Land Reform Review Group

Submission from Caledonia Centre for Social Development
www.caledonia.org.uk
10 January 2013

INTRODUCTION

The Caledonia Centre for Social Development exists to help eliminate poverty. It views social development as the process of building a more equitable system of political economy grounded in the principles of social justice and asset democracy. It uses the Internet to promote popular education and to build social solidarity.

The primary objectives of the Centre are:

- the relief of poverty through the provision of education and skills training for the rural and urban poor in Scotland and abroad.

- the relief of poverty through fund-raising and the provision of social solidarity loans. Loans are channelled through a limited number of social investment institutions and joint ventures.

- the relief of poverty and the advancement of the education of the public by conducting, or promoting research into the causes of poverty, the means whereby they can be eliminated and developing public knowledge and understanding of the plight that the poor find themselves in and to disseminate the results of such research.

Our members are active practitioners in social development have decades of experience in land and community issues in Scotland as well as in countries such as Sri Lanka, Tanzania, Sudan, and Bangladesh.

LAND REFORM

The Centre has a long standing interest in land reform and was an active participant in the land reform debates 1997-2003, publishing a series of authoritative Briefing Papers on proposed legislative reforms.[1]

Over the past 15 years we have continued to take an interest in the topic but noted that political commitment to it has declined dramatically. We therefore welcome the establishment of the Land Reform Review Group. Given the lack of attention to land reform over the past decade, we have decided to submit to you a brief paper that differs little from that which we submitted fifteen years ago to the Land Reform Policy Group in November 1998.

The following are issues we believe require to be tackled if the hegemonic power of landed elites is to be effectively challenged and the ownership and use of land placed within a more popular, local and democratic regime.

[1] See www.andywightman.com/briefings/

Law of Succession to Land

The laws of succession require to be altered to give spouses and children equal rights to heritable property as they currently enjoy to moveable property. The lack of this right is central to the current concentrated pattern of land ownership.

Law of Tenancy

We submit that existing the existing right-to-by enjoyed by crofting tenants should be extended to secure agricultural tenants in order to diversify the ownership of land.

Better Information on Land Ownership and Land Use

The exclusive focus on Land Registration is not the only answer or even the most appropriate answer to the need for better information. The Land Register is designed to record and protect real property rights. The Register is a self-financing executive agency of government and thus there are no new or additional costs to the taxpayer.

What is required is to have proper (non-legal) cadastral surveys of ownership and occupation available in every local authority office and public library. Information on landownership should be networked on GIS and computer databases and made available to the public. Grants paid by the Scottish Government and its agencies should be made public in a similar manner. All Inland Revenue inheritance and other tax breaks to landowners and other beneficiaries should be published in the local papers and in publicly accessible registers. Social auditing should be compulsory for all land owners in receipt of public funds. (1)

Offshore companies should be barred from registering titles to land in order to clamp down on tax evasion and secrecy.

Law of the Land Market

The Government must develop a system whereby the public interest has the opportunity to intervene in the land market. A notification system of ***public interest land*** and ***areas of special community interest***, which could trigger an application for pre-emption within fixed time limits, from interested public and civic organisation is essential. This could secure the public interest in sites for social housing, community facilities, valuable wildlife and historic sites and strategic resources of water, etc.

There is also a need to have a mechanism to regulate the monopolisation of land in a locality by a few landowners. This could be provided by limits to existing holding size, limits to expansion or a land merger regulator.

It is imperative that communities are able to access land vital to their development and compulsory purchase powers should be reviewed to ensure that local land monopolies do not impede community development. The research of Dr Tony Carty into compulsory purchase regimes in Wester Europe commissioned by the Highlands and Islands Development Board in 1976 remains valid today and a copy is appended to this evidence.

Community Right to Buy

The community right to buy should be simplified and extended to all land. Responsibility for its administration should be removed from central government and transferred to local authorities that have a democratic mandate from their local electorate.

