Trends in the Use of Public Controls Affecting Agricultural Landownership in Europe and Great Britain

by

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TRENDS IN THE USE OF PUBLIC CONTROLS AFFECTING AGRICULTURAL LANDOWNERSHIP IN EUROPE AND GREAT BRITAIN

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In this Article, Professor Mann reviews the causal factors contributing to the adoption of European public-controls legislation affecting agricultural landownership. He first discusses the more important economic, social, and political factors, and then analyzes the reasons for the greater incidence of such legislation in Europe as compared to the United States. He includes an explanation of the impact of the European Common Market on such legislation. Thereafter, the author reviews the types of public controls that have been adopted in Europe and proceeds to illustrate these by analyzing specific laws of three countries. The laws analyzed are the Landlord-Tenant and the Agricultural Holdings Acts of Great Britain, the Agricultural Properties Legislation of Denmark, and the Land Consolidation Laws of Spain. Finally, he makes certain projections concerning the implications of the European legislative trend for the United States.

> The motive for limiting property rights is not the desire to deprive anyone of that which is rightfully his. We begin with the assumption that we are more than one living on this mountain.
>
> —Eivind Berggrav[1]

I. Definitions and Objectives

The time dimension of this Article dates roughly from the end of World War I to the present.[2] The reasons for the selection of this time dimension will become apparent in the discussion.[3] This Article

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[1] Berggrav, *Staten og Mennesket,* in Land og Kirke 223-24 (1945).

[2] At times it will be necessary to refer to earlier periods for the sake of historical continuity, especially when discussing English law. Law stated as being presently in force does not have the benefit of all amendments since January 1, 1964. However, in the case of later amendments, they have neither repealed nor brought about sweeping changes in the law cited as being in force.

[3] See the section on factors contributing to use of public controls, text accompanying notes 8-41 *infra.*

deals with the general spectrum of public controls related to landownership that either have been utilized, or now are being utilized, in the legal systems discussed. The type of landownership discussed is confined to private ownership of agricultural lands.

The term "public controls" is used to embody all nature of legislatively imposed controls or limitations on private landownership, except those which might be broadly classed as codified common-law limitations, based on nuisance concepts or the common-law remedies. In the civil law, the exclusions can be broadly classed as the general limitations of traditional civil codes based on the Napoleonic Code. The controls discussed are imposed by the state but may be administered by other governmental units or quasi-public agencies or groups. Such controls may be limitations primarily in direct favor of a particular class of the national society. For example, the landlord and tenant legislation of England imposes limitations in favor of the tenants, in an immediate sense. Nevertheless, the less immediate purpose is to promote goals of the national society. The term "landownership" includes all of the rights that normally accrued to the holder of title in fee simple at common law ("private dominium" in traditional civil-law concepts).

The objectives of this Article are fivefold:

1. To indicate why there is a trend to increased public controls in a mature legal system of landownership and to explain why the trend is more advanced in Europe[4] than in the United States.

2. To discuss the influence of the Common Market on the European trend in public controls of agricultural landownership.

3. To summarize the control devices that have been tried or are in general use in Europe.

4. To demonstrate the trend in the uses of such public controls in Europe by presenting case examples of their integrated application designed to achieve particular goals. These case examples are: (1) the English Agricultural Holdings Acts legislation, (2) the Danish Agricultural Lands Law legislation, and (3) the Spanish Land Consolidation Law legislation.

5. To suggest possible implications of the European trends in future public control of United States agricultural landownership.

II. Purposes of Public Controls

In a broad sense, public controls are tools by which governments attempt to achieve particular national goals. Although such goals

[4] For brevity, the word "Europe" will be used in the remainder of this Article to mean Great Britain, western Europe and northern Europe, unless expressly indicated to mean otherwise.

may have their roots in minority pressure groups, economic ends-in-view, social criteria, or other bases, they ultimately become translated into national goals when they become national (or state) law. The primary purposes which are served by public controls can be classed as follows:

(1) To promote national security.
(2) To shift the incidence of economic risk.
(3) To correct social injustice.
(4) To bring out-of-phase sectors[5] of the economy up to phase.

Although the emphasis may vary, these purposes apply as equally to public controls on agricultural landownership as to controls on other freedoms to exercise individual or private rights.

National security becomes a goal both in the physical sense and in the economic sense. In the physical sense, a nation at war must have food. A nation also must have food for tomorrow's generations. Thus, public controls on agricultural landownership that tend to assure a continuing, adequate, internal production of food promote national security. Soil and water conservation controls and minimum acreage food crop requirements are examples. In an economic sense, public controls on agricultural landownership that tend to prevent or minimize economic problems in the agricultural sector promote national economic stability. Acreage limitations for crops in surplus serve such a purpose.

Shifting the incidence of economic risk is a process of positive action for relieving a degree of responsibility for certain acts or events from the individual upon whom it would normally or traditionally fall and placing it on another individual or group. Thus, an automobile accident insurance contract shifts a degree of the risk of financial loss from the insured driver involved in an accident to the insurer. Likewise, agricultural commodities price support legislation shifts the risk of financial disadvantage caused by low market prices from the agricultural producer and landowner to the taxpayer, intermediary, and consumer.

In the shifting of risk, the beneficiary generally must provide compensation which, over time, is calculated to offset the costs to the new risk-bearer. Thus, the insured driver pays an insurance premium. Likewise, the agricultural landowner with the benefit of price supports is required to limit the acreage grown of the crop supported.

Social injustice includes different things in the collective conscience

[5] An out-of-phase sector is a sector of the economy whose average per capita income is significantly below that of other sectors. This condition may or may not be found in conjunction with an uneven distribution of the income within the sector, with a relatively small percentage of the persons in the sector receiving a relatively large percentage of the sector income.

of different societies. It basically reflects a feeling that certain classes of persons in a society are not participating proportionately in the benefits or resources of that society. Public controls on landownership are sometimes utilized to correct social injustice. This was undoubtedly one of the primary earlier motivations for British rent control legislation in agricultural tenancies.

Agriculture has traditionally been an underdeveloped sector of the economy in most industrialized nations. Per capita income in agriculture is traditionally low as compared to the other economic sectors.[6] Much public-control legislation affecting agricultural landownership has been aimed at bringing agriculture into phase with the more prosperous sectors. This undoubtedly has been a motivating element both in the British Agricultural Holdings Acts and the United States federal price support legislation, with their concomitant controls on freedom of decision making by the agricultural landowner.

Obviously, the purposes described above are not exhaustive, nor are they mutually exclusive. Much overlapping occurs and other significant purposes could undoubtedly be articulated. Nevertheless, the listing is a useful classification for expressing the major purposes of modern European public-control legislation.[7]

III. Factors Contributing to Use of Public Controls

A. Stages of Economic Growth

Professor W. W. Rostow[8] has isolated five stages of economic growth which can be detected in the history of the nations of the world.[9] These five stages are: (1) the traditional society, (2) the preconditions for take-off, (3) take-off, (4) the drive to maturity, and (5) the age of high mass-consumption.[10] A sixth stage, beyond consumption, can be anticipated.[11]

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[6] Furthermore, there generally is a heavily positively-skewed distribution of the income; that is, a small percentage of persons in the sector have very high incomes, and the great majority of people have very low incomes.

[7] The question involved in the use of public controls has been stated as follows: "The question here, as elsewhere, is: What can an individual rejoice in and work with by himself, and how much can and ought to be governed by *reciprocity*? How much of this reciprocity can and ought to be guaranteed the state, and how much ought to be arranged simply, in reciprocity?" Berggrav, *supra* note 1, at 218-19. "The problem is how to bring capital and control into such intimate relation with each other that control becomes part and parcel of the operation." *Id.* at 233.

[8] Professor of Economic History, Massachusetts Institute of Technology.

[9] Rostow, The Stages of Economic Growth (1962).

[10] *Id.* ch. 2.

[11] *Id.* at 11-12. As of yet, according to Rostow, no country has reached this stage, although the United States may be entering it now. *Id.* at 9-92.

The stage of economic growth and its nature are important factors to the degree of utilization of public controls by any particular nation at a given time in its history. To understand this relationship, a brief summary of the five stages of economic growth is useful.

The traditional society exhibits a structure based on pre-Newtonian science and technology and on pre-Newtonian attitudes toward the physical world.[12] The preconditions-for-take-off stage includes the period of development of recognition of the insights of modern science. This recognition takes the form of improvements in production techniques and processes and expansion of world markets and competition.[13]

The take-off stage is the "great watershed" in the modern world. The old resistences to steady growth are overcome. Growth becomes a normal condition, having been stimulated, in the western world at least, by production technology.[14]

The drive-to-maturity-stage is the long interval after take-off in which there is sustained progress. The economy extends modern technology over all phases of economic activity. This maturity takes about sixty years to attain after take-off.[15]

The fifth stage, the age of high mass-consumption, sees the leading sectors of the economy shift to durable consumers' goods and services. Real income per capita rises to a point where a large number of persons can command consumption beyond necessities. The working force becomes mainly urbanized.[16]

According to Rostow, when a country reaches the fifth stage of economic growth it ceases to accept the further extension of modern technology as an overriding objective. In this stage, through the political process, western societies have chosen to allocate increased resources to social welfare and security. To Rostow, the emergence of the welfare state is one manifestation of this post-maturity stage.[17] Thus, public controls on agricultural landownership, as social welfare and security concepts, usually are not translated into law to any significant degree until the end of the fourth stage of economic growth.

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[12] *Id.* at 4. This was Medieval Europe.

[13] *Id.* at 6. This was western Europe in the late seventeenth and early eighteenth centuries. The United States was "born free" of the "traditional society" and did not have the problem of breaking out of it, as did Europe, for example, during the stage of pre-conditions for take-off. See generally HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

[14] ROSTOW, *op. cit. supra* note 9, at 7-8. This was Britain roughly between 1780 and 1800, France and the United States prior to 1860, and Germany between 1850 and 1875.

[15] *Id.* at 9-10.

[16] *Id.* at 10-11.

[17] *Id.* at 10-11, 73-92.

Prior to that point in economic growth, the state is preoccupied with transitional problems and production technology adoption problems.[18] There are, of course, many other factors contributing to the extent of use of public controls and their particular legal nature. Nevertheless, with substantial justification, we can select the fifth stage as the time dimension of significant activity in the adoption of public-controls legislation.

The history of such legislation in Great Britain and Europe bears out this selection. Professor Rostow places the ending of the drive-to-maturity stage for Great Britain symbolically at the Exhibition of 1851 at the Crystal Palace Britain.[19] Interestingly, in 1851 Great Britain also adopted the first legislation of a long series designed to fulfill certain of the above-stated purposes of public controls as related to agricultural tenants.[20] France, Germany, and the United States all reached their maturity (the end of the drive-to-maturity stage) at about 1900 to 1910, and Sweden reached its maturity in 1930.[21]

From maturity, the age of high mass-consumption need not begin immediately, due to various offsetting factors. For one thing, maturity, as defined by Rostow, is a technological definition. It depends on the availability and utilization of capital, entrepreneurial administrators and technicians in application of available production technology. Furthermore, maturity may not have permeated all sectors of the national economy simultaneously. Additionally, the age of high mass-consumption depends on other factors than adoption of production technology. Especially important is sufficient income per capita to allow a high level of consumption per capita. The former does not necessarily assure the latter. Thus, Great Britain went through the period from 1850 to 1935 rich and mature, technologically speaking, but too poor in a well-distributed income per capita sense to enter the age of high mass-consumption.[22]

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[18] Later discussion will modify this statement somewhat. We can state that, except for public-control legislation designed to augment public revenues and to attack social injustice, most such legislation has been forthcoming in the fifth stage of economic growth. Later discussion will substantiate the accuracy of this statement of the case.

[19] ROSTOW, *op. cit. supra* note 9, at 60-62.

[20] British Landlord and Tenant Act, 1851, 15 & 16 Vict., c. 25.

[21] ROSTOW, *op. cit. supra* note 9, at xii (chart), 59. The relationship between these cut-off dates and the adoption of public controls in agricultural landownership will be discussed in a later section. Although Rostow does not include Denmark in his study, it probably reached this stage somewhat earlier than Sweden. However, its close trade and cultural ties (practical economic dependence) to Great Britain undoubtedly influenced it to exhibit social welfare and security aspects of this stage upon Great Britain's entrance into it. Spain probably did not reach the post-maturity stage until after the Second World War.

[22] *Id.* ch. 5, at 59-72. By contrast, the United States reached maturity in about

B. Economic Disorganizations

The continuous and uniform flow of economic growth from stage to stage in the Rostow sense can be and is interrupted by disruptive factors, both internally and externally imposed. Disruptive factors are broadly classed as economic disorganizations by certain economists.[23] They have deep social implications as well, thus affecting trends in the adoption of public controls on landownership.

War, depression, and political upheaval are all forms of economic disorganization. War often physically destroys the capital plant developed during the drive-to-maturity stage. This must be rebuilt, thus prolonging that stage or reverting to it for a time. On the other hand, war speeds up the process of adoption of production technology in an attempt to develop weapons of greater capacity than the enemy. This phenomenon, without destruction of the country's capital plant, may speed up and shorten the drive-to-maturity stage. In war, traditional import sources often are lost and such formerly imported items must be produced at home. This creates incentive for the development of a sector of production that previously could not have been competitive in the world markets or did not develop for other reasons. Public direction and concomitant public controls often result.

Depressions, too, cause economic disorganization, although often in different ways than wars. When they occur during the age of high mass-consumption, as did the Great Depression of the 1930's for many countries, the reaction is to call on government for social welfare and security activity.[24] Public controls receive considerable impetus.

Political upheavals create various surges and declines in the rate of development of a country from one stage of economic growth to another. Such vicissitudes affect the rate of movement from one stage to another, as well as the participation of various sectors of the economy in that growth.[25]

The political power may have as a motivating force the technological development of one or more sectors of the economy, as did Russia for the heavy industrial sector for many years. The result for Russia was that the agricultural sector was later found to be out of phase. In such cases, related efforts often are made to bring the out-of-phase

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1910 and entered the age of high mass-consumption shortly after 1920. *Id.* at 75-76.

[23] See BERTRAND & CORTY, RURAL LAND TENURE IN THE UNITED STATES 25 (1962).

[24] ROSTOW, *op. cit. supra* note 9, at 79.

[25] *Id.* at 93-105. The United States experience in the Civil War and Russia in her Communist Revolution are prime examples. Consider on a somewhat less disruptive scale the effect in the United States of the relatively recent decisions of the Supreme Court of the United States concerning integration, as well as the recent redistricting cases.

sector technologically into phase. Public controls are often turned to as the solution.

In western countries, agriculture has often been the out-of-phase sector in the later stages of growth. The reason often may be traced to the traditional nature of agriculture. The development of industry is more completely the result of adoption of production technology, whereas agriculture is somewhat less affected by production technology. Change in methods and processes in agriculture usually is more difficult. Nature must be adapted to the technology in a direct sense. The result is that agriculture falls behind the mainstream. The post-maturity alternative of increased governmental allocation of economic wealth, with its concomitant controls to realize the social welfare purposes, are then utilized.[26]

C. The Disciplines of Economics and Sociology

Another important factor contributing to the increased utilization of public controls in the twentieth-century capitalistic world is the growth and maturity (and adoption) of social sciences technology. As certain pre-conditions for take-off in the production-technology sense may be isolated, so may other pre-conditions for take-off in the social sciences technology sense be isolated. One such pre-condition is to reach the post-maturity stage of economic growth of the economy.[27] In the western world, social sciences technology, especially economics and sociology, really did not reach a stage of development in which they were capable of contributing significantly to the growth process until well into the twentieth century.[28] Nonetheless, its roots reach back to the pre-conditions for the take-off stage of Great Britain. This is true even though the birth of classical economics preceded

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[26] This is true as well, of course, in other sectors, when production technology fails to produce the desired effect. Witness the social legislation of the 1930's in the United States, when production technology appeared powerless in the face of the economic disorganization of the Great Depression. *Id.* at 21-26, 76-79.

[27] Although Rostow does not expressly so declare, he implies such by indicating that social welfare and security legislation is utilized in the post-maturity stage of economic growth, as a means of entering the age of high mass-consumption. *Id.* at 82-87.

[28] This technology brought mixed blessings and is of questionable utility in the opinion of some. Note the following statement, published in 1945, by an author from a country that embraced the social disciplines as heartily as any as sources of aid in adopting social legislation in the first fifty years of the twentieth century:

> Economic systems and ideologies are by their very nature similar to totalitarianism. They usually contain a mixture of mysticism and brutality. Theories and watchwords are surrounded with great secrecy. The few initiates, the specialists in the field, act like the priests of the mystery cults. Ordinary people are commanded to keep their distance and to stand in awed attention. Berggrav, *supra* note 1, at 216.

that date by over a century.[29] As in the case of production technology, adoption of which creates the conditions for developing more production technology, so it is in the case of social sciences technology. Thus, various experiments were carried out in the translation of economic and social theories of the late eighteenth and early nineteenth centuries into governmental activities. These, in turn, created bases for empirical analysis and criticism, with further maturing and adoption of concepts and ideas.[30]

Early economic thought, generally referred to as "classical economics," preached the philosophy of allowing each person to do what was economically best for himself. This was to be done within the general limitations of what the legal system accepted as socially permissible, and, thereby, all of society benefited. In other words, the individual parts of the economic machine should prescribe the character of the whole. Modern capitalistic economics, on the other hand, concerns itself partly with the regulation and control of economic institutions. It embraces the belief that the economic system must be looked at as a whole and that to benefit the entire system the constituent parts must be blended and fitted within the hoped-for construct. These concepts are loosely referred to as welfare economics in a contemporary sense.

The institutional or welfare economist can be said to justify his approach on the grounds that both external forces and internal market structures destroy orderly operation, in the classical sense, of the economic system. Wars and depressions, monopolies and oligopolies, political upheavals, and other special conditions occur sufficiently often to justify government intervention to adjust the economic and social system to these disruptions in the normal evolutionary process. Economic goals and social goals are blended. Specific institutional structures are created within the economy to influence its operation, consistent with the blend of economic and social goals.[31]

The field of sociology has developed concepts concerning the or-

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[29] Note, for example, that even Adam Smith, who might be called the Father of Economics, recognized the need to provide the capital necessary to adapt production technology for economic growth and suggested the need for governmental devices to bring about this capital transfer from the landowners' surplus income to the entrepreneur who would contribute to the creation and development of the technological production machine. See SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 121-51 (Encyclopedia Britanica ed. 1952).

