultural rights, there is no subjective right of the citizen in this respect (Queiroz 2002; Donnelly 2002). In recent years, though, putative state inefficiency has been set forth to argue that private actors should play a more active role in securing human rights, most especially economic and social rights. Can the responsibility model centred in the state be extended to non-state institutions obligations (see Hertel 2003), like markets? In other words, can an institution other than the state conduct land reform as an instrument for securing human rights?

State obligations as defined in the UDHR or the ICESCR only refer non-specifically to the duty to employ all relevant legal and policy measures in order to reach the full realization of human rights. In other words, several combinations of state and markets could theoretically be envisaged that admit some degree of private participation while still recognizing the predominant public character of securing human rights. Despite this recognition, the following pages will argue that markets are not fully prepared to play this role when land is concerned. First, markets do not voice social preferences and therefore do not observe universality and equality; second, they are not accountable and; third, they are ineffective.

4.1. Markets do not Voice Social Preferences and are not Accountable

First of all, when universal rights such as human rights are being promoted, one is asserting a social preference. In the

case of a right to land one is therefore inclined to admit that a degree of land distribution may be better than another. Furthermore, if in this circumstance one cannot speak of universality in the sense that each individual should benefit from a stretch of land in order to secure the right to land, exclusion, as in the case of rural landlessness, could be unacceptable, as it could constitute a violation of a human right. It turns out that markets do not voice social preferences.

What matters for markets is that agents are satisfied, in other words that sellers are able to sell the amounts they wish at market prices and that buyers are able to buy what they seek at the same market prices. Markets speak the language of wants and within this language ability to pay is the key question. Within the language of rights, on the other hand, the issue is quite different; the heart of the matter here concerns entitlement, the criteria according to which an individual should be qualified to enjoy rights (purchasing power being obviously excluded) and the consequences of the use of such criteria.

If in the first case exclusion and inequality are tolerable, in the second case the only acceptable situation is the one characterized by inclusion and equality. In market led land reforms, not only inequalities in land distribution may not be addressed, but also, they can sometimes even lead to the reconcentration of land and, therefore, to greater inequality (UN 2010: 18). Indeed, the poorest farmers could easily be brought to sell land to large landowners and then "be priced out", particularly if they have fallen into debt as a result of a bad harvest or other circumstances declares Olivier de Schutter, Special Rapporteur of the United Nations on the right to food (UN 2010: 11).

Because human rights represent the rights that individuals have over the conduct of others accountability as we have said above is a key issue. When the state, for example, fails in ensuring an individual his or her human rights, the state is accountable either legally in a court of law or politically through elections. If markets fail in securing human rights, whom should an individual turn to? The state is known; markets, on the contrary, are by definition anonymous.

Markets in a capitalist society are at the most indirectly accountable to corporations' shareholders only (Ellerman 2007: 16–17). According to corporate governance in a capitalist society decisions are not taken by all those affected by them, but by those who own the capital. Therefore, in a society where markets take most of the major economic decisions, controlling accountability becomes, at best, dependent on each shareholder's financial weight; at worst, citizens will be governed by an unaccountable entity. In conclusion, markets are not only unequipped to secure the right to land in particular, but also to allocate rights in general (see Branco 2015).

4.2. Markets are not effective

The agrarian structure, like so many other institutions is constantly changing. With land reform, the issue, then, is not so much about change versus immobility, but rather about the rhythms and modes of change. The rhythms are particularly important because despite the fact that the agrarian structure undergoes constant change, a very slow pace of change is often interpreted as immobility. Land reform, therefore, means fundamentally a sudden transformation of the agrarian structure, and often also a sudden change in property rights.

Changes within the agrarian structure that occur in the long period cannot be considered as land reform, thus. There is no undisputable standard to define what a long period of time is, but the temporal magnitude of land reform must exclude the transformation of agrarian structures that take place over several generations, through inheritance or commercial transaction. If markets can promote changes in the agrarian structures they cannot implement them as fast as necessary in order for them to be labeled land reform.

Compulsory transfer of property rights can only be performed by the state and if most commonly in land reform one deals with redistribution of property, state intervention can also be called upon to implement property rights where they were previously unknown, either because the land in question is located in agricultural frontiers or because collective property rights are dominant, as occurs with commons or with traditional land allocation for cultivation in many parts of Africa (see Demsetz, 1967).

In traditional economic theory, markets are supposed to transfer more effectively land to more productive uses and users. Nevertheless, land transactions tend to favour not those who can make the most efficient use of land, but those who have access to capital and greater ability to purchase land (Musembi 2008), which may be contradictory to the main purposes of land reform. Furthermore, with markets land can be taken out of cultivation for speculation, resulting in both decreased productivity and increased landlessness among the rural poor (UN 2010: 10-11).

By way of synthesis markets are not fully prepared to lead land reform because markets exclude politics, which should not be mistaken with the inability to express political interests, though. Land reform is a political act *par excellence* (Barracough 1999: 1) and it is the state, by means of accountable governance that is best equipped for designing and implementing policy in order to secure human rights.

This doesn't mean that markets cannot have a role to play in a successful land reform. As pointed out by UN's Special Rapporteur on the right to food, Olivier De Schutter,

improving access to credit and markets, as well as rural extension, can account for 60 to 70 per cent of the total costs of a sustainable land reform (UN 2010: 18). According to the World Bank the failure of Latin American reforms when compared with Asian reforms should be attributed to the fact that Latin American reforms have traditionally focused solely on access to land, neglecting rural development policies (World Bank 2003:146).

In an open economy markets have forcibly a role to play in the implementation of these policies. Nevertheless, the state must make sure that market intervention is compatible with human rights, declares Olivier de Schutter. For this purpose, he holds that the state must regulate markets in order to, among other objectives, 1) prevent land speculation and land concentration; 2) secure gender equality and; 3) encourage communal ownership instead of individual titling whenever culturally and politically demanded (UN 2010: 21).

5. Concluding Remarks

Because access to land is very often a prerequisite to secure recognized human rights one can claim that land itself is a human right. As land is not available in infinite amounts around the world, securing access to land often means transferring land rights, in other words reforming the agrarian structure. Land reform is converted consequently into an instrument to secure human rights, not only the right to land but also other economic and social rights that fall under the more general umbrella of the right to development. The key issue becomes, then, what institution should be called upon to conduct land reform. This essay has tried to show that despite the fact that markets have somewhat been claiming for a more active intervention, the state is yet the most qualified institution not only to conduct land reform, but also to secure human rights in general.

But more than determining the nature of the provider, the crucial issue is defining the nature of the resource. Within the global economy natural resources, such as land, have been increasingly commoditized, and following this logic agrarian structural change has been occurring through commercial transactions. A human rights-based approach to land brings another perspective to the value of land, as an economic, social and cultural asset and, more importantly, a fundamental right. The necessary decommodification (see Branco and Henriques 2012) that ensues from this approach assigns the state the prime responsibility to conduct land reform. In an open economy markets can also be called upon to play a decisive part because rural development involves the whole of society, but this intervention must be strictly regulated by the state.

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