Decisions as to what is in the public interest should be determine through citizens' juries and not by the civil courts. A jury of ones peers should judge the pros and cons of ***public interest in the development process*** not the technicians of the law. A process of arbitration should be introduced before any legal appeal can be commenced. An enhanced Land Court siting in the locality should hear legal cases. The burden of proof requires to be placed more on the owner to demonstrate greater need or use of the land.

System of Rental Taxation

There is a need to reintroduce the principle that land should be the basis for a proportion of public revenues. The current use value of land and natural capital (excluding improvements) is the natural source of public revenues. Inflated prices for land mean that many people cannot afford to buy land for housing or for other purposes. High land prices advantage existing owners of land and benefit banks and other lending institutions. The costs of loans to acquire land in these circumstances would be dramatically reduced if land prices were to be lower thus releasing more private capital for productive investment in the real economy.

Democratisation and Devolution of Quangos

A Ministry of Natural Resources should be established through the merger of existing organisations such as the Forestry Commission, Crofting Commission and Scottish Natural Heritage. This Ministry should operate with a core and a network of Local Natural Resources Agencies (NRA). Each local NRA should have all its technical staff located in one building. It should have a devolved budget and be required by legislation to devise through public participation a 5-year rolling development strategy. These local NRAs (or Locality Land Councils) would be accountable to an elected local board. The board members could be elected at the same time as the Local Government elections for councillors while voter eligibility would be based upon the electoral register. The elected Board would operate in accordance with the Nolan principles and standards. All public grants made by local NRA's should be published in the local newspapers and the NRA should have a statutory duty to carry out annual social and financial audits. The financial audit should be carried out by the Accounts Commission for Scotland. All Board meetings should be open to the public and the Board minutes should be in the public domain in both hard and electronic text.

Common Good

Common Good land in Scotland's 198 burghs belongs to the citizens of those burghs although legal title is currently with Scotland's 32 Local Authorities following the abolition of the burghs' Town Councils in 1975. T o improve local governance, democratic accountability and community empowerment, Town Councils should be restored together with all of the heritable and moveable assets that they lost legal ownership of over 35 years ago.

Business Rates

Most rural land which is operated as agricultural, hunting or forestry businesses is currently exempt from Non-domestic rates (otherwise know as business rates). This is unfair when other local businesses (pubs, shops etc.) are subject to this local property tax. In the absence of a system

of Rental Taxation (see above), all non-domestic land and property should pay their fair share of local land taxation. (2)

Forestry

Forestry is a land use with significant potential for expanding locally-based individual and community ownership. Unfortunately, Scottish Government policies still focus on a centralised state forestry service (where renewable energy options have been granted to multinational energy companies) and on a private sector expansion dominated by absentee investors from outside Scotland. One important outcome of the Land Reform Review Group's deliberations would be to urge an overhaul of how forest ownership and governance is organised.

State forest governance is too centralised and should be decentralised and democratised (see above) and private forestry should be developed so as to maximise the benefits to the rural economy. We recommend reading the following two reports.

Forest Ownership in Scotland. A scoping study. published by the Forest Policy Group and available from www.forestpolicygroup.org

Rural Development Forestry in Scotland: the struggle to bring international best practices to the last bastion of British colonial forestry. published by IIED www.odi.org.uk/node/11355

CONCLUSIONS

Land reform is a vital issue for Scotland and can deliver social development, greater equality, fairness and opportunity to the citizens of this country. Developments so far, however, have been very limited in scope and ambition, uninformed by best international practice, and constrained by the vested interests of existing elites.

Above all a programme of land reform needs to be a sustained effort and should inform all aspects of the Scottish Government's policies. It is of concern to us that we find ourselves repeating many of the same arguments we made in 1998. We trust that this time around an independent Land Reform Review Group can develop radical and far-reaching proposals to return control of land in Scotland to citizens of this country.

FOOTNOTES

(1) **Social Auditing** is a process that enables an organisation ***to assess and demonstrate its social, economic and environmental benefits and limitations***. It is a way of measuring the extent to which an organisation lives up to the shared values and objectives it has committed itself to. Social auditing provides ***an assessment of the impact of an organisation's non-financial objectives*** through systematically and regularly monitoring its performance and the views of its stakeholders.