[30] Thus, from the early published works of Smith (1776), Kant (1781), Hegel (1920), and Marx (1867) flowed experiments and comment, until modern-day economic and sociological theory appeared in the mature form of Commons (1924), Keynes (1935), Samuelson (1964) and others. See generally GRAY, THE DEVELOPMENT OF ECONOMIC DOCTRINE (1931).

[31] See generally BERTRAND & CORTY, *op. cit. supra* note 23, at 19-26.

dering of society, its essential elements, and how such elements can be influenced. These concepts have emerged with the post-maturity stage of economic growth in the western world. Sociologists isolate nine societal elements of any concrete social system. These are: (1) belief or knowledge, (2) sentiment, (3) end, goal, or objective, (4) norm, (5) status-role or position, (6) rank, (7) power, (8) sanction, and (9) facility. Each element is said to be articulated by specific social processes. Separate elements are articulated by discernible elemental processes, and combinations of both elements and processes may be systematically isolated at more highly aggregated levels.[32]

Furthermore, the sociologist has isolated and classified the elements of orderliness of a social system. These are said to be: (1) folkways —commonly accepted rules of conduct but without compulsive status, (2) mores—called must-behaviors, and (3) laws—codification and reinforcement of mores and controls on behavior outside the scope of mores.[33] The modern sociologist maintains that laws as public controls on behavior outside the scope of mores can be designed to effect a change in the relationship of the nine societal elements as between individuals and groups within the social system. Those changes, in turn, change folkways and mores, thus altering the order of the system. This is accomplished by legal structuring of the processes which articulate the societal elements. The discipline of sociology has developed methods considered to be reliable in predicting the effect of such public controls, thus making them more reliable in attaining the goals desired.[34]

Obviously, the development of the disciplines of economics and sociology, as summarized above, has had a profound effect upon the utilization of public controls in the economic and social life of western nations. This is equally true of public controls on agricultural landownership, as well as on other sectors of economic activity in modern societies.

The incorporation of the concepts of the economic and social disciplines into political, philosophical, and legal thinking is the avenue by which "scientific" public controls are imposed. Furthermore, independent concepts in politics, law, and philosophy have largely concurred with economics and sociology in terms of goals of social justice, equality of rights, protection of minorities, and similar positive legal philosophical goals.[35]

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[32] See LOOMIS, SOCIAL SYSTEMS: ESSAYS ON THEIR PERSISTENCE AND CHANGE 1-56 (1960).

[33] For a general treatment of the discipline of sociology, see CHINOY, SOCIOLOGICAL PERSPECTIVE (1954). See especially *id.* at 20-40.

[34] *Ibid.* See also LOOMIS, *op. cit. supra* note 32.

[35] In view of the complexities and volume of materials in these disciplines, further

D. Innovators and Innovations

The last factor to be discussed here is classed in the broad sense as innovators and innovations. This covers a variety of causal factors, but all involve certain elements of implementing those factors already discussed. What, in fact, translates conditions, concepts, theories, and other motivations into the law books? Innovation is the key, but the innovator is the force which turns the key. Quite often, the innovator is personified in one or a very few individuals, usually in the political or public sector.[36] They also exist in the private sector but play a less proximate role in the actual realization of legislation incorporating innovations.[37]

Key government figures, in Europe as well as in the United States, have been responsible for insisting that government take the initiative in positive implementation of various innovations, both in production technology and in social science technology.[38]

Why do some countries have innovators when others do not? Why can innovators in some countries implement actions which others cannot? These questions are so rife with variables that it is impossible to deal with them adequately in summary fashion, and only extremely

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discussion in the limited space of this Article is not warranted. Suffice it to say that modern positive legal philosophical concepts which gained considerable early strength in Scandinavia, and to a lesser degree in the Anglo-Saxon world generally, are consistent and complementary to the modern diciplines of western economics and sociology. For the purposes of this Article, cause and effect relationships between the thinking in the various disciplines are not important. See generally HALL, READINGS IN JURISPRUDENCE (1938); SALVADOR DE MADARIAGA, DEMOCRACY VERSUS LIBERTY? (1958). Especially in Scandinavia it can be argued that legal philosophical thinking, in terms of positive law, preceded the maturing of modern economics and sociology and became translated into their political system in the form of positive law at an earlier date than did such concepts in the other European countries. See, for example, the later discussion of Danish law, Section VIII of this Article, *infra*. Note also, the following statement made by Holmes in 1920: "For the rational study of law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (1920).

[36] In Adam Smith's time, he developed the innovations, but the man who applied them, that is to say, the innovator, was Pitt. See SMITH, *op. cit. supra* note 29, at v-vi.

[37] This is true of the innovator, especially in the adoption of production technology, but also in the adoption of social sciences technology as well. Recall Henry Ford's revolutionary changes, not only in mass production technology, but also in the distribution of the income of his firm by doubling wages in the 1920's.

[38] Examples in the area of production technology: The New York legislature built the Erie Canal; enormous subsidies of land grants contributed greatly to the building of the American continental railway networks. ROSTOW, *op. cit. supra* note 9, at 25.

difficult where space is not limited. Nevertheless, certain causal elements rationally can be selected to point the way.

One can hypothesize that successful innovators are a function of the educational institutions of a country. Educational institutions have, as a major role, the creation and diffusion of knowledge—of ideas concerning innovations. The success of both roles reflects the existence of innovators and the success of implementation of innovations.

The copying process also is a strong force in the adoption of innovations. Knowledge of success and failure elements is important in the use of a particular public-control device in agricultural landownership, for example. Diffusion of knowledge of these success and failure elements is normally greater at home than abroad.

Given success by an innovator in an experiment at using a public-control device, and assuming no offsetting disruptive factors, the use of the device is very likely to be expanded. This likely will continue at least until failure elements emerge as dominant or until the goals sought have been achieved.[39]

The question of acceptance by the controlled is a basic element of utilization of any public control. Degrees of positive resistance determine their practicability. In a democracy, it becomes partially a question of numbers. Often, imposition of controls on a limited class paves the way for similar controls on a larger class, as acceptance grows. This is a function of the sociologist's concept of changes in the elements of orderliness, as discussed earlier.

Trends in the adoption of public controls related to industrial economic activity largely have been responsible for trends in the use of public controls over landownership. In industry, the adoption in the western world of the corporate form of organization for carrying on economic activity has been a key factor in creating a recognition of the social responsibility involved in the exercise of economic power in that sector. Society, for some time, has placed rather stringent

[39] The advantage of inertia and initiative are in favor of the original innovator. A copying country may go even further in utilizing the control device. This is because the later adoption of the device might have allowed time for the condition sought to be corrected to develop greater severity. New inertia and initiative of the later innovator may gain an advantage when compared to the original since the former's pioneering begins at a more advanced stage.

The phasing of ideas, in a time sense, is often important. For example, the concepts involved in the workings of the combustion engine were important to the utilization of the concept of the airfoil when it was discovered. So too, the economic concept of optimum combinations of land, labor, and capital in the area of farming, in order to maximize net return, was important to the development of the concepts involved in rental arbitration in the English agricultural holdings legislation, discussed later.

restrictions upon the freedom of action of those in the corporate structure who exercise economic power without the ownership of the concomitant property involved. This "social responsibility" also has become recognized in agricultural landownership.[40]

More and more, public controls over landownership have become politically feasible, not necessarily because the democratic systems of government have transferred governing power to nonowners, but because of new forms of property that have emerged in the maturing process of our societies in developing social welfare and security laws. Rights in jobs, rights to education, retirement and pension rights, medical care rights, and similar vested intangible rights, are beginning to depreciate the relative value of land for acquiring economic advantage and security. Such possibilities during the feudal period, and indeed up to the end of World War I in most of Europe, were uniquely available primarily through landownership or the aristocracy. Today, land is held and has economic value more and more as space and less and less as the primary capital resource for production and individual and family security purposes.

The influence and dominance of the union movements and cooperative movements in European agriculture can be specifically isolated as one more factor contributing to a trend toward the utilization of increased public controls in agricultural landownership. The desire to provide security to tenants and laborers, as well as owners, in agriculture, translated into organized political pressure, facilitated the success of innovators in obtaining the adoption of laws utilizing innovations in public control of agricultural landownership.

E. The Gap Between Existing Conditions and National Goals

Inherent in the preceding discussion is the implication that public-control legislation is enacted to bring about structural change or to maintain existing structural relationships in the ownership system. A gap either exists or is anticipated between the existing agricultural landownership system and the system visualized as satisfying national goals. Furthermore, to the innovator, existing legislation either does not satisfactorily facilitate the elimination of the gap or it does not satisfactorily protect the *status quo* where no such gap exists. In other words, existing conditions may be creating or widening the gap, holding it constant, or narrowing it too slowly. In each case, public-controls legislation may be called upon to change such conditions.[41]

[40] For a modern treatment of social implications of the corporate structure in the United States, see LLOYD, THE CORPORATION IN THE EMERGENT AMERICAN SOCIETY (1962).

[41] As an example, public controls in the form of landlord and tenant legislation are designed to change the relationship between the landlord and his tenant.

The original purpose of public-control legislation may be to effect structural changes in the agricultural landownership system. However, as such legislation operates upon the existing system, the structural pattern changes until the system generally conforms to the outlines delineated by the legislation. The role of such legislation then shifts to that of maintaining the existing structural pattern. One problem that arises because of this shift in role is that economic and social goals change over time. Thus, national goals also change. By the time the role of public-controls legislation has shifted from effecting change to that of maintaining the existing system, national goals often have changed. New public-controls legislation then may be necessary to bring about changes in the agricultural landownership system consistent with the new national goals.

The result is that once public-controls legislation has been invoked to effect structural change consistent with national goals, changed national goals can be implemented only if reflected in changes in the relevant public-controls legislation. Such legislation tends to reduce flexibility of structural change by freezing it into the pattern set by the legislation. New criteria require new legislation for implementation. Thus, the adoption of public-controls legislation often sets a course of continued use of such legislation. The closer such legislation controls freedom of action to adjust to changed economic and social conditions, the more often it will be necessary to adjust the legislation to keep in phase with such changes.

IV. Europe's Lead in Public Controls Affecting Agricultural Landownership

The somewhat detailed, nevertheless incomplete, and arguably necessary discussion of factors contributing to utilization of public controls is equally applicable to the United States and to Europe. Before we turn our attention to the discussion of specific public controls, one more assumption and one more question must be considered. The assumption is that, in the broad spectrum of public controls in Europe, there is more extensive intrusion upon traditional private rights in the ownership of agricultural land than there is in the United States. This assumption is the heart of the interest which this Article may have to the American legal profession. This assumption is reinforced with evidential proof in the remainder of the Article.

The question, then, is this: Why are Great Britain and western and northern Europe relatively more advanced than the United States in

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Since the *quid pro quo* is the land, public-control legislation of this type inevitably will affect the owner's rights in his land.

the use of public controls of agricultural landownership?[42] To answer the question, we must consider the historical aspects of the factors discussed above as contributing to utilization of public controls. Perhaps of greatest significance is the impact of economic disorganizations on stages of economic growth in the post-maturity era.[43] In Europe, the First World War destroyed a large part of the capital plant that had been built during the drive-to-maturity stage. The United States escaped this destruction. Thus, in effect, the drive-to-maturity stage was prolonged in Europe, or, stated conversely, the age of high mass-consumption was delayed more than for the United States. Whereas the United States entered this latter stage in about 1920, Britain entered it only in 1934. France and Germany were denied it until after World War II. This war and the attendant war machine preparation denied them earlier entry.[44] Denmark probably followed Britain's lead, and Spain was to wait until about 1950. During the gap between maturity and the age of high mass-consumption, Europe turned more and more to social welfare and security legislation to provide to its middle class and its out-of-phase sectors the affluence otherwise possible only on entry into the age of high mass-consumption.[45]

The wars also made Europe painfully aware of the problems of maintenance of national sovereignty and internal food supply (national security). This added considerable impetus to public controls in agriculture as a device for assuring this food supply.

Causal factors must be examined prior to World War I as well. In Europe, and in Britain especially, the move toward the welfare state was much sharper than in the United States between 1850 and 1914. This can be explained partially in Great Britain because maturity was reached in about 1850 and the government was then experimenting with means of redistributing its rather limited national income. This was a prerequisite (albeit unknown to Great Britain at the time) to entry into the age of high mass-consumption. Other factors also con-

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[42] The use of the term "advanced" is not intended as a value judgment. It is intended only to convey the fact that these countries in general have adopted, to a greater extent than the United States, public controls affecting agricultural landownership.

[43] These economic disorganizations date after 1900 for most of Europe and the United States, while that of Great Britain dates at 1850. See earlier discussion in this regard.

[44] ROSTOW, *op. cit. supra* note 9, at 82-92.

[45] *Ibid.* See also *id.* at 106-18. In the United States, social welfare and security legislation was seriously turned to as an alternative only when the machinery of the age of high mass-consumption broke down in the 1930's during the Great Depression. Europe, too, affected by this depression, increased the momentum of public control already in action.

tributed. Europe was probably less agrarian in its political balance. The starting place for social legislation, the industrial laboring class, exerted greater political influence. Union movements and cooperative movements gained earlier and greater momentum. Furthermore, there was a greater weight of socialist doctrines and ideals among intellectual leaders in Europe than in the United States. Thus, innovations and innovators in public controls abounded relatively more in Europe than in the United States. The governments of Europe, in general, provided a higher proportion of total consumption in their national economics than did the United States. Unfair allocations in the market place were combatted with public controls. In the United States these unfair allocations also existed, but they had no similar impact. One reason was that the sufferer could overcome the injustice of the unfair allocation by going to the frontier to seek the basic security of landownership. No similar alternative existed for the European sufferer. Finally, it is true that the United States launched into production technology adoption under conditions of being "born free."[46] It was thereby provided with more initiative and drive and found itself with more cheap land, higher wages, and was generally richer. It could deal with its fewer out-of-phase sectors by way of more generous grants and subsidies. Europe had to turn more to direct controls, limiting the right (power) of the haves to take advantage of those who had less.[47] Not until the 1930's did the United States feel it sufficiently necessary to take the same means for acquiring social security for the masses and the out-of-phase sectors.[48]

V. The Effect of the Common Market

The Treaty of Rome[49] historically united the countries of Belgium, Holland, Luxembourg, France, West Germany and Italy into a more or less "common market." Furthermore, the Scandinavian countries, Great Britain, Portugal, and Spain all are interested in becoming a part of the Common Market and in time undoubtedly will do so.[50] The Treaty of Rome—as will any future treaty, including the "Outer Seven"—has an effect on the trend in public control of agricultural

[46] The meaning of this term was explained earlier. See note 13 *supra*.

[47] Rostow, *op. cit. supra* note 9, at 86.

[48] Additionally, the timing of the imposition of the progressive income tax and other similar types of "equalizing" legislation was such as to encourage the entry into and extension of the age of high mass-consumption to a degree beyond that of Europe.

[49] Treaty Establishing the European Economic Community, March 25, 1957, published by the Secretariat of the Interim for the Common Market and Euratom, Brussels.

[50] These countries are now known as the Outer Seven, loosely united in commerce by the European Free Trade Association.

landownership in the countries involved. As the more advanced stages of integration are achieved, the agricultural sectors of each country come more and more in direct competition with each other. The traditional agricultural tariff barriers and trade agreements are reduced, restricted, and finally abolished. Internal agricultural subsidy and price support legislation must be modified and unified so as to place all farmers in all the member countries in equivalent competitive positions. The Treaty of Rome, in general, calls for the development of a uniform agricultural policy throughout the Common Market area.[51] Furthermore, it calls for free movement of persons, services, and capital, including that of agriculture, among all Common Market countries.[52]

Countries within the Common Market that have limited the adoption of technology in agricultural production by limiting farm size, or by allowing their institutional structures, such as the inheritance system, to do so, will find their agriculture at an economic disadvantage. Undoubtedly, such countries will be strongly motivated to adopt far-reaching land-consolidation legislation.

Similar arguments can be made for other economic disadvantages of the agricultural sector in certain Common Market countries, as compared to others. This practical incentive, combined with the requirements of the Treaty of Rome, undoubtedly will bring about gradual uniformity of legislation involving public control of agricultural landownership, using to a large degree the country with the most extensive relevant regulatory device as the standard. The net result predictably will be an overall increase in the adoption rate of public controls affecting agricultural landownership.

VI. Types of Public Controls Affecting Agricultural Landownership

Public controls affecting agricultural landownership can be classified according to the traditional private rights of ownership that are being controlled. They can also be classified comprehensively, according to the particular conditions they are designed to evolve or the type of property interests they affect.[53] It is useful to use the former

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[51] Treaty Establishing the European Economic Community, March 25, 1957, pt. II, tit. II, arts. 38-47, 298 U.N.T.S. 30-36.

[52] Treaty Establishing the European Economic Community, March 25, 1957, pt. II, tit. III, arts. 48-73, 298 U.N.T.S. 36-44.

[53] Such comprehensive classifications would include topics such as land consolidation legislation, agricultural land units legislation, or landlord and tenant legislation. Furthermore, they may be classified as direct or indirect (example: control on use—taxation), voluntary or mandatory (election by the person or

classification to summarize the public controls over private agricultural landownership that have been tried or are being used in Europe. To analyze specific legislation, the latter classification will be used.

Generally stated, public controls of agricultural landownership have been effected by restricting or limiting, in a positive or negative sense, some aspect of one or more of the following traditional freedoms of action (bundle of rights) by private owners of agricultural land: (1) freedom to use, (2) freedom to lease, (3) freedom to transfer, and (4) freedom to acquire and freedom to continue ownership.[54] Within each of these areas of public control, there are several specific legal devices or "tools" which have been invoked at one time or another in Europe. These control devices will be briefly summarized according to the particular traditional freedom they restrict. Then specific legislation in Great Britain, Denmark, and Spain will be analyzed.[55]

A. Controls on Freedom To Use

These controls include many of the common devices currently in use in the United States, as well as those that have been seldom, if ever, invoked there. They include restrictions on hunting and sporting rights, reservation of mineral rights to the state or public agencies, limitation of prospecting rights for undiscovered minerals, forestry cutting limitations and supervision, landscape protection provisions, soil and water conservation requirements, residue-burning restrictions, and removal of manures prohibitions. Another device that has been used in England is known as good ownership management criteria. Good ownership management, according to these criteria, is a prerequisite to continued ownership or to the right to farm without public supervision. A requirement for permission to change from an agricultural use to another use has been adopted in some countries.

In addition to these considerable controls applying directly to actual uses to which land may be put, there is an ever-increasing body of laws in Europe, as in the United States, which, taken together, constitute a considerable restriction on land use. These include public health and food sanitation regulations, veterinary policing, grades and standard requirements, marketing restrictions and price controls.