(2) See this blog entry Dukes, Sheiks, Fire Brigades and Property Taxes for a useful summary of the issues www.andywightman.com/?p=1410

Methods of Compulsory Purchase of Land in Europe

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October 1977

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Introduction

The Highlands and Islands Development Board (HIDB) commissioned research into European legislation affecting control of land use and land ownership. The terms of reference for this work were " ……. *to report to the Board on the nature, extent and operation of compulsory purchase powers by national and regional agencies and the procedures which attach thereto, and the nature of other public controls over land ownership transfer and use in certain Europe countries"*. The countries studies were Norway, Sweden, Denmark, West Germany (Baden-Wurtenberg and Bavaria), Switzerland, Italy, France, Spain and the Irish Republic.

Compulsory Purchase of Rural Land in Western Europe - The Social Obligations of Property

The concept of a social obligation of property is the one usually employed where the state wishes to tie inadequate use of rural land to a penalty of compulsory purchase. The United Nation's Food and Agriculture Organisation (FAO) view is that a compulsory acquisition of rural land, with a view to changes in land use, is different in kind from similar urban land

acquisitions. Even where only small areas are involved the measure amounts to agrarian reform and tends to provoke a contagious insecurity in the entire farming community. In no case does compulsory purchase of large rural estates constitute a *normal* way (*i.e.* apart from an agrarian reform) of alleviating economic and social problems. *Normally* a state in Western Europe has undergone drastic land reform and subjects its present landowners to legal sanctions, which do not directly affect land ownership. Hence extreme care is called for in defining the circumstances and procedures of acquisition in what amounts in effect to *piecemeal* land reform.

The essence of agrarian reform is that rural land is taken in accordance with an objective measure, which does not argue the particular merits of a landowner. That measure is simply the size of the holding. Apart form Portugal the most recent Western Europe experiences are in West Germany and Italy. In both cases this approach was adopted with respect to underused estates. The experience of Bavaria and Baden-Wurtenberg in southern Germany is especially interesting. The Boden Reform **Gesetz**, introduced in the US Military Zone, provided the alternative ground for compulsory acquisition where land was consistently and to a significant extent inadequately farmed. However, this provision was seen as both insufficiently automatic and socially undesirable, because of the amount of individual coercion involved.

Where the land tenure system is not at issue, most Western European states employ legal sanctions for misuse or under-use, which do not include compulsory purchase even as a last resort. Instead they use (a) penal sanctions against the owner, as in Denmark, Switzerland, Sweden and West Germany; (b) compulsory use of the land by a third party, as in Norway, Baden-Wurtenberg, Switzerland (proposed), Italy. However, a somewhat different legal mechanism amounting to compulsory purchase is the taking of land where the owner is not resident on it. This is especially significant in Ireland but it also used as a last resort in Norway. Though France, Norway, Ireland and Spain include compulsory purchase as a last resort, these powers are rarely used in practice.

Whatever the variety of sanctions applied to misuse (or under-use) of land there is almost universal agreement that the legal concept must be supplemented by specific regulations laid down in development plans or introduced by land reform authorities. Otherwise litigation will ensue about the meaning of the law. As the Irish Inter-Developmental Committee on Land Structure Reform (Interim Report May 1977) puts it - paragraph 27:

"….. the experience of the (Land) Commission to date indicates that there are many practical problems in exercising these powers e.g. the difficulties in specifying acceptable levels of management and proving in law that they have not been reached…."

The *Swedish Land Maintenance Act 1969*, which provided penal sanctions where land was left uncultivated for two years, has been abandoned for the same reason. An FAO staff member was emphatic that a compulsory procedure must take place within the context of a democratically agreed plan, which is not being observed by the landowner. A three-stage process was proposed:

(1) A background feasibility socio-economic study of what the proposed land use will do for the people;
(2) An authoritative approval by the Secretary of State or a decision by referendum of the local community; and
(3) Compulsory acquisition of owners or tenants who do not comply.