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group affected—applicable automatically or at the determination of a public agency), or indicative or directive (can be expressly contracted out of—no choice of exclusion).

[54] The exercise of the power of eminent domain for "normal" public purposes is not considered here.

[55] The types of controls summarized are specifically illustrated in the analysis of the specific legislation.

There is a further significant form of land-use restriction which does not follow the traditional pattern of public limitation on the private use of land. It, nevertheless, obtains force because of laws which allow and encourage it. These use restrictions are found in the form of producer organizations for marketing of agricultural production. There has been a relatively recent growth of large agricultural-product purchasing and processing firms that are able to carry out the marketing process more efficiently than the individual producer. This is due to their ability to enter into and fulfill large-volume contractual marketing obligations. These organizations, in turn, have become more efficient by contracting with individual producers for a reliable production supply.

Such organizations often take the form of cooperatives that contract for and enforce a high degree of market discipline upon their members. Although entry into such limiting agreements is voluntary, it is generally economically advantageous, and, as more and more producers of a given market area contract away their freedom of land use in this manner, the remaining producers find it to be a practical economic necessity to follow suit. Their alternative is to shift their land use from that product to another.

Marketing contracts are a particularly potent form of restriction on land use, both in terms of quantity and quality of the particular product produced. In addition, even though it is a voluntary arrangement on the part of the individual landowner, his individual economic goal of maximizing income, and in extreme cases, economic necessity, induces him to "conform."[56]

B. Controls on Freedom To Lease

Included in this group of controls are those which restrict operating through a hired operator or manager, as opposed to personally working the land and making the decisions. They are, in some aspects, specialized controls over land use. Nevertheless, since leasing (or contracting a hired operator) is actually a process by which rights of use are separated from traditional ownership rights and transferred to another private sector entity, it is distinguished from normal land-use control devices.

Legal devices or tools which have been used as controls on the right to lease take the general forms of (1) limitations against leasing (or hired operators) and (2) control of the lease terms. The first of these is generally motivated by a social goal of owner-operator operation of land and maximum dispersion of landownership. The latter, al-

[56] Denmark has a long history of extensive farmer cooperative marketing and processing firms, beginning with the turn of the century.

though in part influenced by a public social policy of protection of nonowner-operators, is motivated primarily by society's desire, for other reasons, to provide security of tenure. Such security of tenure (1) lengthens the operator's planning horizon, (2) increases the availability of credit to him, and (3) increases his production, thus augmenting the national food supply, as well as his own income.

The first class of leasing controls mentioned above includes such devices as (1) limitations on numbers of operating units which can be owned by one entity, (2) limitations on consolidation of operating units, and (3) prohibitions against multiple-unit operations. High rental payment requirements are sometimes used to discourage potential renters, and rental payments restrictions sometimes are invoked to discourage landowners from becoming landlords.[57]

The second class of controls mentioned includes (1) security of tenure provisions, (2) compensation for disturbance, (3) compensation for improvements, (4) tenants' right to obtain fixed equipment from landlords, (5) rent control, (6) substitution of statutory lease provisions for oral or written leases, (7) customary lease provisions, and (8) nonstandard individual lease provisions.

C. Controls on Freedom To Transfer

Controls on transfer of ownership usually take one of three general forms. Perhaps the least restrictive is that of regulation of descent of land in cases of intestate, as well as testate, successions. In fact, in modern times, some aspects of the feudal rule of primogeniture have been revived, not for the purpose of maintaining the unity of noble title and landed estate, but for the purpose of maintaining land operating units of a sufficient size for efficient use of modern technology.

Another form which the restriction on land transfer takes is that of pre-emption. In the case of a potential land transfer, whether by sale, gift, or inheritance, the state may have the right to step in as grantee in place of the expected or desired recipient of the land.

The third form of control includes requirements for deniable permits of sale, especially when the sale involves a changed land use or a land division. Licensing requirements for farmers is another example. Also, eminent domain often is made available for purposes of changing the landownership pattern. Some legislation places absolute prohibitions on transfers that involve a subdivision of an agricultural unit.

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[57] See especially the later discussion of Danish law, Section VIII *infra*. Such restrictions can have this effect when the opposite result is desired. See later discussion of English law, Section VII *infra*.

Controls on landownership transfer are not a new concept in many countries. For example, public intervention in consolidation of strip parcels dates back several decades in certain countries. However, modern concepts have added new dimensions to the use of these legal devices. Increased population densities, industrial complexes, the advancement of farm mechanization and other technological advancements in agricultural production, as well as the effect that the adoption of these technologies has had on the problems involved in land and water management, are all relevant economic elements. These, along with improved communications and transport, have made it less and less efficient to maintain scattered strips of land or very small plots as farm operating units. The private and public cost has become too great to allow historical patterns to overshadow economic efficiency. In fact, consolidation has often become an economic necessity for the individual farmer.

D. Controls on Freedom To Acquire and Freedom To Continue Ownership

At times, certain European countries have determined it necessary to invoke absolute prohibitions on landownership by certain types of owners. Absolute prohibitions against acquiring land by legal entities other than natural persons is not uncommon. As a limitation on acquisition, the restriction is generally combined with a pre-emption provision, and a time limit on existing ownerships, in order to gradually eliminate such ownership from existence. Prohibitions on the numbers of farm units that can be acquired are sometimes combined with pre-emption provisions applicable to farm units over a given size. The effect is to prohibit farm enlargement and to bring about gradually the reduction of farm sizes to a predetermined maximum which is considered optimum.[58] Land consolidation is a form of control on continued ownership. It is a mandatory transfer of certain physical land areas for other physical land areas or for cash.

E. Indirect Public Controls

Certain legal devices effecting public control have only an indirect restricting effect upon landownership. These will be briefly mentioned here.

Taxation, as a regulatory device, has been applied in practically every country of the world. Two examples will be mentioned: property tax rates, based on site value, tend to encourage the landowner to use his land for its highest and best use, and ad valorem taxes on

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[58] Danish legislation especially illustrates this. See the later discussion of Danish legislation, text accompanying notes 189-91 *infra*.

production of nonfood crops tend to encourage raising food crops. Other taxes having similar indirect effects could be described.

Subsidies and price supports have the effect of keeping land in the production of the crop subsidized or supported. Such lands otherwise might be shifted to another use. Subsidy payments for carrying out conservation practices indirectly control the use of the land. Drainage-improvement subsidies, sea wall subsidies, and irrigation financing schemes are other examples.

Closely related to subsidy payments and price supports are voluntary contractual arrangements which (1) restrict cropping rights, (2) require growing of soil-saving crops, and (3) impose acreage limitations. Quite often, the progressive effect over time of such voluntary contracts (or even historical patterns) is to provide a basis for later mandatory cropping restrictions or for determining the right to participate in subsidies and grants.[59]

We now shall proceed to discuss three integrated sets of legislation from different countries. Each of these sets of legislation has been designed and evolved to realize similar general economic and social goals, but by utilizing different means. The means are adapted to the particular agricultural landownership structure found in each country.

VII. Landlord-Tenant (Agricultural Holdings) Legislation in Great Britain[60]

The 1925 Law of Property Act[61] brought about considerable change in the legal structure of property ownership in Great Britain. By that act, all legal tenures that had previously existed either at com-

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[59] There are various levels of government which may participate in the application and administration of public controls on landownership. They may be (1) self-executing controls, (2) invoked and administered by agencies of the central government on their own motion, (3) granted to provincial or local levels of government or to special quasi-public groups. These methods will be discussed in greater detail in the following sections analyzing specific legislation.

[60] The term of years absolute is the estate created by a lease. In the past half-century, England has adopted a considerable body of legislation regulating the nature of a term of years absolute in agricultural land. Great Britain comprises England, Wales, and Scotland. The United Kingdom includes Great Britain and Northern Ireland. However, British legislative enactments often are applicable only to England and Wales, with separate enactments applicable to Scotland and to Northern Ireland. This is true of the Agricultural Holdings Act of 1948 (discussed in detail later). The treatment of the law here will be confined to that applicable to England and Wales. Hereafter, where the word "England" is used, it shall be understood to include Wales, unless expressly stated to mean otherwise.

[61] Law of Property Act, 1925, 15 Geo. 5, c. 20; also see Law of Property (Amendment) Act, 1926, 16 & 17 Geo. 5, c. 11 [hereinafter cited as L.P.A. 1925, and L.P.A. 1926, respectively].

mon law or by statute were converted to free and common socage, now called freehold tenure. In addition, another legal tenure was created by the 1925 enactment: that of leasehold tenure. Leasehold tenure is the present-day equivalent of the old "term of lease" arrangement which was not a feudal legal tenure, but rather was a contractual form of holding creating a possessory estate.[62]

The effect of the 1925 Law of Property Act was to allow only two legal estates in land: the fee simple absolute and the term of years absolute. All other estates in land are relegated to equity.[63]

A. Historical Summary of Agricultural Holdings Legislation

Landlord and tenant acts or agricultural holdings acts have existed in England since 1851. Since that time, more than twenty acts have been passed.[64] Until 1875, the tenant was required to rely upon custom or his contract of tenancy to show any tenant rights.[65] The 1875 Agricultural Holdings Act enabled the tenant to claim compensation for the value of certain improvements at the termination of his tenancy.[66]

The 1923 Agricultural Holdings Act[67] comprehensively covered

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[62] L.P.A. 1925, § 1. For a summary of the historical background of tenure, see MEGARRY, REAL PROPERTY 8 (2d ed. 1955).

[63] L.P.A. 1925, § 1.

[64] Including Landlord and Tenant Act, 1851, 14 & 15 Vict., c. 25; Agricultural Holdings (England) Act, 1875, 38 & 39 Vict., c. 92; Agricultural Holdings (England) Act, 1883, 46 & 47 Vict., c. 61; Arbitration Act, 1889, 52 & 53 Vict., c. 49; Tenants Compensation Act, 1890, 53 & 54 Vict., c. 57; Agricultural Holdings Act, 1906, 6 Edw. 7, c. 56; Agricultural Holdings Act, 1908, 8 Edw. 7, c. 28; Law of Distress Amendment Act, 1908, 8 Edw. 7, c. 53; Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919, 9 & 10 Geo. 5, c. 63; Agricultural Holdings Act, 1923, 13 & 14 Geo. 5, c. 9; Agriculture (Amendment) Act, 1923, 13 & 14 Geo. 5, c. 25; Landlord and Tenant Act, 1927, 17 & 18 Geo. 5, c. 36; Arbitration Act, 1934, 24 & 25 Geo. 5, c. 14; Leasehold Property (Repairs) Act, 1938, 1 & 2 Geo. 6, c. 34; Landlord and Tenant (Requisitioned Land) Act, 1942, 5 & 6 Geo. 6, c. 13; Agriculture Act, 1947, 10 & 11 Geo. 6, c. 48; Agricultural Holdings Act, 1948, 11 & 12 Geo. 6, c. 63; Agriculture (Miscellaneous Provisions) Act, 1949, 12 & 13 Geo. 6, c. 37; Arbitration Act, 1950, 14 Geo. 6, c. 27; Landlord and Tenant Act, 1954, 2 & 3 Eliz. 2, c. 56; Rent Act, 1957, 5 & 6 Eliz. 2, c. 25; Agriculture Act, 1958, 6 & 7 Eliz. 2, c. 7.

[65] For a good summary of the Agricultural Holdings Acts up to 1923, see DENMAN, TENANT-RIGHT VALUATION 24-65 (1942). The Landlord and Tenant Act of 1851 did no more than vest in a tenant the right to install fixtures upon the land with the consent of the landlord and to remove them at the end of the term, unless the landlord exercised an option to purchase.

[66] Agricultural Holdings (England) Act, 1875, 38 & 39 Vict., c. 92. However, the provisions of this act could be overruled by contract. The Agricultural Holdings Act of 1883 removed the power of the parties to contract out of its provisions. Agricultural Holdings Act, 1883, 46 & 47 Vict., c. 61.

[67] Agricultural Holdings Act, 1923, 13 & 14 Geo. 5, c. 9 [hereinafter cited as A.H.A. 1923].

compensation for improvements, compensation for high farming,[68] compensation for diminished value due to bad farming, compensation for disturbance,[69] tenant's right to freedom of cropping, and certain other tenant-right matters.

B. Existing Agricultural Holdings Legislation

The 1923 A.H.A. is the point of departure for agricultural holdings legislation presently in effect and for the legislative activity which has continued to the present.[70]

1. Public Regulatory Agencies

The policy and purpose of public controls on agricultural holdings has been declared to be that

> of securing that the owners of agricultural land fulfil their responsibilities to manage the land in accordance with the rules of good estate management, and that occupiers of agricultural land fulfil their responsibilities to farm the land in accordance with the rules of good husbandry.[71]

Leasing of agricultural holdings is still a matter of contract between the parties. However, the applicable legislation includes a number of provisions which control the creation and duration, as well as the form and content, of leasing agreements. These provisions have been imposed on the grounds of public policy and amount to public social control of the land. Existing public controls may be classified as (1) good estate management and special directions, (2) arbitration of the tenancy agreement, (3) determination of rent, (4) notice to quit, (5) compensation for disturbance, (6) compensation for improvements, (7) compensation for continuous adoption of a special system of farming, (8) compensation for dilapidations, and (9) freedom of cropping and removal of fixtures.

Each of these public controls will be discussed in turn. However, it is first necessary to review the administrative structure through which the various applicable laws involving direct public intervention are applied.

a. Ministry of Agriculture and Its Agencies

National powers and duties are ultimately centered in the Minister

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[68] "High Farming" was the term used in the A.H.A. 1923 for what is now called "continuous adoption of Special System of Farming," discussed later.

[69] Disturbance here refers to the disturbance of the tenant in his possession. This is discussed later under *Compensation for Disturbance.*

[70] Existing relevant legislation includes Agriculture Act, 1947, 10 & 11 Geo. 6, c. 48, §§ 10-11 [hereinafter cited as A.H.A. 1947]; Agricultural Holdings Act, 1948, 11 & 12 Geo. 6, c. 63 (certain sections later repealed) [hereinafter cited as A.H.A. 1948]; Agricultural Act, 1958, 6 & 7 Eliz. 2, c. 71 [hereinafter cited as A.A. 1958].

[71] A.A. 1947, § 9.

of Agriculture, Fisheries and Food.[72] An Agricultural Land Commission has been established to manage and farm land vested in the Minister. In addition, it advises and assists him in matters relating to the management of agricultural land.[73]

The Minister has certain authority in relation to the supervision of agricultural operations. This is exercised mainly by county agricultural executive committees (hereafter called C.A.E.C.), from whose decisions an appeal can be taken to the Agricultural Land Tribunal.[74]

b. Agricultural Land Tribunals

The agricultural land tribunals function as original hearing bodies for the determination of issues that may be or must be submitted to them according to the provisions of the Agricultural Holdings Acts. The tribunals are under the direct supervision of the Council of Tribunals by virtue of the 1958 Tribunals and Inquires Act.[75]

A tribunal is specially constituted for each hearing. The chairman of a tribunal must be a barrister or solicitor of not less than seven years' standing. The tribunal consists of the chairman, plus one man from each of a farmers' and a landowners' panel, selected by the Lord Chancellor (Minister of Justice). Two assessors may also be appointed if the chairman deems it necessary. Procedure for a hearing before the tribunal is generally by direct application.

The tribunal must sit in public when holding a hearing and must give all parties an opportunity to be heard. Rules of evidence required at law need not be followed. A majority decision controls and is given in writing accompanied by a statement of reasons. Questions of law are referred to the high court and that court has general control of hearing before tribunals by certiorari, prohibition, and mandamus.[76]

c. Arbitrators

There is provision for the appointment of an arbitrator to arbitrate any claim of whatever nature, by a landlord or tenant of an agricultural holding, against his tenant or landlord. Arbitration is available if the claim arises under the 1948 A.H.A., or any custom or agreement. This is true so long as the claim arises on or out of the termination of the tenancy, as well as certain specified disputes that arise dur-

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[72] Ministry of Agriculture and Fisheries Act, 1919, 9 & 10 Geo. 5, c. 91, §§ 1(1), (2) & (3).

[73] A.A. 1947, § 68.

[74] For a summary of this authority, see Section VII. *A. 2. infra.*

[75] A.A. 1947, § 73; A.A. 1958, 1st sch.; Tribunals and Inquiries Act, 1958, 6 & 7 Eliz. 2, c. 66.

[76] See generally JACKSON & WATT, AGRICULTURAL HOLDINGS 183-94 (11th ed. 1959).

ing the tenancy.[77] An arbitrator is appointed by agreement of the parties, or, if they cannot agree, by the Minister of Agriculture, on the application of either party.[78] The Minister makes his appointment from a panel selected by the Lord Chancellor.[79]

Within fourteen days from the appointment of an arbitrator, the parties are required to deliver to him a statement of their respective cases with all necessary particulars.[80] A hearing is then held. The proceeding is a judicial one and the arbitrator acts as a judge. Both parties are entitled to be heard, but the arbitrator is entitled to hold an ex parte hearing if he is convinced that a party is trying to frustrate the proceedings by obstruction. The same rules of evidence apply as in actions at law.

The arbitrator has the power to inspect the holding and take whatever other action is necessary in obtaining a proper understanding of the case. He is required to make an award within forty-two days of his appointment.[81] Questions of law must be referred to the county court as they arise in the course of the arbitration.[82]

2. Good Estate Management and Special Directions

As long as an agricultural landowner practices management that is "reasonably adequate, having regard to the character and situation of the land and other relevant circumstances, to enable an occupier reasonably skilled in husbandry to maintain efficient production as respects both the kind of produce and quality and quantity thereof," he is considered to fulfill his obligation to practice good estate management (management of the ownership unit).[83]

Up to the time the 1958 A.A. took effect, the C.A.E.C., if it was satisfied that the owner of agricultural land was not fulfilling his responsibilities, could place him under its supervision with regard to the management of the land.[84] In pursuance of the supervision order, the C.A.E.C. could give directions to an owner in order to assure that he fulfilled his responsibilities to manage the land properly.[85] If the Minister further certified that management of the land was not showing satisfactory improvement, he could exercise a right of compulsory purchase.[86]

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[77] A.H.A. 1948, § 70(1); see JACKSON & WATT, *op. cit. supra* note 76, at 147.

[78] A.H.A. 1948, 6th sch., para. 1.

[79] A.H.A. 1948, 6th sch., para. 3; see A.A. 1958, § 8, 1st sch., para. 20.

[80] A.A. 1958, 1st sch., para. 6(a), (b).

[81] The Minister may allow a longer period. A.H.A. 1948, 6th sch., para. 13.

[82] A.H.A. 1948, 6th sch., para. 24.

[83] A.A. 1947, § 72.