An alternative view held by other FAO staff and Spanish commentators is that such a broad power to acquire compulsorily is adequate only where there is the political will and general competence in a Ministry of Agriculture. Cases of misuse, under-use and damage to the local

community are usually quite obvious but civil servants and individual ministers will only sporadically face up to piecemeal land reform. The difficulty is to build in some procedure to compel then to act, and this difficulty will exist in any case unless some other authority has legal power to initiate the ministerial action. The Columbia Land Reform was considered the most interesting. It provides that lands may be acquired compulsorily in the following order:

(1) Uncultivated land;
(2) Inadequately cultivated land; and
(3) Where the most significant part of the land has been tenanted out.

Uncultivated land is defined, as land not visibly subjected to any organised agricultural activity. The concept *inadequate* requires the Agrarian Reform Institute to consider the following:

- Quality of soil;
- Possible return on capital invested;
- Population density of the area; and
- Contiguity to urban areas

Section 57 requires the Institute to give priority to acquisitions in areas in which levels of unemployment, living standards and conditions of work are significantly worse than the average. An alternative criterion recently adopted in Ecuador provides that at least 80 percent of the surface of a property must be so cultivated as to yield the average level of productivity of the region, understood as at least 80 percent of the level attained within the last three years according to available Ministry of Agriculture statistics and studies.

Method of Study

It is proposed:

(a) To investigate the laws of Western European countries which are directly relevant to the type of procedure recommended above, at the same time explaining these laws within their own context. Spain, France, Switzerland, Ireland and Norway all yield experience of interest. Spain illustrates very fully the interaction of the local community and central authorities in the elaboration of a development plan in very backward socio-economic areas. However, because of the virtual absence of compulsion in Spain the later stages of the procedure are not developed. Switzerland presents the same interest. In a much more developed country the farming community has more legal initiative in developing improvement plans. Ireland and Norway have compulsory purchase powers as a last resort but considerable difficulties are experienced employing them in communities of small/medium size farms. Both countries afford experiences about the place of local participation in the compulsory purchase process, which have to be contrasted with the Swiss experience. The French system is of interest, even though it has never been employed, because it forms an integral part of the French system of public law and does not regulate the compulsory purchase procedure to a special *democratic* or *administrative* process.

(b) To set out one more limited legal procedure for tackling **specific cases** of misused or under-used land in Western Europe. This will have been mentioned already in the cases of Norway and France. It consists of allowing other persons or groups to cultivate the land. It is most widely employed in Italy but is also significant in Baden-Wurtenberg (West Germany) and Norway. Proposals to introduce such a law are far advanced in Switzerland and they are being studied in Ireland. Farmers tend to prefer it because a form of *forced leasing* does not directly threaten land ownership. FAO and OECD

(Organisation of Economic Co-operation and Development) personnel thought that it was a most suitable way of improving land use and rural employment without raising the spectre of land reform, and that it would also avoid the expense of compulsory purchase.

(c) To explain the place of the right of pre-emption and the control of land sales in Western Europe. This is the most favoured **general method** of ensuring that land is effectively used. The strictest law on land purchase is in Denmark. West Germany is of interest as a large, predominantly industrial state. It has a very flexible system, which allows for a very large measure of local initiative. France and Norway have considerable experience with respect to the right of pre-emption itself. Sweden reveals more the pitfalls in regulatory legislation. The Irish experience is especially interesting because it shows how a country, which has completed land reform through compulsory purchase may now consider land sales regulation and other means of assuring effective land use.