[84] A.A. 1947, § 12.

[85] A.A. 1947, § 14(1).

[86] A.A. 1947, § 16(1). The Minister is still authorized to give special directions,

3. *Public Controls on Freedom To Lease*

a. Arbitration of Tenancy Agreement

If the term of a tenancy agreement does not exceed three years and is for a rack rent,[87] it may be made in writing or orally and be valid.[88] However, either party to the agreement may require that it be put in writing by submission to an arbitrator if the parties cannot agree.[89] Either party may also have the agreement submitted to an arbitrator at least once every three years, if the other party does not agree to proposed changes.[90]

The arbitrator is first of all required to specify the existing terms of the tenancy and any agreed variation. Then, if these terms do not cover all the relevant matters dealt with in the 1948 A.H.A., he is first to determine if the parties can agree on the matters not covered. If the parties cannot agree, the arbitrator himself specifies these provisions, determining them on the basis of reasonableness and justice.[91] There are certain exceptions. These are certain model clauses applying to the maintenance, repair, and insurance of fixed equipment. The Minister has drafted model clauses covering these matters.[92] Apparently the parties can contract out of these model clauses, so long as they cover each point. However, any contracting out is subject to the right of either party to take the terms of a written agreement to arbitration if the terms vary widely from the model clauses, and the other party refuses to change them.[93]

b. Determination of Rent

Either party has the power, by written notice, to request that the question of the amount of rent be referred to an arbitrator. The reference can be made in any year of a tenancy from year to year, or at the end of a lease for a term of years, or at the time when a term of

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upon prior notice, to owners and occupiers of agricultural lands where it appears to him necessary in the interests of the national supply of food or other agricultural products. A.A. 1947, § 95.

[87] Rack rent is the best rent reasonably obtainable, *i.e.*, full market rent.

[88] L.P.A. 1925, § 54.

[89] A.H.A. 1948, § 5.

[90] A.H.A. 1948, § 6(2).

[91] A.H.A. 1948, § 6. Fixed equipment includes buildings or structures affixed to the land, works such as roads, embankments, waterworks, drainage works, works for the supply of electricity, and the like, as well as hedges, ditches, and livestock windbreaks.

[92] A.H.A. 1948, § 94(1); Statutory Instrument 1948, No. 184. In general, they require the landlord to insure and to carry out major repairs and replacements, while the tenant is obliged to carry out minor repairs.

[93] A.H.A. 1948, § 7.

years could be terminated prior to its full term at the option of one of the parties.

The arbitrator is to determine the rent properly payable, having regard to the terms of the tenancy, on the basis of the rent that might reasonably be expected for that holding in the open market by a willing landlord from a willing tenant, disregarding the fact that the tenant is in occupation of the holding.[94]

The landlord has a statutory right to increase the rent in certain cases where he has carried out an improvement that increases the rental value of the holding. There is no requirement for arbitration unless a dispute arises.[95] Also, if a part of a holding is quit by the tenant, there is provision for a rental reduction.[96]

c. *Notice To Quit*

Generally a notice to quit a holding, whether given by the landlord or the tenant, must be given at least twelve months before the date it is to become effective. This rule cannot be contravened by the tenancy agreement.[97]

If the landlord gives the notice to quit, the tenant may give a counter-notice within one month thereafter.[98] This has the effect of forcing the landlord to apply, within one month, to the Agricultural Land Tribunal for its consent to the operation of his notice to quit.[99] In some cases, the tenant has no right to serve a counter-notice. These are: (1) if the landlord has obtained the consent of the Agricultural Land Tribunal before giving his notice to quit, (2) if the landlord has obtained a certificate of bad husbandry from the Tribunal, (3) if the tenant with whom the contract of tenancy was made has died, (4) if the tenant has become bankrupt, or (5) if the tenant has not paid his rent.[100]

If the tenant wishes to contest grounds put forth by a landlord as his reason for a notice to quit but which cannot be contested by a counter-notice, he may serve on the landlord, within one month after the notice to quit, a notice requiring arbitration of the matter.[101] For other grounds upon which the landlord is entitled to base his notice

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[94] A.H.A. 1948, § 8; A.H.A. 1958, § 2. This changed the A.H.A. 1948, under which the arbitrator did consider the fact that the tenant was in occupation of the holding and did not base his determination on an open-market rent.

[95] A.H.A. 1948, § 9.

[96] A.H.A. 1948, §§ 31-33.

[97] A.H.A. 1948, § 23.

[98] A.H.A. 1948, § 24(1).

[99] A.H.A. 1948, § 24(4); A.A. 1958, 4th sch., paras. 6-8.

[100] A.H.A. 1948, § 24(2).

[101] A.H.A. 1948, § 26(1)(a); Statutory Instrument 1959, No. 81.

to quit, and which the tenant cannot bring before the Tribunal by serving a counter-notice, the tenant may resort to court action. To do this, he can remain in possession and when the landlord brings an action for recovery of possession, the tenant then can contest the ground alleged by the landlord as entitling him to possession.

If the landlord desires to apply for the Tribunal's consent prior to giving a notice to quit, the application must be based upon at least one of five grounds set out in the statute. If the Tribunal is satisfied that the grounds alleged in fact do exist, and if it feels that a fair and reasonable landlord, under such circumstances, would insist on possession, it must give its consent.[102] The five grounds are as follows:[103]

1. The purpose for terminating the tenancy is in the interests of good husbandry with regard to the holding. The landlord can satisfy this requirement by showing that he would be replacing a bad farmer with a good farmer.
2. The purpose is in the interests of sound management of the ownership estate of which the holding is a part. Here, such things as a more economic production unit by amalgamation of the holding with other land of the landlord may be considered. It need not be shown that the holding is being badly farmed.
3. The purpose is to use the holding for agricultural research, education, experimentation, or demonstration, or for small-holdings or allotments. This includes public, as well as private, schemes.
4. If the landlord can establish that greater hardship would be caused by withholding than by giving consent to the notice, he is entitled to the consent of the Tribunal. The burden of proof of this is on the landlord, and it apparently refers to personal hardship to the landlord or the tenant, or to members of their respective families.
5. The purpose is to use the holding for a nonagricultural use for which planning permission under the Town and Country Planning Acts is not required. An example is use for private forestry.[104]

d. Compensation for Disturbance

A tenant quitting a holding as a result of a notice to quit given by his landlord has been entitled to compensation for disturbance since 1906.[105] The right to this compensation exists if a notice to quit by

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[102] A.H.A. 1948, § 25(1), as amended by A.A. 1958.

[103] *Ibid.*

[104] See Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51, § 12(2), proviso (e).

[105] A.H.A. 1906, § 4, coming into force first by virtue of A.H.A. 1908, § 11, and repeated in the A.H.A. 1923, § 12, presently found in A.H.A. 1948, § 34.

the landlord is the proximate cause of the tenant's leaving. This is true even if the notice was defective in some way, or if the tenant did not leave exactly at the time the notice became effective.[106] This section of the statute cannot be nullified by contracting out of it.[107] The right to compensation for disturbance is not available if the right to serve a counter-notice is excluded for any reason except (1) where the notice to quit is based on prior consent of the Tribunal or (2) the land is to be transferred to a nonagricultural use for which permission has been obtained under the Town and Country Planning Act.[108]

Compensation for disturbance shall be an amount equal to at least one year's rent of the holding, without proof of any loss or expense. With such proof, it can be as much as two years' rent, but not more, even if a greater loss is proved.[109] Within this range, the tenant is entitled to any amount of loss or expenses he can prove was unavoidably incurred and directly attributable to the quitting of the holding in connection with the sale or removal of (1) his household goods, (2) implements of husbandry, (3) fixtures, (4) farm produce or farm stock on or used in connection with the holding, and (5) any expenses incurred by the tenant in the preparation of his claim for compensation.[110]

A claim for compensation for disturbance may be determined by arbitration under the act if the parties cannot agree. Once the amount is determined, the tenant may require payment through an order of the county court.[111]

e. Compensation for Improvements

Compensation for improvements is payable both for improvements begun before March 1, 1948, and those begun after March 1, 1948.[112] The former are designated as old improvements and are treated somewhat differently from those designated as new improvements.

Old improvements have been of decreasing importance in recent years. The items included in new improvements are set out in the Act.[113] They include (1) improvements requiring the consent of the landlord, (2) those requiring the consent of the landlord or approval of the Agricultural Land Tribunal, and (3) those for which compensa-

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[106] See Preston v. Norfolk County Council, [1947] K.B. 775; Gulliver v. Catt, [1952] 2 Q.B. 308.

[107] Coates v. Diment, [1951] 1 All E.R. 890 (Ass.); A.H.A. 1948, § 65.

[108] A.H.A. 1948, § 34(1).

[109] A.H.A. 1948, § 34(2)(a), (d).

[110] A.H.A. 1948, § 34(2).

[111] A.H.A. 1948, § 71.

[112] A.H.A. 1948, §§ 46-55.

[113] A.H.A. 1948, § 46, 3d sch., 4th sch., pt. 1.

tion is payable without the consent of the landlord to their execution.[114]

Compensation also is payable for certain items called tenant-right matters. These are defined by statute, but the tenancy agreement can also include additional items for which compensation is payable, although it cannot cut them down.[115] An example of a tenant-right matter is the benefit of money and labour expended by the tenant on cleaning, tilling, and sowing the land during the tenancy, such benefit's otherwise being lost on termination.[116]

The right to compensation arises on the termination of the tenancy and when the tenant quits the holding.[117] In some cases, notably when he was in occupation prior to March 1, 1948, the tenant must declare his election to take the statutory basis of compensation. Otherwise, he is relegated to compensation based on his tenancy agreement, or on custom.[118]

The measure of compensation for improvements compensable under the statute is an amount equal to the increase the improvement makes in the value of the agricultural holding as a holding. The character and situation of the holding and the average requirements of tenants reasonably skilled in husbandry must be considered.[119] For certain short-term improvements and for tenant-right matters, the measure of compensation is the value of the improvements to an incoming tenant.[120]

f. Compensation for Continuous Adoption of a Special System of Farming

A tenant may have continuously practiced a system of farming which was more beneficial to the holding than the system required under the contract of tenancy. If so, and if the value of the holding has been increased during the tenancy by this means, the tenant is entitled to claim compensation at the time of quitting the holding.[121]

To recover compensation the tenant must have made a record of the condition of the holding from the time the system upon which he bases his claim began.[122] He also must give notice to the landlord of his intention to make the claim, at least one month before the termina-

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[114] *Ibid.*

[115] A.H.A. 1948, § 47.

[116] See JACKSON & WATT, *op. cit. supra* note 76, at 94.

[117] A.H.A. 1948, § 47.

[118] A.H.A. 1948, §§ 47(2), 64.

[119] A.H.A. 1948, § 48.

[120] A.H.A. 1948, § 51(1).

[121] A.H.A. 1948, § 54.

[122] A.H.A. 1948, § 56(1), proviso (ii).

tion of his tenancy.[123] The measure of the compensation is the same as for compensation for long-term improvements discussed above.

g. Compensation for Dilapidations

The landlord may recover compensation from the tenant for dilapidation of, deterioration of, or damage to any part of the holding or anything in or on the holding. This is true if the damage was caused by a nonfulfillment by the tenant of his duty to farm according to rules of good husbandry.[124] This includes such items as (1) failure to apply sufficient fertilizers to the land in relation to the crops taken therefrom, (2) failure to care for pasture land properly, (3) failure to maintain and repair fences, hedges, and ditches, and (4) failure to fulfill duties with regard to other items. Such items may be included in the contract of tenancy or other agreement affecting the holding, as well as under the provisions of the 1948 Agriculture Regulations on maintenance, repair, and insurance of fixed equipment.[125]

h. Freedom of Cropping and Removal of Fixtures

The 1948 A.H.A. provides that the tenant is entitled to dispose of the produce of, and practice any system of cropping he chooses on, the arable land regardless of any custom or agreement to the contrary.[126] The tenant is required to provide for the return of the equivalent manurial value of crops sold off in contravention of custom or agreement.[127] If deterioration occurs as a result of the tenant's activities, the landlord may obtain an injunction against such operation and recover for deterioration when the tenant quits the holding.[128] Any disputes arising under these provisions are to be submitted to an arbitrator.[129]

The tenant may remove, either during the tenancy or within two months from its termination, any engine, machinery, fencing, or other fixture affixed by him to the holding or any building erected by him on it.[130]

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[123] A.H.A. 1948, § 56(1), proviso (i).

[124] A.H.A. 1948, §§ 57-59, 94(2).

[125] See Burden v. Hannaford, [1956] 1 Q.B. 142; A.H.A. 1948, §§ 10(3), 11(3); Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Reg. No. 184 (1948).

[126] A.H.A. 1948, §§ 11-12.

[127] A.H.A. 1948, § 11(1)(b). The tenant is not entitled to remove from the holding certain crops with manurial value.

[128] A.H.A. 1948, § 11(2).

[129] A.H.A. 1948, § 11(3).

[130] A.H.A. 1948, § 13 (subject to certain exceptions).

4. Impact of English Agricultural Holdings Legislation

Assessment of the impact of agricultural holdings legislation in England is difficult. Nevertheless, the following trends appear to be significant:

1. The percentages of holdings in England above five acres that were tenanted, for specified years, were as follows:[131]

   1911—80 per cent,
   1927—64 per cent,
   1941—66 per cent,
   1950—61 per cent,
   1959—50 per cent.[132]

2. The percentages of premium paid for agricultural holdings with vacant possession (without a sitting tenant) for specified years were as follows:[133]

   1938—42 per cent,
   1941—37 per cent,
   1949—100 per cent,
   1951—100 per cent,
   1953—109 per cent,
   1957—73 per cent,
   1958—67 per cent.

3. Three-fourths of the agricultural holdings in England are below 50 acres in size.[134] However, 122 ownership units, being 5 per cent of the total number in England and exceeding 10,000 acres each in size, comprise 37 per cent of the total agricultural acreage. On the other hand, 1,179 ownership units, being 48 per cent of the total number and having less than 1,000 acres each in size, comprise 7 per cent of the total agricultural acreage.[135]

Certain conclusions can be drawn from these statistics. If the purpose of the Agricultural Holdings Acts was to disperse agricultural landownership, it has not been particularly successful. If it was to preserve the predominance of the landlord-tenant system, it has not done so. If it was to protect the efficiency of agriculture, it has not succeeded. On speculation, one of the most significant effects of the agricultural holdings legislation has been to restrict the mobility of factors of agricultural production. The result frequently has been that poor tenant farmers have been able to stay in possession of hold-

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[131] NATIONAL FARM SURVEY REPORT (1958); 1950 WORLD AGRICULTURAL CENSUS.

[132] WARD, FARM RENTS AND TENURE XI (1959).

[133] Ward, *A New Peak in Farm Prices*, Estates Gazette, Jan. 31, 1959.

[134] 1950 WORLD AGRICULTURAL CENSUS.

[135] Denman, Farm Rents 179 (1959) (mimeograph results of Farm Rental Survey, 1956-1958).

ings. Landlords have had difficulty gaining possession of holdings to consolidate them. Aspiring farmers have been unable to enter farming as tenants because a landlord who is able to obtain vacant possession keeps it in hand. To let it again would be transferring up to one-half the value of the land to the new tenant.

Thus, many of the effects have been disadvantageous, both to competent landlords and competent tenants.

VIII. Agricultural Properties Legislation (Landbrugsloven)[136] in Denmark

In Denmark, only one type of private legal estate is recognized as existing, or that can be created, in agricultural land. This is called the self-owned (*selveje*) estate. This estate theoretically vests absolute dominion but is subject to restrictions constitutionally imposed by the state.[137] Leasing (*give den i brug*) is permitted. A

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[136] Throughout this section certain key Danish terms are not translated into English. There are two reasons: (1) the terms embody unique concepts in Danish law which would tend to be confused with common-law concepts if the closest English equivalent terms are used, and (2) for brevity, since to explain the meaning of these terms in English requires several words or sentences.

The meanings of the most important Danish terms that recur frequently throughout the discussion are explained below:

Landbrugsloven: Literally, "the Agricultural Law," but embodies restrictions on traditional freedoms of action with regard to agricultural landownership. It does not include agricultural production or land-use questions. It is the name given to the most recent codification of public controls on agricultural landownership.

Bøndergod, bøndergaarde and *bondejord:* These are not equivalent terms, as will be illustrated in the textual discussion. However, the common element of the terms is that they all are names of lands that were considered to be attached to manor estates during the Danish feudal period.

Landbrugsejendom(me): Literally, "agricultural property(ies)." Term used in present Danish legislation to specify lands to which the *Landbrugslov* public controls apply. It includes those lands that historically were included in the terms *"bøndergod," "bøndergaarde"* and *"bondejord."*

Fri jord: Literally, "free land." Includes, all agricultural lands that do not fall within the classification of *Landbrugsejendomme,* and, therefore, are not subject to the public controls imposed by the *Landbrugslov.*

Opretholdelsespligt(en): Literally, "the preservation duty." Term used to embody special duties imposed upon owners of *Landbrugsejendomme* by the *Landbrugslov.*

Vedligeholdelsespligten: Used in earlier legislation as equivalent term to *opretholdelsespligten.*

[137] Regulation by the state through legislation designed to promote the general welfare is allowed with regard to private ownership of agricultural land, as well as other forms of property or rights of action. An agricultural landowner has the "general power to dispose in every direction" where there are no special limitations imposed. See Danish Constitution of June 5, 1953, § 73. For a general dis-

lease is considered to be a contractual relationship, even though controlled to some extent by statute. No possessory estate is considered to be thereby created in the tenant, as that term is used in the common law. A lease is simply a "use contract."[138]

The legislatively imposed public controls that have developed over the years to limit the general power of an agricultural landowner "to dispose in every direction" are considerable. A large part of these controls are found in the Danish Agricultural Law (*Landbrugslov*) and related legislation.[139]

A. Historical Development of the Landbrugslov[140]

Until extensive reforms in the last half of the eighteenth century, the agriculture of Denmark was marked by two legal-economic forms of organization: the manorial system and the common husbandry system. Under this arrangement two general types of tenure were recognized: complete property rights (*fuldkommen ejendomsret*) and incomplete property rights (*ufuldkommen ejendomsret*).[141] The differences between these types of properties were not primarily tied to the character of the property right involved, but more to the original source of the land title and the social status of the owner. The differences in property rights included:

1. the difference in obligations to make public payments,
2. the presence of transfer restrictions on entailed estates and titled estates, as well as on self-owned farms with incomplete property rights (*selvejergaarde*), and
3. the existence of limitations on use on farms under the manorial

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cussion of the right-of-private-property concept in Denmark, see 1 KRUSE, EJENDOMSRETTEN (3d ed. 1951).