A: Procedures and Practice Relevant to the Compulsory Purchase of Land in Western Europe

Spain

The Spanish Ley de Reforma y Desarollo (Development) Agrario (Texto Aprobado Por El Decreto 118/1973 de Enero BO Del Estado No 30 del 3 Febrero) is seen as a reflection of a whole tradition in rural land improvement intensified since the 1950s. The Law of 28 June 1936 on Agrarian Reform had been partially implemented in 1939 so that the situation after the Civil War was very confused. The Franco Regime took up again an old tradition of improvement of completely unused land by means of colonisation. This was central to the transformation of large parts of good agricultural land in the 1950s and 1960s. It was done on the basis of laws of 1946 and 1949 now incorporated into the 1973 Act. They gave a broad power to the government to declare the development of an area a matter of national interest, to set out and then to execute a plan. The power of compulsory purchase existed but it was almost never used. The land question was valueless without the state assistance for irrigation. The state took about three-quarters of an estate usually by purchase, farmed it out to *colones* (who acquired long-term leases culminating in ownership) and placed an obligation on the owner to farm the remainder adequately, with the threat of confiscation. Since the original owner was much more prosperous as a result, very few cases came as far as compulsory purchase. However, where the occasion did arise there was serious opposition from landlords disputing the question of fact of misuse as well as from others who felt *they would be next*. The problem *latifundia* is now in general resolved by state assistance to improve infrastructures and by the drift of the rural populations to industry. The good rural land is now largely in use.

Since the **Ley de Camarcas y Fincas Mejorables 1971** (now a part of the 1973 law) legal intervention in land use has concentrated upon areas which, owing to special circumstances, have not followed the general pattern of development of the country. This law was passed after much public discussion. It does not amount to state planning of agriculture but simply indicates that some regions may pose such technical and financial problems that they cannot be resolved by individual farmers. The plans for development since 1973 in Camarcas Mejorables (regions of improvement) have been worked out with the consent of farmers. The Law of 1973 begins by defining the social obligations of property in general terms:

Section 2:

(a) Land (whether public or private) is to be exploited in accordance with appropriate technical and economic criteria, considering both the profitability to the individual and the national interest; and

(b) Agricultural lands shall be subjected to the most adequate exploitation of natural resources which existing technology allows and which is compatible with a profitable social and economic investment.

These are the purposes which plans of improvement have to fulfil. The Ministry of Agriculture may initiate such plans by local authorities or other organisations (labour unions, chamber of commerce, in the region). The Law requires that the plans are based upon studies of economic profitability and social improvement concerning disadvantaged regions preferable where large public and private property predominate. Before a plan is submitted to the Government for approval by decree it must be so elaborated to include the following details:

(a) the scope and purpose of the plan, a description of the boundaries of the land affected, with a general outline which justifies the investment entailed and explains the basic elements of the work envisaged;

(b) a description of the physical installations and services (roads, schools, canals, processing plants), the companies chosen to assist and the time-limits for execution;

(c) the general of the improvements which individual landowners are to implement with state assistance;

(d) statistics relating actual and projected production and productivity of the *comarca* (region);

(e) a sociological study of the *comarca* with particular mention of the level and distribution of income at present and foreseen;

(f) the characteristic of the particular estates to be improved; and

(g) details of voluntary agreements for voluntary improvements already concluded.

The problem of development is seen as essentially social. An agricultural economist has explained that lack of initiative and education in the region, general fatalism and social disintegration due to the drift to towns and use of the countryside as a recreation area by city-dwellers, all mean that the team of experts (architect, economist and sociologist) from the Institute of Agrarian Reform and Development (IRYDA) have as their primary task to build up a local council capable of elaborating a development plan. The amount of local participation in the research for and elaboration of the plan depend upon the level of education and standard of living. The consent of existing local institutions, local authorities, chambers of commerce, labour unions, tourism association, is essential, but these are usually unsuited to, and not intended for, such agricultural developments, so the major task of the expert team is to seek out potential local leaders and encourage them to set up a council especially for the elaboration of a plan which will be accepted and executed by the *comarca*. When this has been done the plan, with a description of the new Council, receives the approval of the Ministry of Agriculture and is sent to the Government.