[138] See generally TOLSTRUP, LAEREBOG I LANDBORET 154-60 (1958) [hereinafter cited as TOLSTRUP, LAEREBOG]. Note also that for particular use types, other "quasi-estates" have been created by statute. These so-called "estates" are such only to the extent that when certain conditions exist, special laws apply. See TOLSTRUP, LANDBRUGSEJENDOM - LANDBRUGSPLIGTEN 149-75 (1958) [hereinafter cited as TOLSTRUP, LANDBRUGSEJENDOMME].

[139] Landbrugsloven, L. Nr. 291, 31/3 1949 om Landbrugsejendomme med tillaeg, senest optrykt i L. Bkg. Nr. 388, 25/9 1951 med yderligere tillaeg: L. Nr. 242, 7/6 1952 [hereinafter cited as Landbrugslov].

[140] The significant laws in the sequence of development are: Christian 5's Danske Lov; Frd. (Ordinance) 26/11 1757; Frd. 6/5 1760; Frd. 13/5 1769; Frd. 6/6 1769; Frd. 28/7 1769; Frd. 27/9 1805; Lov. 20/6 1850; L. Nr. 39, 9/3 1872; L. Nrer. 171, 172, 173, 20/3 1918; L. Nr. 563, 4/10 1919; L. Nr. 373, 30/6 1919; L. Nrer. 106, 107, 108, 3/4 1925); L. Nr. 339, 9/6 1948; L. Nrer. 290, 291, 31/3 1949; L. Bkg. Nr. 388, 25/9 1951; L. Nrer. 240, 241, 242, 7/6 1952; L. Nr. 129, 28/4 1955.

[141] ORSTED, HAANDBOG OVER DEN DANSKE OG NORSKE LOVKYNDIGHED MED STADIGT HENSYN TIL AFDODE ETATSRAAD (1835).

estates (*böndergods*) as well as for self-owned (*selvejergaarde*) farms.[142]

Although traces of these property-right distinctions remain in present-day law, most of them have been practically eliminated or now exist as legal easements common to all properties of a given class.[143] The old distinctions are important primarily for determining their present-day classification for applicability of legislation.

From 1769, legislation has created a distinction between different land units on the basis of the legal nature of such land units at the time of the legislation, even though the feudal incidents creating the distinctive character have long since been eliminated. Frd. 6/6 1769, made a distinction between land of a manor estate not formed directly for the lord's account (*bondejord*), and all other tracts of land that later were called free land (*fri jord*).[144]

The exact areas of land that were included in the term *bondejord* is not entirely clear, but it apparently includes all the land that the manor peasants from the earlier times had possessed, either as land that carried with it personal services to the lord (*föesteland*)[145] or land that had already been separated from manor lands which the farmers owned as self-owned (*selveje*) with incomplete property rights (still owing certain feudal incidents).[146]

This concept of property rights in land—*bondejord* versus *fri jord*—was recognized in later legislation, and, although the distinctions were confused at times,[147] there was no significant change in its scope until comprehensive legislation was adopted in 1925, following provisional

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[142] See D.L. 3-12-3; TOLSTRUP, LANDBRUGSEJENDOMME 17.

[143] The concept of "legal easement" is used in Denmark to include those burdens and limitations imposed upon properties of a given class by direct legislative mandate, as a right of the public.

[144] For a summary of the restrictions placed on *bondejord*, see TOLSTRUP, LANDBRUGSEJENDOMME 19.

[145] Although the tenant was required to perform these personal services, the lord could not evict him so long as he did so.

[146] EVALDSEN, OBLIGATIONSRETTEN 125 (Specielle Del 1905). Another interpretation has simply held that any land in the use of *Landalmuen* (land-villagers or land peasants) on June 6, 1769, was *bondejord*, while all other land was *fri jord*. In later years, the nature of certain lands, especially the town-owned lands, ecclesiastical lands, and official lands, was difficult to determine. In the final analysis, the owner of a property has the onus of proof to show the nature of the land. This may require documentation of its nature in 1769. There has been some support of the view that if a tract is treated for many years as being of a particular nature, this is sufficient evidence to require the authorities to treat it as such, but apparently the general rule is that prescription does not run against a legal easement. See generally BORUP, DEN DANSKE LANDBORET 75-76 (2 Udg. 1880); TOLSTRUP, LANDBRUGSEJENDOMME 20-21.

[147] For example, see L. Nr. 36, 9/3 1872; L. Nr. 373, 30/6 1919, Kap. II.

legislation in 1918.[148] This legislation utilized new terminology with broader scope: The term *landbrugsejendomme* (agricultural properties) replaced the old term *bondejord.*

The special feature of *bondejord* was a statutory duty to preserve the operating units (existing on June 6, 1769) as independent farms (*vedligeholdelsespligt*—literally meaning "duty to preserve the status quo"). The nature and extent of the duty was enlarged and sharpened by the 1918 and, later, the 1925 legislation, with the name's being changed to *opretholdelsespligt* (preservation duty).

Although the earlier legislation covered such aspects of agricultural landownership as parcelling and classification, the focal point for existing law is the 1925 legislation. New terminology for the old concepts and expanded application are its contributions to public controls of agricultural landownership.[149]

In 1946, a ministerial commission recommended a somewhat more simplified version of the *landbrugsejendomme* law. It consolidated the provisions for *landbrugsejendomme,* including provisions on parcelling, into one body of legislation called *Landbrugsloven* (the agricultural law). Technical provisions for land division and provisions on property boundaries and their alteration were codified separately as the Law of Parcelling (*Udstykningsloven*).[150]

B. Existing Concept of Landbrugsejendomme

The concept of *landbrugsejendomme,* as it now exists, includes five necessary elements:

1. Ascertainable lands attached to the property in the sense that it is considered a part of the operating unit, although not necessarily contiguous land (*jordtilliggende*), of at least 10,000 square meters geometric measure (2.47 acres).[151]
2. A tax assessment valuation of at least 2,000 Danish Kroner (approximately $280).[152]

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[148] L. Nrer. 171, 172, 173, 20/3 1918.

[149] In 1921 the Minister of Agriculture formed a commission to "improve by revision the existing regulations on the parcelling out and consolidation of real property." The commission took this charge to include the existing legislation on *vedligeholdelsespligt.* See Agricultural Commission's Report 1 (København, 1924). A part of its proposals that were adopted included a continuation and clarification of the requirement of the *vedligeholdelsespligt,* utilizing the terminology of the 1918 provisional legislation. L. Nr. 106, 3/4 1925. Two other proposals also adopted had to do with parcelling and consolidation of land. Adopted as L. Nrer. 107, 108, 3/4 1925.

[150] L. Nr. 290, 31/3 1949 (published 1/7, in force 1/10 1949).

[151] Landbrugslov, § 1, stk. 1, litra (b). 1 hectare geometric measure = 2.47 acres.

[152] L. Nr. 174 7/6 1958. The Kroner is the Danish unit of money.

3. Used at least in part for agricultural and certain related types of production.[153]
4. The existence of a dwelling and farm buildings on the property.[154]
5. Inhabitants (*beboelse*).[155]

If the above elements existed in 1925, or at any time thereafter, the property is classified as *landbrugsejendom* for the purposes of the legislation and is subject to its provisions.

The old *bondejord vedligeholdelsespligt* included most of the same requirements needed to establish a *landbrugsejendom*. Thus, the greater portion of those properties are included within the *landbrugsejendomme* specifications. However, since the legislation first defining *landbrugsejendomme* was adopted in 1925, this is taken as the cut-off date. From that moment on such units have been subject to the controls imposed by the legislation.

1. Registration of Landbrugsejendomme

A register of *landbrugsejendomme* was established in pursuance of the *Landbrugslov*. Qualifying properties were required to be noted as *landbrugsejendomme* in the title registration record (*tingbog*) and in the assessment valuation rolls (*matrikel*).[156]

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[153] Includes those that should have been preserved under the 1925 law but were not. See Law 1925, § 4; Landbrugslov § 1. Forest use is not considered agricultural use. See U. 1941. 511 H. (U = *Ugeskrift for Retsvaesen* (Official Court Reports); H = *Højesteretsdom* (Supreme Court of Appeals).)

[154] Landbrugslov § 1. If the buildings should have been preserved under prior law, but were not, this condition, nevertheless, is considered as satisfied. See Law 1925, § 4.

[155] Inhabitants of the property that actually work the land from the buildings thereon, as an independent operating unit. See Landbrugslov § 1.

[156] See 1 KRUSE, *op. cit. supra* note 137, at 195-202. The registration of farms for tax assessment purposes was developed at a rather early stage in Denmark. A list, called the *matrikel,* was drawn up in 1664 in connection with a reorganization of the tax system after the new constitution of 1660. This was based on the landbooks of the nobility in which the peasants' rent charges were stated in units of rye or barley. The *matrikel* adopted this as the basis of assessment, designating the unit of measure, *tønde hartkorn* (meaning a barrel of hard grain). Subsequent *hartkorn* valuations were authorized in 1688 and 1802 on the basis of quality and yield. The 1688 valuation was used until 1844. The later valuation, first used in 1844, included a map survey, carried out from 1806-1822 (Frd. 1/10 1803, § 44). This new valuation rated land according to production quality based on a numbered scale ranging downward from the figure "24." The figure "24" represented the best quality of land, and as the quality of land decreased, its representative figure on the scale decreased, with the figure "1" representing the poorest quality of farm land, and "0" representing land unusable for agricultural production purposes. Land rated at 24 on the scale has a ratio of quality measure (*tønde hartkorn*) to geometric measure (hectares) of 1:2.84. In other words, one *tønder hartkorn* of land rated at 24 is equal to 2.84 hectares. The *tøndeland* is an older system of Danish land measure and is equal to about .55 hectare. Five and

Presently, each property unit is designated by number and letter, district, parish, and *hartkorn* valuation, in the assessment valuation rolls (*matrikel*) maintained by the Agricultural Ministry's Valuation Department.[157] The properties are also identified in the Parish Title Registration Record (*tingbog*) in the same manner, on a separate sheet for each unit. The identification further is required to note whether the property is *landbrugsejendom* in both records.

The *Landbrugslov* includes all properties registered as *landbrugsejendomme* under the 1925 law and not subsequently legally removed from that classification, as well as those property units that fulfilled the requirements for such a classification, even though not so recorded.[158]

New properties are required to be registered when they fulfill the requirements of the five elements of *landbrugsejendomme*. However, recording as a *landbrugsejendom* is not a prerequisite to a property's being subject to the provisions of the statute. The property need only fulfill the conditions; it is then automatically a *landbrugsejendom*.

2. *Opretholdelsespligten (Preservation Duty)*

Every property that in 1925 satisfied the five necessary elements for a *landbrugsejendom* is automatically subjected to mandatory provisions of the law, called *opretholdelsespligten* (preservation duty). This requirement immediately applies as the result of the property's having fulfilled the elements for *landbrugsejendomme*. If one of the five elements did not exist with regard to a particular property in 1925, that property is not a *landbrugsejendom* and is not subject to the *opretholdelsespligt*.

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two-tenths *tøndeland* equal approximately one *tønde hartkorn*. Another unit of quality measure used in Denmark is the hectare quality measure (ha. Q.M.). About three hectares quality measure equals one *tønde hartkorn*. Land rated lower than 24 has a correspondingly lower valuation for tax assessment purposes. *Hartkorn* as a basis of taxation was abolished during the first part of the twentieth century. L. Nr. 103, 15/5 1903; L. Nr. 352, 7/8 1922; L. Nr. 83, 31/3 1926. Nevertheless, the classification according to *hartkorn* is still important as a means of property identification, as a unit of measure in sales, and for enforcing the legislation on partitioning of properties.

157 Frd. 28/3 1845, §§ 3-9.

158 Tingslysninglov, L. Nr. III, 31/3 1926, as amended, and regulations thereon up to An. Nr. 166, 8/6 1957. A *landbrugsejendom* originally was recorded as such whether it was only a part under one matriculation number or consisted of more than one matriculation number. Wherever, upon initial recording as *landbrugsejendom*, more than one property was included within the area covered by only one matriculation number, they were redesignated in order that each *landbrugsejendom* would be identified by a different number or numbers. If any partition or consolidation takes place, it will show up in the matriculation number. This means that a recorded *landbrugsejendom* can no longer consist of only part of the area encompassed by a matriculation number.

Generally, the *opretholdelsespligt* cannot be extended to *fri jord* added to *landbrugsejendomme,* except where there is actual formal consolidation, but such consolidation is frequently necessary as a prerequisite to obtaining permission for doing other things for which the Ministry's consent must be obtained.[159] All property not coming within the definition of *landbrugsejendom* is considered as *fri jord.* As *fri jord,* it is not subject to the *opretholdelsespligt.* Furthermore, the *Landbrugslov* leaves it to the owner's own initiative whether or not a new *landbrugsejendom* should be created out of land owned.

The transfer of *landbrugsejendom* to the classification of *fri jord* with extinguishment of the *opretholdelsespligt* is impossible without the permission of the Agricultural Ministry. However, the *Landbrugslov* specifies certain instances where the Agricultural Ministry must consent.[160] The Ministry must consent in case of an authorized partitioning of the property, or where, in any other manner, the area of the property falls below 10,000 square meters (2.47 acres) or where its assessed valuation is reduced below 2,000 Kroner ($280).[161] The "in any other manner" terminology may include (1) natural causes, (2) a new valuation for assessment purposes, and (3) an expropriation.

The extent of *fri jord* is unknown but it is generally considered to be extensive. The restrictions from which it is saved are substantial and landowners tend to utilize every method available to keep it free.

3. *Elements of Opretholdelsespligten*

The term *opretholdelsespligten* signifies the heart of the requirements of the statute with regard to *landbrugsejendomme.* In effect, this duty is to preserve all of the elements that were necessary for bringing a property within the classification of *landbrugsejendom.* Once a property is *landbrugsejendom,* the elements that the owner can control must, by law, continue to exist. It is the legal duty of the owner to take whatever steps are necessary to assure that they do so continue.

The duty is based on the policy that no *landbrugsejendom* should be operated together with another *landbrugsejendom.* Each such property must be preserved as an independent operating unit.[162] This

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[159] Agricultural Ministry Res. No. 158, of Aug. 9, 1939 (Den.); Registration Reg. 15.400 (Den.). This is true in connection with partitioning regulations and certain mortgages.

[160] See TOLSTRUP, LANDBRUGSEJENDOMME 68.

[161] Landbrugslov § 27.

[162] Special permission for consolidation can be obtained under certain circumstances from the Agriculture Ministry. This is discussed later.

means it must be "supplied with a dwelling and farm buildings, from which the land is operated by inhabitants of the property, and to which *indavling*[163] occurs."[164]

To understand the significance of this rule it must be determined (1) what area of land of a property is considered to be subject to the *opretholdelsespligt,* (2) whether or not any other areas of land can be added to a *landbrugsejendom* and, if so, whether it is subject to the *opretholdelsespligt.*[165]

Fri jord may be operated with a *landbrugsejendom* and an area from one *landbrugsejendom* may be operated temporarily with another *landbrugsejendom,* in certain limited cases. The duty of the inhabitants of a *landbrugsejendom* is to operate the land.[166] Apparently, this duty applies only to the main parcel[167] of the property. Thus, any excess area can be used for other purposes as the owner desires.

Another aspect of the *opretholdelsespligt* has to do with the requirement that there be present on the property "fixtures and produce, possibly including livestock, to the extent necessary for maintaining the independent operation of the property." The personal property thereon must be suitable to the pertinent land as a whole, even if only a part of it is registered as *landbrugsejendom* land.[168]

There is a further provision. An owner who has not owned the property for at least one year cannot sell or otherwise transfer it to another, unless the livestock, fixtures, crops, and other items are present and transferred with the property in an amount that is normal for other similar *landbrugsejendomme.*[169] Aside from this exception, a *landbrugsejendom* owner may sell it bare of personal property. However, the new owner must, as soon as possible, provide the personal property thereon as required by law.

Another provision of the *opretholdelsespligt* requires the proper maintenance of buildings. Unless special permission for a longer delay is obtained, any accidental damage to a building must be repaired within two years after it occurs. If the building is destroyed by fire or otherwise, it must be reconstructed within this time.[170]

In general, the owner otherwise has rather wide discretion as to

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[163] *"Indavling"* is the process of tilling the land around the buildings and bringing the crops into the buildings after harvest.

[164] Landbrugslov § 2, stk. 1.

[165] Lbkg. Nr. 544, 1949, § 1, stk. 2.

[166] Landbrugslov § 2, stk. 1.

[167] This term has a special meaning which is explained later under the section on subdivision of *Landbrugsejendomme.*

[168] Landbrugslov § 2, stk. 2.

[169] *Ibid.*

[170] See Landbrugslov § 2, stk. 3-4.

the buildings needed and their state of repair, so long as they include both a dwelling and farm buildings.

The final aspect of the *opretholdelsespligt,* and one which is difficult to analyze, is the nature of the relationship required among the ownership, the operation or management, and the habitation of *landbrugsejendomme.* The inhabitants of a *landbrugsejendom* are not required to look after the management of the property for their own account. The only requirement is that each *landbrugsejendom* be supplied with inhabitants that have such a connection with its management that the operation is carried on without any physical relationship with or dependence on the management of another *landbrugsejendom.*[171]

The legislation is designed to prevent camouflaged operation of independent *landbrugsejendomme* together, even though on the surface they seem to be operated as independent units. It is difficult to stop the unlawful combined operation of *landbrugsejendomme* that on the surface appear to be independent units. If such covert combined operation is permitted, it can make one or more buildings superfluous, and this can lead to the elimination of a home for a family. A more serious problem in the view of the policymakers is that the combination of operations leads to economics of a scale that allow a higher capital-labor ratio, leading to the possible loss of one or more jobs.

An owner may have his property operated for his own account, without living on it. If so, to fulfill the *opretholdelsespligt,* he must have a manager inhabiting the property who has at least the following responsibilities and rights:

1. The right to determine and carry out the daily farm work on the property, including directing the work of any hired men,
2. the power to hire and discharge any day, hourly, or job workers needed in operating the farm, and
3. the duty to maintain the machinery, fixtures and equipment used in operating the farm.

He must be independently employed in that he cannot have a similar position on another *landbrugsejendom,* although he can perform part-time work for another.[172]

The courts have generally required that the owner of a *landbrugsejendom* living on it alone, in fulfilling the requirement of inhabitants, must look after himself. Thus, householding cannot be tied to a neighboring property. By contrast, a bachelor living alone on his

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[171] See L. Nr. 241, 7/6 1952, Afsnit A; TOLSTRUP, LANDBRUGSEJENDOMME 149-60.

[172] These requirements are set out in Bkg. Nr. 544, 1949, § 1, stk. 6. Other requirements are found in Landbrugslov, Kapitel III. See also TOLSTRUP, LAEREBOG 153-54.

landbrugsejendom and doing his own cooking and cleaning without help, but who has all the farm work done by hired help, is within the legal requirements.[173]

4. *Subdivision (Udstykning) of Landbrugsejendomme*

The provisions for subdivision (*udstykning*) are found in various laws, including the *Landbrugslov*.[174]

One of the most significant provisions concerning such subdivision requires that on every *landbrugsejendom* there shall be preserved a main parcel (*hovedparcel*) of a certain minimum size, with normal farmstead buildings.[175] The size of this main parcel depends in part on the size and valuation of a *landbrugsejendom* at the time of its registration as a *landbrugsejendom,* and in part on its assessed valuation (*grundbelöb*) as determined under the provisions of a 1950 law.[176]

An unregistered *landbrugsejendom* is also subject to the main parcel provisions. If there is a division of an unregistered *landbrugsejendom,* the title transfer must be recorded to be valid. At this time a land inspector enters into the picture. If he determines the property to be a *landbrugsejendom,* it must be registered as such at the same time as the transfer is recorded.[177]

The main parcel minimum size is determined by dividing all *landbrugsejendomme* into four categories or classes, according to the scheme in the following table:

MINIMUM SIZE OF MAIN PARCELS OF LANDBRUGSEJENDOMME AS PROVIDED BY LAW IN DENMARK† - (Cont.)

Class	Relation between the area of property and its *hartkorn* quality	Minimum size of main parcel		
I	If 5 ha. G.M.* or less equals 1 Td. Htk.**	Minimum of 7 ha.	and	Either 2 Td. Htk. or 6 ha. Q.M.***

[173] U. 1944. 944; U. 1947. 204; U. 1953. 914.

[174] See L. Nr. 290, 31/3 1949, L. Nr. 291, Kapitel IV, 31/3 1949; L. Nr. 175, 7/6 1958. Consolidation (*sammenlaegning*) is allowed only where *fri jord* is available to add to a *landbrugsejendom.* Also, where the same owner owns up to three *landbrugsejendomme,* he may combine them so long as the total consolidated area does not exceed the following scale:

1. either 7 ha. G.M. (16.8 acres) and 19,000 Kroner ($2,714) in *grundbeløb,*
2. or 10 ha. G.M. (24 acres) and 15,000 Kroner ($2,142) in *grundbeløb,*
3. or 12 ha. G.M. (28.8 acres) and 14,000 Kroner ($2,000) in *grundbeløb,*
4. or 14 ha. G.M. (33.6 acres) and 12,000 Kroner ($1,714) in *grundbeløb.*

The consolidator also must obtain approval from the Parish Council and the State Land Settlement Committee.

[175] Landbrugslov § 19, stk. 1.

[176] L. Nr. 265, 27/5 1959, §§ 3-5.

[177] Landbrugslov § 4, stk. 1, and § 1, stk. 1.

MINIMUM SIZE OF MAIN PARCELS OF LANDBRUGSEJENDOMME AS PROVIDED BY LAW IN DENMARK†

II	If from 5 to 8 ha. G.M., incl., equals 1 Td. Htk.	Minimum of 10 ha.	and	Either 1½ Td. Htk. or 4½ ha. Q.M.
III	If from 8 to 14 ha. G.M., incl., equals 1 Td. Htk.	Minimum of 12 ha.	and	Either 1 Td. Htk. or 3 ha. Q.M.
IV	If over 14 ha. G.M., equals 1 Td. Htk.	Minimum of 14 ha.	and	Either ½ Td. Htk. or 2½ ha. Q.M.

* Ha. G.M. = Hectares geometric measure.
** Td. Htk. = *Tönde (r) hartkorn.*
*** Ha. Q.M. = Hectares quality measure.
† Source: TOLSTRUP, LANDBRUGSEJENDOMME 187 (1958).

In addition, if the *grundbelöb* of the property exceeds 32,000 Kroner ($4,571), for every full 1,000 Kroner ($228.50) excess, the minimum size of the main parcel is increased by five per cent to a maximum of four times the original minimum.[178] Thus, if a Class II property has a *grundbelöb* of 128,000 Kroner ($18,285) or more, its main parcel minimum will be 40 ha. G.M. with 6 Td. Htk. (18 ha. Q.M.).

Where soil-improvement practices are carried on, the *grundbelöb* is not the controlling factor. For example, a Class IV property with a *grundbelöb* of 64,000 Kroner must maintain a main parcel size of 28 ha. G.M. with 1 Td. Htk. or 5 ha. Q.M. However, if the property is improved to the point where a new quality measure shows the 28 ha. G.M. to have 14 ha. Q.M., it will be raised to Class II and can be further reduced to 20 ha. G.M. with 9 ha. Q.M.[179]

If an area from the main parcel is to be exchanged for another parcel simply to improve the arrangement of the land, this is permitted so long as the total area is not reduced below the 10,000 square meters minimum for *landbrugsejendomme.*[180]

Any area in excess of the main parcel minimum may be separated at the will of the owner thereof. The only limitation is that the land remaining, as much as possible, shall lie in a contiguous tract best suited for operation from the buildings situated thereon.[181]

If a subdivision separates the required buildings from the main parcel, a duty at once arises for the owner to erect the necessary buildings within two years to re-establish the area as a *landbrugsejendom.*

Deviation from the main parcel minimum size is allowed for any *landbrugsejendom,* with the permission of the Agricultural Ministry,

[178] Landbrugslov § 19, stk. 1.
[179] Examples are from TOLSTRUP, LANDBRUGSEJENDOMME 188-90.
[180] Landbrugslov § 19, stk. 4.
[181] Landbrugslov § 22.

under special circumstances.[182] These situations include the following:[183]

1. Separation is allowed where the property consists of scattered tracts, or it is disproportionately large in relation to the buildings.
2. Separation is permitted for public use, including gifts to the state or community, to private persons or charitable institutions for public use.

5. Limitations on Ownership of Landbrugsejendomme

There are three important absolute limitations on ownership of *landbrugsejendomme*. First, the state has a right of pre-emption to all *landbrugsejendomme* with an assessed valuation over 56,000 Kroner ($8,000), for use in establishing smallholdings.[184] The pre-emption right does not apply to transfers by gift or inheritance, or between spouses or near relatives.

Second, since 1949, it has been unlawful to acquire an additional *landbrugsejendom* if at least two are already owned; if one is already owned, only one more can be acquired; and if none is owned, only two can be acquired. This applies regardless of the manner of acquisition, whether by purchase, inheritance, or gift. In determining the properties owned by one person, *landbrugsejendomme* owned by a spouse or minor children are included. Furthermore, ownership by a parent company is considered as ownership by a subsidiary and vice versa. Ownership by a corporation and ownership by an individual owning a majority of the shares therein (also a partnership and majority partner) is considered as one ownership unit.[185]

There are exceptions to the limitation on the number of units that can be acquired: (1) if an owner of two *landbrugsejendomme* desires to acquire a third, he may be given permission to do so if, in return, he transfers an area to the state, which area must be at least one-fifth of the value and area of the newly acquired *landbrugsejendom* and must be suitable for parcelling; (2) if the acquisition is by way of inheritance or by way of a purchase within the immediate family circle[186] and the *landbrugsejendom* is not subject to the state pre-emption right (that is, does not exceed 56,000 Kroner assessed valuation), it may be acquired free of the limitation; (3) *landbrugsejendomme* existing in 1949, within those estates of more than two *landbrugsejendomme*, could be freed of the limitation for acquisition by inheritance or by purchase within the immediate family circle if, before

[182] Landbrugslov § 21.

[183] See TOLSTRUP, LANDBRUGSEJENDOMME 191-96.

[184] See Statshusmandslov § 8; TOLSTRUP, LAEREBOG 180.

[185] TOLSTRUP, LAEREBOG 186-88.

[186] Family members of relationship at least as close as children of brothers or sisters.

October 1, 1953, at least one-fifth of the land of the estate by value and area, according to its *grundbelöb,* was transferred to the state.

Improper acquisition is punishable by a fine, and although the state cannot force a sale of unlawfully acquired *landbrugsejendomme,* it can impose a periodic fine so long as the unlawful condition exists. Control is effected by way of the registration provisions.

Third, since 1957, foundations, associations, and other corporate bodies have been prohibited from acquiring *landbrugsejendomme* and agricultural land, except for experimental purposes, mining purposes, building development, and the like. In other words, the limitation applies only when the purpose of the acquisition is to carry on agricultural operations for profit or for investment. The Minister of Agriculture has wide discretionary powers in exempting particular cases from this limitation. It should be noted that this legislation does not prohibit the continuation of ownership of *landbrugsejendomme* owned at the time the law was adopted.[187]

Other legislation permits foundations and other corporate forms to exchange their *landbrugsejendomme* with the state for variable annual payments. This legislation is the first step of a policy aimed at counteracting the "dead hand" controlling agricultural land. In this, it is setting out on the path followed by other Danish agricultural law: first, a friendly suggestion without direct power, then gradually increasing the mandatory aspects of the law until the state is given full direct authority to bring about the desired ends.[188]

C. Effects of Landbrugsloven

The impact of public controls imposed by the *Landbrugslov* on agricultural landownership in Denmark is suggested by the following trends:

1. Distribution of farms by size, for the years 1946 and 1956, was as follows:[189]

	1946		1956	
	Number	Per Cent	Number	Per Cent
.5 — 10 has.	101,573	48.8	93,141	46.8
10 — 30 has.	80,136	38.5	81,125	40.8
30 — 60 has.	21,908	10.5	20,721	10.4
60 — 120 has.	3,534	1.7	3,238	1.6
120 has. and over	996	0.5	865	0.4

[187] Tolstrup, *Agricultural Landownership and Land Tenure in Denmark,* in Proceedings of First International Conference of the Institute of International and Comparative Agrarian Law 17 (Florence, Italy 1960).

[188] See TOLSTRUP, LAEREBOG 186-88.

[189] LANDBRUGSRAADET, APERCU DE L'AGRICULTRE DANOISE 2 (1959); DET LAND-

2. The number and percentage of owner-occupied and leased farm units, for specified years, were as follows:[190]

	Owner-Occupied		Leased	
	Number	Per Cent	Number	Per Cent
1885	170,000	97	5,000	3
1910	180,000	99	2,000	1
1946	190,000	91	18,000	9
1958	189,000	95	10,000	5

3. Farm income available (per owner-occupier family in 1957) for personal consumption and capital accumulation does not surpass that of an experienced hired farm worker until the farm unit operated exceeds fifty hectares in size. Only about two per cent of the Danish farms exceeded this size in 1957.[191]

The trends illustrated above suggest that the *Landbrugslov:*

1. has maintained the almost complete domination by the owner-occupier (*selveje*) tenure system in agricultural landownership, and

2. has held farm sizes virtually unchanged with only a slight decrease.

Whether these are favorable results is questionable. The limitations on income to owner-occupier farm families indicate that the limitations on increasing farm size have placed these families in an uneconomic position relative to other groups. Perhaps the inflexibilities injected by the *Landbrugslov* in the ability of agricultural landowners to adjust to changing agricultural technologies now outweigh its advantages.

IX. Land Consolidation (Concentracion Parcelaria) Legislation in Spain

A. The Concept of Consolidation

Consolidation of agricultural land is a means by which many countries are attempting to improve their agrarian structure[192] in order to meet certain economic and social goals. Because these goals, especially social goals, differ somewhat from country to country, the legal aspects of consolidation also differ. However, similarities, especially in eco-

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konomisk Driftsbureau, Regnskabsresultater Fra Danske Landbrug 1917-1947, at 9 (Det Danske Forlag 1949).

[190] 1 Kruse, Ejendomsretten 28, 189 (3d ed. 1951); authorities cited note 189 *supra.*

[191] Mann, Agricultural Landownership in Denmark and Great Britain 301 (unpublished dissertation, University of Cambridge, England 1961).

[192] "Agrarian structure" is a term here used to identify the legal and physical conditions of agriculture which contribute to its change, delineate its present characteristics, and contribute to the continuance of those characteristics.

nomic objectives, are sufficiently great to make it practical to analyze the land-consolidation legislation of one country to illustrate modern use of this public-control device within the time dimensions of this Article.[193]

The country which has been selected for this illustrative task is Spain. Spain was selected, not because it is the European country with the greatest experience or longest history of land consolidation;[194] rather, Spain was selected because its legislation is relatively recent and reflects a modern integrated approach of institutional economics.[195]

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[193] There are two generally recognized methods for carrying out land consolidation: the "statutory method" and the "voluntary method." The statutory method, authorized by mandatory legislation, allows a government agency to force the consolidation as its own activity. A fixed procedure is required for initiating the project and continuing to its conclusion. There are two prevalent types of initiation procedure: (1) a designated number or percentage of the landowners or operators in the area, often being required to own a specified percentage of the land area, request a consolidation (some countries allow this intiative to come from relevant farmers' organizations, local governmental units or specially constituted commissions), (2) the initiation power is placed in the hands of the agency responsible for executing the consolidation program, independent of any request from the farmers concerned.

The voluntary method leaves the entire initiation and execution of the consolidation to the persons affected. "Indicative legislation" specifies that the consolidation must conform to certain requirements and usually must be approved by some public agency. Often the public agency is required to provide technical and, sometimes, financial assistance, in the execution of the plan. See generally MORAL-LÓPEZ & JACOBY, PRINCIPLES OF LAND CONSOLIDATION LEGISLATION (1962). Both the statutory and voluntary methods are authorized in Spain. The specific procedures used there are discussed in a later section.

[194] Sweden, Norway, Denmark, France, and certain of the German states began developing laws of land consolidation as early as the eighteenth century. For a brief historical commentary, see GÓMEZ-JORDANA & FRANCISCO, PROBLEMAS JURIDICOS DE LA CONCENTRACIÓN PARCELARIA 9 (1962). In France, the first national law concerning land consolidation was the Chauveau Law of November 27, 1918. However, as early as 1705 there was a land-consolidation program in the Municipalidad of Rouvres, near Dijón. See SANZ JORQUE, LEGISLACIÓN Y PROCEDIMIENTO DE CONCENTRACIÓN PARCELARIA 6 (1963).

[195] This is not to say that there was not earlier thought given to the problem of land consolidation in Spain. Several earlier laws and legal dispositions indicated a recognition of the problem, but never were applied in practice. See Ley de 8 de Enero y 23 de Mayo de 1845; Real Decreto de 23 de Mayo de 1845; Leyes de 2 de Julio de 1849; 21 de Noviembre de 1855; 11 de Julio y 3 de Agosto de 1866; 7 Ley de 3 de Junio de 1868.

Real Decreto de 22 de Marzo de 1907 created a special commission "for the study of the subdivision of the territorial lands, its causes, conditions and effects, in its legal, social and economic aspects, as well as to propose remedies for the problems created by such excessive subdivision." On the same date, a *Real Orden* named such a commission, which presented a project of law (bill) in 1907 which was never enacted into law.

Furthermore, the Spanish legislation recognizes and attempts to deal with the problems of both fractionation and fragmentation.[196] The causes are often different for the occurrence of the two problems, and the legal means for correcting them often must be quite different in scope.

Causes of the extreme parcellation of agricultural lands in Spain can be attributed to one of the four following causes:

(a) Unavoidable division resulting from natural topographical conditions.
(b) Division resulting from nonagricultural human activities (such as roads, canals, railroads, etc.).
(c) Divisions which, at the time, were, from the agricultural point of view, rational and economic.
(d) Other divisions that were irrational when considered in connection with the characteristics, functions, and purposes of the property.

The latter class has as its main contributor in many European countries, including Spain, an historical base in the primitive communities requiring equal distribution of land among all mature males and heads

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Effective land-consolidation legislation in Spain dates from 1952, when a comprehensive law made it through the hurdles of studies and enactments under the unique "dictator-courts" system of the Franco Government. The Government proposed a project of law of land consolidation to the *Cortés Españolas*. This was unanimously approved by them in their session of December 18, 1952. This project of law had been developed in studies of the *Instituto de Estudios Agro-Sociales*, and was presented and defended by the Minister of Agriculture. The Chief of State, Francisco Franco, sanctioned the law on December 20, 1952, and it was published in the official state journal on December 23, 1952, thereby breathing life into its frame. Since then, the following significant amendments and additions to Spain's land-consolidation law have been enacted: Órdenes de 16 Febrero 1953 y 27 Mayo 1953, creating the Land Consolidation Service; Orden de 16 de Febrero 1953, establishing norms and procedures for consolidation; Decreto Ley de 5 de Marzo 1954, resolving certain practical problems that had arisen; Ley de 20 de Julio 1955, recodifying the Ley de 10 de Agosto de 1955; Decreto de 9 de Diciembre de 1955; Orden Conjunta de 14 de Marzo 1956 (now Orden Presidencial de 13 de Julio 1960); Orden de 28 de Mayo 1956; Orden de Reglamentación de 11 de Febrero de 1956; Orden de 3 Julio de 1956; Orden Conjunta de 20 de Julio 1956; Decreto de 26 de Julio 1956; Orden de Hacienda de 31 Marzo 1960; Orden conjunta de 27 de Julio 1957; Ley de 27 Diciembre 1956; Decreto de 10 Octubre 1958; Decreto de 16 de Julio 1959; Decreto Ley de 25 Febrero de 1960, recodifying Ley de 14 de Abril 1962; and finally the recodifying Law for the Concentration of Land Parcels of November 8, 1962, which replaces, in large part, the previous legal provisions on the subject.

[196] Fractionation and fragmentation refer to subdivided and dispersed parcels of land, respectively. In Spain, the equivalent terms are *minifundia* and *parcelamiento*, respectively. See SANZ JORQUE, *op. cit. supra* note 194, at 1. Fractionation is the division of land into small units unfit for efficient farming. Fragmentation is the excessive dispersion of parcels that form parts of a single farm.

of families. Under this system there was gradual cultivation of new lands until no more new lands were available. Thereafter, successive subdivisions of the available land, to maintain the equality, created a fragmentation problem. Furthermore, easier acquisition of small amounts of property, scarcity of jobs outside of agriculture, and political instability and devastations caused by wars and revolutions, induced the populace to obtain, hold, and work subsistence tracts of land as a place to live and as a source of food.[197]

Furthermore, the early system of inheritance in Spain, unlike that in Great Britain, Norway, and, to some extent, in Germany, down to the twentieth century, followed basically the inheritance provisions of the Napoleonic Code (as did other Latin countries). This provided for partition of the property equally among heirs of a given class. Not only did this system lead to subdivision in Spain but also to fragmentation.[198] Fields of different soil qualities were divided separately, often leaving each heir several separated tracts within the same inheritance. With time, fractionation and fragmentation have become severe problems.[199]

B. Specialized Consolidations

Land consolidation has come to mean the revamping of the entire agrarian structure in many countries and not just a regrouping of divided parcels.[200] Thus, other resources important to agricultural production and rural living must be considered. Development of irrigation works in relation to land consolidation, construction of canals, and allocation of fixed water supplies to consolidated parcels, are all provided for in various consolidation laws.