If the plan is approved by decree it enjoys the force of law. This means automatically that the *comarca* is a region *of public interest* so that there is no further need of legal authority to acquire land indispensable to the execution of works which are regarded as necessary. The procedure being adopted is to wait till the end of a series of six years *comarca* plans and then consider to what extent individual deviations from the plan justify compulsory purchase.

Switzerland

Genossenschaften (group farmers) are the usual instigators and virtually the only instruments of land improvement in Switzerland. The Swiss Civil Code provides certain circumstances a group of farmers may compel the Kantons to facilitate land improvements against the will of a minority in a district. The Kanton has the legal power to bring changes without the consent of a majority of farmers but this would violate their sense of hostility to state intervention that it occurs very rarely. In fact the genossenschaften precede the Kantons as the historical basis of Swiss Government. Since the Kanton is an outgrowth of local associations, farmers have all some experience of administration. There are at least 13,000 farmers' groups with half million members. Administrators are usually paid only expenses. The groups specialise. So 1,100 are involved in purchase of goods and materials for farms, 5,200 with processing of farm products, 5,600 with breeding animals, cultivation of mountain pastures, and 500 especially for Alpine pasture (20,000 members). Associations (Verbande) form a pyramid over the farming groups to pool expertise, etc. 1,000 groups are especially responsible for investments and credits. Farmers' groups constituted for the purpose and dissolved afterwards usually carry out improvements. So it is not surprising that if farmers get together on an improvement scheme there are only 15 percent of cases where it does not get a majority.

The **Swiss Civil Code Art 703** provides: Where land improvements can only be carried out through a common undertaking, and two thirds of all landowners, who own more than half the land affected, agree upon the undertaking, the remaining landowners are obliged to conform. The Kanton regulates the procedure. The Kanton may legislate to facilitate further execution of land improvements.

The authoritative commentaries interpret *improvement* as including any commonly exercised or artificial undertaking capable of increasing directly or indirectly the productive capacity of the land. The only condition is that more than two owners are involved. Kantons may ease the voting requirement. It is usually a vote by simple majority, owning half the land. In Zurich the onus is on opponents of improvements to find a majority. Since the Kantons regulate procedure for study of Bern law has been selected**: Gesetz uber Bodenverbesserungen und Landwirtschaftliche Hochbauten, 26 May 1963** (Agricultural Land Improvement Law).

The Act applies to:

"Any work which has the goal of maintaining or increasing the productive capacity of the land or to facilitate its exploitation, or to protect it."

Where any farmer submits an improvement to the Melioration's Amt (Kantonal Improvement Office) it considers whether the proposal is feasible. The Amt then sets out a provisional, general outline plan for the area, including in it any land it considers necessary. The farmers responsible for the initiative pay half the cost unless they are financially not able to. The proposal is then publicised for the area for 20 days whereupon the local authority invites the farmers to an assembly with the Amt also represented. If the required majority supports the plan the farmers are automatically constituted into a public farmers' group (genossenschaft). They each have one vote. They elect a board of directors, an estimate and accounts committee. The Board of Directors is responsible for carrying out the entire project (these need not be owners), though the Amt is present and advises.

The estimates committee consists of experts who are not the owners. They cost the operation and set the guidelines for distributing the cost among the farmers. In principle the Kanton may contribute only up to 40 percent and each farmer in proportion to the advantage they obtain pays the rest. A bank may serve as the accounts committee.

When the statute of the farmers' group is completed the Kanton Government Council (Regierungsrat) approves it, whereupon the group acquires legal personality

(Zwangsgenossenschaft, Compulsory farmers' group) and all members are bound by its decisions. They must tolerate the improvements made on their land. Where an owner delays and is warned the Board of Directors might carry them out forcibly. Appeals against the purposes of the farmers' group are not possible; appeals on legal ground are made to the Kanton government within 10 days of the vote. Appeals from the estimates committee are to a Kantonal Land Commission, agricultural experts and lawyers chosen by the Government. From this decision appeals on legal procedural grounds are allowed to the administrative court.