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[197] SANZ JORQUE, *op. cit. supra* note 194, at 2.

[198] See CODIGO CIVIL ESPANOL DE 1889, art. 1061.

[199] SANZ JORQUE, *op. cit. supra* note 194. In 1959 there were 54 million farms in Spain with a total area of 43 million hectares (1 acre equals .4 hectares). Of these farms, 48.71 million, or 91% of all Spanish farms, were less than one hectare in size. These small farms occupied only 15.61% of the total land in farms. Stated differently, of the 6 million agricultural landowners in Spain, 2 million own less than 1/2 hectare each and 3.12 million own less than 1 hectare each. Fifty-three million of the total farm parcels have a tax valuation of less than 1,000 pesetas (about $17). Of the 6 million landowners, 4.83 million have total assets with a tax valuation of less than 1,000 pesetas ($17) each. Note that if there are 54 million farms and 6 million agricultural landowners, there is an average of about 9 farm parcels per landowner. Looked at within the 1-hectare size, there are over 15 farm parcels for each landowner, illustrating not only the fractionation problem but also the extreme fragmentation problem.

[200] In Spain, since 1962, with the reorganization of the Ministry of Agriculture under the Decree of December 7, 1962, the term "ordenación rural" (rural reorganization), from article 60 of that decree, has been adopted as the generic term reflecting the scope of land-consolidation activities.

Because of the topography in mountain regions, land consolidation there is faced with unique problems. Swiss legislation, especially, has dealt with this problem, utilizing special subsidy schemes for land improvement and special inheritance and consolidation procedures to require boundaries to be strategically placed in relation to the topography.[201] Forest lands are quite often given special treatment in land-consolidation legislation. One unique application is the authorization, and sometimes the requirement, for creation of private forest associations which operate and control the cutting of several properties treated as a whole.[202]

The question of consolidation of cultivation rights or consolidation of various plots cultivated by one person, not the owner, into a single plot for cultivation purposes, also is a unique problem.[203] Sometimes such plots even may belong to different owners. Further, it is possible that tenancy relations may be altered, shifting tenants to new owners if this is necessary to carry out the consolidation in a rational manner.[204]

C. Economic and Social Implications of Consolidation

The ultimate objective of land consolidation is to improve conditions for agricultural production and to improve the rural standard of living.[205] The process is a coordinated effort, through the utilization of public controls on landownership, to slow the trend of immigration of the most able youth out of agriculture in search of opportunities superior to those offered by fractionated and fragmented farm units and to integrate agriculture into national economic development by reorganizing production conditions and improving living standards. The desire to place farmers on an equal footing with industrial laborers is quite often a primary motivating factor, especially in industrialized countries.[206]

There is basic justification often given for realizing economic and social objectives of land consolidation through positive governmental

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[201] See, *e.g.*, Swiss Agriculture Act of 1951, arts. 91, 94, 102, 621.

[202] See, *e.g.*, Danish Skovlov, L. Nr. 164, 11/5 1935 om skove med Tilleg: L. Nr. 497, 1/12 1949, which provides for such associations.

[203] See Section IX. *infra* for a discussion of the Spanish law with regard to tenant rights.

[204] Belgian Act of 1956 for Consolidation of Rural Estates, art. 29. Article 28 of the draft bill, which was never enacted into law, stipulated that tenancy relations could be modified to carry out consolidation of cultivation rights. See MORAL-LÓPEZ & JACOBY, *op. cit. supra* note 193, at 115.

[205] *Ibid.*

[206] Spain has generally developed its legal theory of land consolidation on the basis of the concept of the agricultural business as a family operation providing the family with a standard of living equal to that of families earning a living from industry. For an interesting theoretical discussion of these "juridical concepts" in Spain, see MARCIAL, LA AGRICULTURA ESPANOLA EN SUS ASPECTOS JURIDICOS 25-54.

activities which constitute an exercise of public control on landownership. The natural adjustment process is not able to bring about the changes sufficiently rapidly to relieve large numbers of the rural population from disadvantages of low labor productivity and resultant relative conditions of poverty in which they live. Furthermore, the effect of this low labor productivity and inefficient use of the land, as well as other factors of agricultural production, is an economic disadvantage to the entire nation.

The point of view is that these adjustments normally would take place in the ordinary competitive relationship between all economic activities. This includes the competition between agriculture and industry in attracting capital and labor. This normal adjustment does not take place because of the rigidities injected by the legal system, which fixes the agrarian structure through laws of ownership, inheritance, contract, and the like (considering, also, the limitations on such adjustments imposed by folkways and mores).

Thus, if the legal system creates these rigidities which impede the adjustment process (mainly to provide security factors in the control and use of resources in economic activity), it must be called upon to provide the tools for speeding up the adjustment process. These include the public controls of landownership used in land-consolidation legislation. Equally important, of course, is the role of such public controls to induce tradition (folkways and mores) to give way to the needs of economic progress, hopefully in a manner consistent with the social goals of the community affected.[207]

The economic and social implications generally accepted as being involved in land consolidation have been summarized succinctly as follows:

> The continuous need for directing economic and social progress and for regulating the process of adjustment to technical advances and demographic development asks for a comprehensive program of land consolidation in order to avoid friction and the unnecessary loss of human and material values, which is so closely associated with the way of economic and social development.[208]

D. Consolidation Procedure Under Spanish Law[209]

The land-consolidation law of Spain does not expressly set out any

[207] See MORAL-LÓPEZ & JACOBY, *op. cit. supra* note 193, at 114-15. See Section III. B. *supra* for a discussion of the role of economics and sociology in the development of public controls.

[208] MORAL-LÓPEZ & JACOBY, *op. cit. supra* note 193, at 126. Evaluation of consolidations is an effective indicator of their economic and social utility. General results in Europe show increased production, more efficient utilization of agricultural labor, increased net returns to labor and capital, and a more satisfied and contented rural population. See *id.* at 124-26 for specific data.

[209] As stated earlier, the basic legislation of land consolidation in Spain is the Law for the Concentration of Land Parcels, Texto Refundido de 8 de Noviembre

basic policy statement of legislative necessity for its enactment.[210] The closest thing to a statement of policy is found in Article 1 of the General Disposition of Title 1, which specifies: "In the zones where the subdivision of rural properties shows extreme characteristics of serious proportions, there shall be carried out . . . land consolidation for reasons of public utility. . . ."[211] Government officials have asserted the conformity of the land-consolidation law with modern doctrine of the Roman Catholic Church with regard to fundamental principles of the "New State."[212]

Under Spanish law, public utility of land consolidation is a question for the Council of Ministers to determine in the final instance, independent of the desires of the landowners involved, and even contrary to their express desires.[213]

The economic objectives of the law are expressly stated:

1. To assign to each landowner, within a single parcel, or if that is not possible, in a reduced number of parcels, an equivalent area, considering soil type and crops, to the area he originally held.[214]

2. To enlarge the area of small parcels that cannot be economically farmed.[215]

3. To arrange the property units in accord with the agricultural and

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de 1962 (approved by Decreto Presidencial 2799 (1962)) [hereinafter cited as C.P. 1962]. This law is a recodification and coordination of earlier laws. All other earlier laws directly related to consolidation were expressly repealed excepting the Orden Conjunta de Agricultura y Justicia de 22 de Noviembre 1952, and, excepting, where applicable to consolidation, those projects in process on or before May 6, 1961. Also, orders or regulations not having the rank of law and not having been expressly repealed, remain in effect when they are not in conflict with this law and are complementary to it. See Disposiciones Finales, Segunda, de la Ley de 8 de Noviembre de 1962. See also SANZ JORQUE, *op. cit. supra* note 194, at 15-16.

[210] This is in large part because of the constitutional nature of the Spanish government. So long as the correct procedures of the law are followed in adopting a law, there is no problem of justifying necessity to the courts. See Ley Fundamental de 17 de Mayo de 1958.

[211] C.P. 1962, art. 1.

[212] See SANZ JORQUE, *op. cit. supra* note 194, at 17, referring to the Encyclical "Mater et Magistra," chapter one, part III, which discusses "New Aspects of the Social Question," and referring also to the Encyclical "Pacem in Terris," published in 1963.

[213] C.P. 1962, arts. 1, 5, 10, 77.

[214] C.P. 1962, art. 2(a).

[215] C.P. 1962, art 2(c). For implementing this objective, the law fixes two farm sizes: indivisible "minimum cultivation units" and "typical family farm units," also indivisible. C.P. 1962, art. 27. These are to be fixed for each zone. The minimum unit generally runs from three to four hectares for dry farming land and .25 hectares for irrigated land. The typical farm varies considerably, being intended to include an area sufficient to cultivate economically, using modern technology. See SANZ JORQUE, *op. cit. supra* note 194, at 20.

natural characteristics of the zone, consistent with modern technical requirements, considering access and arrangement of fields in relation to the farmstead, providing or abolishing rights of way, easements, and the like, in a manner consistent with the consolidation.[216]

4. To execute all agricultural improvement works approved by the Ministry of Agriculture, including those necessary to carry out the consolidation, those that will be useful in executing the consolidation and those that will benefit individual farmers, independently of whether or not there is a benefit to the consolidation program.[217]

From a legal point of view the objectives are:

1. To create new ownership units (replacement units) by substitution of title to new lands in exchange for titles to old lands, extinguishing, creating, modifying, or transferring any property rights that may exist, if necessary to carry out the economic objectives.[218]

2. To formalize the new consolidation pattern by vesting legal titles and registering the changes as required for validation and cadastral purposes.[219]

3. To subject the property to special restrictions against transfer or divisions that would not be consistent with the purposes of the consolidation.[220]

The social objectives can be stated as:

1. To determine the size of minimum units and typical farms, consistent with the minimum amount necessary to provide adequately for the family and allow it to live in a "dignified" manner.[221]

2. To make the operator the owner of the land.[222]

3. To free agricultural land of burdensome debts by providing adequate credit.[223]

4. To develop cooperative farming through financial and technical aid.[224]

5. To provide family gardens for farm workers.[225]

6. To carry out improvement works and introduce improved methods of farming for purposes of raising the standard of living.[226]

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[216] C.P. 1962, arts. 2(C)-(E), 29, 65.

[217] C.P. 1962, arts. 84-90. These are discussed in more detail later.

[218] C.P. 1962, arts. 29, 31, 65.

[219] C.P. 1962, arts. 56, 70, 71, 72.

[220] C.P. 1962, arts. 73-76.

[221] C.P. 1962, arts. 10, 27, 28, 36, 38, 39. See also Ley de 14 de Abril de 1962, concerning family-type farms (see Decreto 2799 (1962)).

[222] C.P. 1962, arts. 35, 83.

[223] C.P. 1962, art. 81.

[224] C.P. 1962, arts. 81, 34.

[225] C.P. 1962, art. 40.

[226] C.P. 1962, arts. 84-91.

7. To assist certain agricultural areas to become integrated into the national economy by defraying various costs of the consolidation programs with state funds, and by exoneration of smaller consolidated tracts from various taxes.[227]

1. Administrative Organization

There are, basically, three public agencies or organisms involved in the administration of the Spanish land-consolidation law and the execution of projects under the law. These are: (1) the National Rural Land Consolidation and Reorganization Service (hereafter called the "Consolidation Service"), (2) the Central Land Consolidation Commission" (hereafter called the Central Commission), and (3) the local commissions.[228] In addition to these three organisms, the Ministry of Agriculture and the Council of Ministers have various duties to perform under the law.[229]

The Consolidation Service is an agency of the Ministry of Agriculture but operates as a distinct legal entity. It has the duty of planning and executing land-consolidation projects throughout the country, including the execution of all related improvement works and any other rural reorganization under the law.[230]

The Central Commission is the only, and the highest, administrative appeals tribunal before which interested persons can bring their claims and complaints. If an interested party is dissatisfied with the treatment he receives at the hands of the Consolidation Service, he may appeal to the Central Commission. The decision of the Central Commission is final, except for the disapproval power of the Minister of Agriculture. The Central Commission is made up of various public servants and two representatives of private agricultural associations.[231]

A local commission is created for each consolidation project. It is composed of the judge of the Court of First Instance for the county *(Término Municipio)* in which the project is located, as president; a delegate of the Consolidation Service, the county recorder *(registrador de la propiedad)*, the local notary,[232] an engineer from the Consolidation Service, the county "mayor" *(alcalde)*; the head of the local

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227 C.P. 1962, art. 77.

228 C.P. 1962, art. 3.

229 These will be pointed out specifically where appropriate.

230 C.P. 1962, art. 5.

231 C.P. 1962, art. 4. Only very few matters are required to be reviewed or approved by the Council of Ministers. C.P. 1962, art. 1, for example. Nowhere is judicial review provided for with respect to action of the public agencies.

232 Notaries in Spain are lawyers who are licensed to carry out official legal business related to the state, such as granting land titles, and setting up corporations.

Syndicated Brotherhood of Agriculturalists, and two landowners and one renter elected by the local Syndicated Brotherhood of Agriculturalists.

The local commission, with the advice of the Consolidation Service, has the exclusive duty to determine the bases for consolidation with regard to classification of land and coefficients of compensation. It determines the owner of each parcel, the area in each parcel, and all mortgages, easements, or liens affecting each parcel.[233] When the local commission has finished its job, it is dissolved, and any later duties that may arise within its functions are handled by the Consolidation Service.[234]

2. Preliminary Phase

There are three steps in the preliminary phase to bring a land-consolidation project to the stage of actually being ready to plan the consolidation.

The first step is that of promotion of the project or initiation of the proposal for a project. The law has both a statutory and a voluntary procedure for this step. The statutory procedure can be accomplished in any one of the following ways:

1. By petition of:
   a. a majority of the landowners,
   b. those landowners owning more than three-fourths of the area to be consolidated, or
   c. those landowners owning at least fifty per cent of the land area to be consolidated, provided they agree to operate the land collectively.

Any such petition must be accompanied by a report of the county "mayor" or the head of the local Syndicated Brotherhood of Agriculturalists, confirming the validity of the facts stated in the petition.[235]

2. By action of the Ministry of Agriculture:
   a. on its own order, when the fragmentation in a particular zone is considered to be so serious as to make consolidation necessary or exceedingly advantageous, or
   b. when the Consolidation Service is requested to carry out a consolidation by the appropriate assessor (*catastro*), county government (*ayuntameinto*), Syndicated Brotherhood of Agriculturalists, or Official Chamber of Syndicated Agriculturalists.[236]

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[233] C.P. 1962, arts. 6, 13.

[234] C.P. 1962, art. 7.

[235] C.P. 1962, art. 8.

[236] C.P. 1962, art. 9.

Private or voluntary consolidations may be carried out upon petition by at least three persons.[237]

The second step of the preliminary phase is a preliminary study and report by the Consolidation Service, to determine if there is, in fact, an economic and social need justifying a land-consolidation project.[238] In the case of a petition in the first step, the Consolidation Service must carry out a preliminary study only when it considers it necessary to corroborate the petition.[239]

The third step of the preliminary phase consists of a decree referred by the Minister of Agriculture and approved by the Council of Ministers. This decree is the administrative act which initiates consolidation activity in each zone.[240] The decree includes, among other things, the preliminary boundaries of the zone and authorizes the consolidation service to take whatever action is necessary, within the law, to carry out the consolidation.[241]

3. Pre-Plan Phase

With the approval of the decree, the Consolidation Service has the duty to create the local commission,[242] and the landowners must thereafter respect the rules and orders of the Consolidation Service. They must properly maintain the land subject to consolidation, cultivating it according to the rules of good husbandry.[243] Further, they are required to present all documents and titles related to the land and declare all known mortgages, easements, and liens on the land.[244]

The fundamental element of the pre-planning phase is the establishment of the bases for the consolidation. These include:

1. The boundaries of the zone to be consolidated.
2. Soil classification and determination of coefficients of compensation.
3. A declaration specifying the existing owner of each parcel, the area in each parcel, and the soil classification of all lands.
4. A declaration of mortgages, liens, and other legal claims related to each parcel.[245]

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[237] C.P. 1962, art. 82. Such consolidations can affect only those who voluntarily agree to the consolidation plan. Furthermore, the plan must comply with norms established by the Consolidation Service. *Ibid.*

[238] C.P. 1962, arts. 1, 9, 10.

[239] C.P. 1962, art. 8.

[240] C.P. 1962, art. 10. This is true only if the report of the Consolidation Service recommends consolidation. If it does not, the Service's report ends the matter.

[241] C.P. 1962, art. 10(B)-(C).

[242] C.P. 1962, art. 8.

[243] C.P. 1962, art. 59.

[244] C.P. 1962, art. 20.

[245] C.P. 1962, art. 13.

Various lands are excluded by law from the boundaries of the consolidation zone. These include public domain, property of the community or local government, and areas that cannot be benefited by a consolidation.[246]

Classification of soils and valuation are technical operations with but few guides in the law. Soil classification is to be according to its productivity and tillage, and a relative value is to be assigned to each soil class for purposes of determining compensation payments, if these become necessary.[247] From the values and the soil classes, coefficients of compensation are calculated for purposes of determining equivalent areas to be exchanged when one soil class must be surrendered and another soil class is received.[248]

The studies and investigations necessary for determining the bases are carried out by the Consolidation Service.[249] Once this work is completed, provisional bases are published for three days in the *Tablón de Anuncios* (public notices board) of the county. The public has thirty days thereafter to make comments or raise objections.[250]

Objections may be raised orally or in writing. Those who claim a property interest in land contrary to that shown in the provisional bases must bring documents to support their claim. The local commission listens to all claims and decides whether to alter the provisional bases.[251]

After the expiration of the thirty-day hearing period, the local commission makes whatever alterations of the provisional bases it considers necessary and approves the bases.[252] Thereafter, the approved bases are published once in the *Boletín Oficial de la Provincia* (Official Bulletin of the Province), for three days in the *Tablón de Anuncios* of the county, and in the local village or town "public notices board" for the same three days.[253]

Within thirty days after the last official notice, persons with a direct interest claim[254] not recognized in the approved base may appeal their

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[246] C.P. 1962, arts. 14-19.

[247] C.P. 1962, art. 26.

[248] C.P. 1962, art. 13.

[249] C.P. 1962, art. 11.

[250] C.P. 1962, arts. 12, 43. In the public interest, the Minister of Agriculture is authorized to reduce the time period involved. See art. 3 of Decreto de 16 de Julio de 1959. In one case, at least, the Minister has exercised this privilege, reducing the time period to fifteen days for the Coruña project.

[251] Orden Conjunta de 22 de Noviembre de 1954, arts. 20-23.

[252] C.P. 1962, art. 6. The local commission's power of alteration does not extend to the boundaries of the consolidation zone, which are approved by the Consolidation Service. C.P. 1962, arts. 14-19.

[253] C.P. 1962, art. 44.

[254] C.P. 1962, art. 49.

claim to the Central Commission.[255] Within fifteen days after notification of the determination of the Central Commission, the claimant may present his claim to the Ministry of Agriculture for review by the Minister. During this fifteen-day period, the proceedings must be made available to any claimants.[256]

If appeals are rejected at the Central Commission and Ministerial levels or if there is no action taken within three months after presentation of the claim,[257] the bases are considered as fixed and can be attacked neither directly nor collaterally, neither administratively nor judicially.[258]

4. The Consolidation Plan

The first step in developing the consolidation plan is to propose a reorganization of the farm units.[259] To do this, a basic decision must be made concerning the minimum sizes of the agricultural units. This includes both the minimum cultivation unit and the typical family farm unit referred to earlier in the discussion. These minimum units are proposed to the Ministry of Agriculture for final approval by the Consolidation Service, basing such sizes on the following elements:

1. The minimum cultivation unit shall be:
   a. If dry-farming land, an area sufficient that basic tillage, utilizing normal methods of production, can provide a satisfactory return.
   b. If irrigated land, an area determined to be sufficient for a family truck garden or orchard (smallholding).
   c. If land with adequate natural rainfall, an area equal to that determined for irrigated land.
2. The typical family farm unit shall include an area sufficient for agricultural production, utilizing modern production methods, considering the characteristics of each zone.[260]

Both types of units are indivisible in perpetuity. Every family re-

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[255] C.P. 1962, arts. 44, 47.

[256] C.P. 1962, art. 47.

[257] C.P. 1962, art. 51.

[258] C.P. 1962, art. 47. For administrative appeals, the procedure set forth in administrative procedure legislation (Ley de Procedimiento Administrativo de 17 de Julio de 1958) is to be followed. C.P. 1962, art. 46. Actions at law between individuals concerning rights in lands involved in the consolidation project do not affect the consolidation procedures. C.P. 1962, art. 63. The Consolidation Service may alter its bases or not, as it sees fit, in order to recognize an independent judicial or administrative decision communicated to it. C.P. 1962, art. 64. There is a special administrative procedure for presenting claims of substantial material error, such as error in mathematical calculations. C.P. 1962 art. 52.

[259] C.P. 1962, titulo III, capitulo III.

[260] C.P. 1962, art. 27.

ceiving land must receive at least a minimum cultivation unit. Only those who request a typical family unit will receive such.[261] If a person who has contributed more land than that in the typical family unit asks to have his area divided into more than one typical family unit, he will be exonerated from a special tax imposed by the law.[262] In case there is insufficient land to form typical family units for all applicants, those who did not contribute an equivalent amount of land will be excluded first.[263]

At once it can be seen that the problem of having sufficient land to "go around" becomes the limiting factor. There are various ways in which the Consolidation Service can obtain sufficient land to execute the consolidation plan. Perhaps the most important way is by carrying out irrigation improvements on formerly dry-farmed land.[264] In this way, the land equivalent in dry-farmed land contributed by an owner is much greater in area than the irrigated land equivalent which he receives. For obtaining land physically needed for carrying out improvement works, such as for new roads, irrigation canals, and so forth, the Consolidation Service can expropriate up to three per cent of the area of any contribution which exceeds a typical family unit. This is accomplished by distributing up to three per cent less of equivalent land area to the affected owner and paying the difference in cash.[265]

The Consolidation Service may buy land voluntarily offered for sale by its owner;[266] it may expropriate land that is rented, distributing the area of a typical family unit to the renter, with any excess being available for distribution elsewhere;[267] it may expropriate landed estates, if the social circumstances of the zone justify it and if the Council of Ministers has approved such expropriation in its decree initiating the consolidation project.

When a serious social problem exists in an area due to excessive fragmentation of the land, the entire area can be expropriated and redistributed. The only limitation is that a direct cultivator of land must receive land equivalent to that originally expropriated which he was so cultivating.[268]

Once the minimum cultivation unit and the typical family unit sizes are fixed, the Consolidation Service proceeds with the development of

[261] C.P. 1962, arts. 27, 28.

[262] C.P. 1962, art. 80. This tax is discussed later.

[263] C.P. 1962, art. 28.

[264] C.P. 1962, art. 87.

[265] C.P. 1962, art. 32.

[266] Certain limits as to price are imposed. C.P. 1962, art. 36.

[267] C.P. 1962, arts. 36 & 10(C). The National Colonization Service may also contribute any lands it may have available in the area. C.P. 1962, arts. 36, 37.

[268] C.P. 1962, art. 83.

the concentration plan. When completed, it is published as a proposed plan of consolidation, according to the procedure for publishing the provisional bases, as discussed earlier.[269] The proposal also includes the proposed transfer of mortgages, liens, and other legal claims, excepting easements, the latter's being re-established as the reorganization may acquire.[270]

During the hearing period, the landowners may request specific areas they desire in the exchange.[271] Furthermore, any group of owners who propose to form a cooperative can request that their parcels be placed together.[272] The Consolidation Service will consider these requests only when they can be accommodated without prejudice to the over-all proposed plan.[273]

With the conclusion of the hearings, the Consolidation Service makes whatever adjustments it considers necessary or advisable, based on the results of the hearing, and again publishes the plan as a finalized plan (*acuerdo*).[274] With the completion of publication, and after all appeals are dealt with, the plan is final.

5. *Execution and Control*

Once the consolidation plan is final, possession of new parcels is turned over to the new owners. Those who refuse to give up possession of contributed land which is not included in their new allocation can be forcibly ejected.[275] Within thirty days after new parcels are made available to their new owners, such owners can present claims if the area of their new parcel is more than two per cent less than that provided for in their title or in the consolidation plan. The Consolidation Service determines the validity of the claim and may rectify by granting additional land or by paying its value in cash.[276] Thereafter, titles are granted and inscribed in the *Registro de la Propiedad* (recorder's office) as well as in the *Catastro de Propiedad Rustica* (cadastral of rural lands).[277]

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[269] C.P. 1962, art. 29.

[270] C.P. 1962, art. 30.

[271] C.P. 1962, art. 33.

[272] C.P. 1962, art. 34.

[273] C.P. 1962, arts. 33, 34.

[274] C.P. 1962, art. 31.

[275] C.P. 1962, arts. 53, 54. Provisional possession can be given whenever less than 4% of the landowners have outstanding appeals not yet decided. Only after all appeals have been determined can final possession be given. See C.P. 1962, art. 53.

[276] C.P. 1962, art. 55.

[277] C.P. 1962, arts. 56-58, 69-71; tenants' rights, mortgages, real estate liens, or other incorporeal claims existing against a landowner, are transferred to his new parcel and are also inscribed in the *Registro de la Propiedad*. See C.P. 1962, arts. 65, 66, 70.

Land interests of unknown owners are subject to a five-year statute of limitations, after which such rights are granted to the county for the formation of cooperatives or for creating family gardens for agricultural workers.[278] The same is true of any excess land remaining available after each landowner has been provided for under the law.[279]

During the period of the planning and execution of the consolidation project, the owners and other interested parties must abide by the dispositions of the Consolidation Service, which has authority to impose fines from 100 to 500 pesetas ($1.70 to $8). Furthermore, during the planning and execution phases, the owners and operators are obligated to conserve and maintain land and buildings under their control. They cannot destroy or make alterations of any improvements that reduce the value of the property. In case they do, they are subject to a fine in the amount of twice the reduction in value which the property suffers.[280] Renters and sharecroppers may rescind their contracts without liability for breach of contract if they elect not to transfer their right to the new parcel of their landlord, as otherwise is required by the law. [281]

6. *Preservation of the Economic Advantage*

The minimum cultivation unit and the typical family unit are both indivisible ownership units.[282] Larger units can be divided in ownership only when such division does not create an ownership unit of less than the minimum ownership unit.[283] Control is effected by holding all other attempted transfers to be null and void, both with regard to the parties and with regard to third persons. An attempted land transfer within a consolidation zone cannot be registered without a certificate of approval from the Consolidation Service. In addition, in cases of attempted transfers by private document, the tax office will not recognize any change in ownership.[284] The Consolidation Service has the right to obtain a judicial declaration of nullity with regard to any contracts or attempted transfers contrary to the in-

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[278] C.P. 1962, art. 39.

[279] C.P. 1962, art. 40.

[280] C.P. 1962, art. 59. Any person who destroys, causes the deterioration of, or makes bad use of any improvement works included in the plan is subject to fines from 500 to 5,000 pesetas ($8 to $80).

[281] C.P. 1962, arts. 65, 66.

[282] C.P. 1962, arts. 27, 72.

[283] *Ibid.* If the purchaser of a smaller unit is at the same time acquiring an adjoining tract, which, taken together, exceed the size of the minimum cultivation unit, the division of ownership is permissible. Exceptions to the division of typical family units are possible with the approval of the Council of Ministers, on recommendation of the Minister of Agriculture. *Ibid.*

[284] C.P. 1962, arts. 73, 74.

divisibility rule.[285] The indivisibility rule applies equally to transfers inter vivos and causa mortis. The civil code provides procedures for transferring inheritances to one person where the property otherwise would be divided among various heirs. The receiving heir must pay cash compensation to the other heirs.[286]

7. *Tax and Financing Aspects*

All transactions related to the consolidation project are exempted from all transfer and stamp taxes, up to a maximum value for each transaction of 40,000 pesetas ($600).[287] Furthermore, the assessment rate for the properties in the area cannot be altered for a period of twenty years. However, there is a five per cent special increase in the property tax on consolidated properties,[288] excepting those lands included in typical family units.[289]

The costs of the consolidation operation are paid by the state,[290] including notarial and recording costs and fees.[291] With regard to payment for improvement works, the law divides such works into three groups or classes as follows:

1. Works necessary for carrying out the consolidation, such as new roads, drainage ditches, culverts, etc.

2. Agriculturally beneficial improvements motivated by the consolidation, such as irrigation works, storage facilities, electrical supply, livestock shelters, etc.

3. Improvements of direct value only to an individual farm or farms, such as farmstead improvements or permanent improvements on new parcels.[292]

The costs of the first type of improvements are paid wholly by the state, and the costs of the third type, wholly by the landowner.[293] The costs of the second type are prorated between the state and the landowners benefited, according to benefits received, but with a maximum payment of forty per cent by the state.[294] The balance is paid initially

[285] C.P. 1962, art. 76.

[286] See CODIGO CIVIL ESPANOL, arts. 1056, 1062. There are various other laws with the goal of preserving the unity of farm properties. See, for example, Act of July 15, 1952, regulating family estates in colonization areas.

[287] C.P. 1962, Disposiciones Finales, Primera. Certain acts and transfers necessary in order to carry out the consolidation are exempted from such fees and taxes, regardless of the value of the property. C.P. 1962, art. 79.

[288] C.P. 1962, art. 80.

[289] C.P. 1962, art. 28.

[290] C.P. 1962, art. 77.

[291] C.P. 1962, art. 78.

[292] C.P. 1962, art. 84.

[293] There are certain exceptions to this rule, which are allowed when considered by the Consolidation Service to be of special interest.

[294] C.P. 1962, art. 85.

by the state but must be repaid by the landowners benefited, over a twenty-year period at an interest rate of four per cent.[295]

The *Banco de Crédito Agrícola* (Agricultural Credit Bank), a state bank, is expressly charged with the duty to provide credit to the participants in the consolidation who do not have sufficient land to form a minimum cultivation unit, or a typical family unit, if they request it. Such credit is to be used to buy the additional land necessary to form such a unit. Further, the Bank is to provide credit for amalgamating debts against consolidated land, to pay amounts owed to the Ministry of Agriculture, and for other purposes related directly to the consolidation program.[296] The Bank and the Consolidation Service are to collaborate in providing economic and technical assistance for encouraging and developing collective farming operations by cooperatives, farmers associations, and the like.[297]

E. Results of Land Consolidation Activities in Spain

Noteworthy is the extent to which land-consolidation legislation has been applied in Spain. In the ten-year period from 1953 through 1962 there were:

1. 433,535 hectares consolidated.
2. 74,789 landowners involved in consolidations.
3. 1,105,034 separate parcels consolidated.
4. 143,706 reorganized farm units resulting from consolidations.

The average number of parcels per owner before the consolidations was 14.08. After the consolidations, each landowner owned an average of 1.09 farms. The average size of parcels before consolidation was .4 hectares, and the average size of the new farm units after consolidation was 3 hectares. The total operations extended over 1,338 villages, 2,052,400 hectares and 31 provinces.[298]

X. Implications of the European Trend for the United States

As discussed earlier in this Article, Europe generally leads the United States in the use of public-controls legislation affecting agricultural landownership. Several reasons for this have been discussed. An inquiry into the implications for the United States of this European trend requires comparisons of the conditions that prompt such controls. The gap between existing structural conditions in agriculture and the national economic and social goals for agriculture also must be compared, as well as factors contributing to the gap. Further-

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[295] *Ibid.*

[296] C.P. 1962, art. 81.

[297] *Ibid.*

[298] Sanchis, La Ordenacion Rural en Espana 36, 37.

more, the alternatives available to the United States for closing the gap must be considered as compared to the alternatives available in Europe.

Finally, the question of how aggravated are the conditions creating the gap is important. For example, one per cent of the farm units in a particular country may be too small to be operated efficiently utilizing the methods and tools of modern technology. In another country, the number of inefficient farms may constitute ninety-five per cent of the total. Obviously, the condition is not as serious in the first country as in the second. It is equally apparent that the same degree of public control or the same types of specific control devices are not necessarily satisfactory to both countries in realizing the desired adjustment.

An adequate inquiry, as outlined above, is a considerable undertaking in itself. It is a subject for separate treatment outside the limits of this Article. Nevertheless, certain general hypotheses can be suggested. United States agriculture has suffered from less economic disorganizations than has European agriculture. In general, it has been more prosperous than European agriculture. The percentage of farms too small for efficient use of modern technology generally is lower than in Europe. The "family farm" ideal held dear by many has continued to dominate the American scene, and there is no foreseeable danger of its general disappearance. Redundant labor has been able to move out of agriculture and find jobs in industry with relatively greater ease in America than in Europe. On the other hand, United States agriculture has been chronically out of phase with other sectors of the economy for several decades in terms of per capita income and, perhaps, in terms of distribution of income within the sector. Farm "slum areas" do exist. There are areas of the country with chronic conditions of undersized farms. On the other hand, observers in some western states are becoming concerned about the recent increased growth rate of big corporation agriculture.

The very high capital requirements for owner-operators has increased the number of tenant-operated farms in some areas. The relatively poor bargaining position of the tenant often results in rental relationships that do not provide a fair share of the farm income to the tenant. Aggravated by the resulting uneconomic conditions, rented land often is not properly maintained and may be undercapitalized as compared to owner-operator units. The result is that the landlord-tenant sector of agriculture in some areas is economically out of phase with the owner-operator sector. Similar conditions of undercapitalization exist on many small farms operated by the owners of the land.

Reference must also be made to the somewhat unique and continually chronic farm commodity surplus problem in the United States. Europe has not generally been concerned with this problem, although the related problem of stabilizing prices and markets has received considerable attention. Past public-controls legislation in the United States has focused primarily upon conservation of soil and water resources, and on maintenance of economic stability in agriculture in the face of chronic surpluses of certain agricultural commodities. As these conditions tend to become stabilized, more attention will undoubtedly be given to the less aggravated, but, nevertheless, significant, gaps between national economic and social goals and the conditions of the existing agricultural structure as described above.

Certain of the gaps in United States agriculture are precipitated by causes similar to those in the various European countries discussed. Undoubtedly, the United States, and especially various states, will experiment with public-control devices that have been found satisfactory in Europe.[299] The purposes of public-controls legislation are valid for the various regions of the United States, especially with regard to (1) agricultural tenancies, (2) economic size of farms, (3) preservation of the dominance of the owner-operator family farm, and (4) absolute limitation of big corporation agriculture.

Iowa law, as an example, does little to provide economic security to the agricultural tenant.[300] Yet, a significant number of Iowa's farmers are renters. Perhaps England's landlord-tenant legislation offers some helpful experience in the use of public-control devices in this area. California law does little to restrict big corporation agriculture. Yet, the rapid growth of big corporation agriculture is cause for concern to the advocates of the preservation of family-type farms. Perhaps Denmark's agricultural properties law legislation offers some possibilities for public-control devices that could stabilize or reverse the trend.[301] Midwestern, southern, and eastern states all have pockets of agricultural "slums." Many farm units are undercapitalized and too small for efficient operation. Yet, these states have little public-controls legislation to deal with the problem. Spain's land con-

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[299] Note in this connection the observation of Holmes: "The life of the law has not been logic: it has been experience. . . ." HOLMES, THE COMMON LAW 1 (1881).

[300] See IOWA CODE ch. 562 (1962).

[301] Note the Kansas law, for example, which for many years has limited the right of corporations to own certain types of farms. This law does not distinguish between big corporation agriculture and family-size incorporated farms. Some would argue that to prohibit the latter is to seriously limit the ability of a family to satisfactorily finance its farm operation. This illustrates the need for careful study of the effects of public controls on agricultural landownership. See KAN. GEN. STAT. ANN. §§ 17-202a, -2701 (1949).

solidation legislation includes various public-control devices that might provide useful insights in attacking this problem.

Finally, the experiences of the European countries in the use of public-control devices affecting agricultural landownership contain valuable lessons for the United States in another sense. Their experiences show unexpected results, as well as anticipated results, from the use of public controls affecting agriculture. Such unexpected results reflect certain aspects of over-control. Certain examples were briefly mentioned in the earlier discussion of the English landlord-tenant law and the Danish agricultural properties law. These illustrate that certain controls did not adequately anticipate the kinds of adjustments that would be encouraged by them. Neither did they adequately anticipate future changes in economic criteria based on technological changes. The experiences in Europe hold valuable lessons for the United States in terms of elements which will provide both flexibility and stability. These should be considered by American jurisdictions before they adopt similar public controls affecting agricultural landownership.