Where Kantonal money is used on improvements the land affected cannot be alienated for a purpose contrary to the improved use for 20 years, unless the Kanton allows it and reckons a repayment due to the state. The Kanton also controls any profit made from a sale of land, and the Amt supervises the sound use of the improvements.

Ireland

The Irish legal experience illustrates very clearly the thesis of FAO legal advisers that compulsory acquisition of rural land usually takes place within the context of land reform. Where the land tenure system is not in question, such powers are more difficult to implement whatever the existing legal framework. The 1923 Land Act gave the Land Commission drastic powers to deal with absentee landlordism, the cause of misuse of land. Additions to these powers in 1965 largely transformed the powers into a form of pre-emption. At present none of the powers is seen as adequate to deal with the inefficiency of many owner-occupier farmers.

The Land Act 1923 section 24 (1) provides that there shall vest in the Land Commission:

" ….. all tenanted land wherever situated and all untenanted land situated in any congested districts and such untenanted land situated elsewhere, as ***the Land Commission shall …… declare to be required for the purposes of relieving congestion, or facilitating the re-sale of tenanted land****."*

There are 4 lay commissioners appointed by the Government and one judicial commissioner, a High Court judge assigned by the President of the High Court (Courts of Justice Act 1936). Under the Land Act 1950 acquisition of land is a reserved matter not subject to ministerial direction.

The Land Commission has about 25 inspectors who are assigned to observe the use and mobility of rural land, about one a county, by watching local newspapers, etc. and hearing farmers' complaints about neglect of land or sales which would interest them. If an inspector has reason to believe that a farm is not worked properly a statutory notice to inspect is issued under *section 40 of the Land Act 1923*. The landowner is obliged to furnish in writing upon request:

" …..… such particulars with respect to the land in such form and verified in such a manner within such time as the Land Commission may by a general or special notice require and prescribe."

The inspector then makes a report, if he wishes to recommend institution of proceedings for acquisition, specifying the entire condition of the land and its use, but especially whether the owner is resident, whether he has offered the land for sale within the year, and an assessment as to whether the land is in adequate production and employs an adequate number of people.

Two lay commissioners may then decide to issue compulsory acquisition proceedings by publishing a provisional list of the land affected and a certificate of the purposes for which it is required. They certify simply that the lands are required for the relief of congestion in the

immediate neighbourhood, or for the purpose of re-sale to the persons or bodies mentioned by *section 30 of the Land Act 1950* – in effect to assist migration from another congested area. Twenty-eight days are allowed for objections to a provisional list sent to the owner. If objection is made the matter is heard in a special Land Commission Court. Two lay commissioners decide.

In a recent unreported case the Irish Supreme Court avoided deciding on the facts whether the two lay commissioners hearing objections had to be different from those instituting the proceedings. The practice is now that they are. Appeal to a judicial commissioner is allowed and to the High Court, on a point of law. The leading case requiring the Commissioners to act in a quasi-judicial fashion is *In the Matter of the Estate of Roscrea Meat Products Ltd (1955).* Two unreported recent decisions of the Supreme Court, *Clarke v Irish Land Court* and *Cassell v Irish Land Court* illustrate clearly the role of the inspector within the Quasi-judicial process. Henchy, J. delivering the judgement of the Supreme Court in both cases, said that the Commissioners were bound to hear evidence that land other than the objector's might be suitable, and a choice of land would be quashed if made.

" …. on grounds held to be unjustifiably discriminatory on a consideration of all the circumstances …. Were that not the law the Land Commission could arbitrarily avert its eyes from lands ideally suited, because of their propinquity, etc. for the relief of congestion, and instead acquire compulsorily further removed and otherwise less suitable lands.…….."

Clarke v Irish Land Court

However such evidence was given:

" ……... for the Land Commission inspector conceded in cross examination that there were other holdings in the vicinity which might be acquired for the relief of congestion, but his evidence stood unchanged that this holding, because of its size and position, was crucial to the Land Commission's scheme for the relief of the local congestion."

At present the powers of compulsory purchase are used almost exclusively against absentee owners, especially relatives who inherit from overseas and *would be* purchasers from urban areas for whom a farm serves as a recreation or part-time activity. Complete neglect and inadequate production is usually tied to absenteeism, cases of serious neglect by owner-occupiers being very rare.

With the movement of populations off the land since the 1930s the *adequacy of employment* criterion is not applied at all. Inspectors have no difficulty in supplying standards of adequacy of production for the area. However, at present the inspectors are actively concerned primarily with the ageing farmer on marginal land and here the practice is to persuade them to accept a few acres around their house. They are then paid in cash if the qualify under the Farmers' Retirement Scheme (EEC - European Economic Commission Directive 160). It is felt by the Inter-departmental Committee that the compulsory powers are probably (supra, the Social Obligation of Property) unsuited to a context in which 30 percent of land has shown no significant economic growth in recent years. One estimate is that land is being worked at 60 percent capacity.

There is no real political prospect of transferring land from a more inefficient farmer to a less inefficient one. The problem is tied to high EEC prices for farm products, the large social security benefits of farmers, and according to the Irish Farmers' Associations, the fact that 51 percent of farmers are over 50 years of age, 25 percent are 65 years plus, 43,000 farmers are over 50 years of age with no apparent heirs and 30 percent do not acquire land till over 40. This is a general social problem attributed to the drift of the young and women to urban areas. The Inter-departmental Committee is not sure how to proceed with regulation of land use. It is

thinking more in terms of taxation measures to make it financially less attractive for the inefficient farmer to hold land; a flat tax is being considered. In Denmark this method was used to ensure that larger farms were adequately exploited. Nonetheless compulsory purchase in some cases is not being ruled out. The power exists at the moment. The Agricultural Institute in Ireland makes studies of farm performance and is able to afford standards of general appearance and fertility. Compulsory purchase may continue to take place as a last resort where a farmer has been offered assistance and warned, where other are demanding the land and some form of temporary possession is not feasible.

Norway

In Norway the problem of misuse or under-use of land exists within the context of small to medium size farmers who own marginal land and are often practising another profession. The problem is of very small dimensions. In Norway the cultivated areas (about 3 percent of the country, out of a possible 5 percent) are nearly all around human settlements (*e.g.* Bergen, Trondheim, Narvik, Oslo) so that the exercise of farming alongside another profession is very common. Neither the Land Board (the local authority) nor the County Agricultural Committee have any special competence to recommend types of agricultural land use and conflicts between these and farmers about the merits of particular uses are unheard of. Instead, tradition, economic need and general social pressure ensures a generally satisfactory level of agriculture. No public authority is legally competent to acquire land for use under public direction. The function of the Land Act 1955, amended 1975, and the Concession Act 1974 is directed to a context of small farmers, though within this context the Land Acts include power of compulsory purchase as a significant power of last resort. The idea is to allow neighbouring farmers to complain that land in their area is being so neglected that it is in the public interest that it be divided up and distributed among the adjoining farmers. However where the estates in question have been very large the Ministry of Agriculture, against the opinion of the Ministry of Planning, has not considered the Land Act powers to be suitable.

The Land Act 1955 section 53 as amended by the Land Act 1975 (21 March) provides:

"If the County Agricultural Committee (CAC) finds that cultivated land is being neglected or is lying fallow it may issue instructions to the owner regarding the work to be performed by him in order that the land shall yield a reasonable return according to the circumstances. Upon the expiration of the appointed time the CAC may put the work in hand for the owner's account or lease the land to others…."

"The CAC may also prohibit any undertaking likely to result in the neglect of cultivated land."

"If the owner does not act and the CAC finds a serious infraction of the above provisions the State may, at the request of the CAC, expropriate the land and assign it to another who will undertake to operate it fittingly."

The 1975 amendment replaced the local Land Board, an elected body, by the CAC because of the impossibility of supervision of farmers by local politicians. In Ireland despite unease about the extensive powers of the Land Commissioners some form of National Land Agency is being considered and not a transfer of powers to local authorities. However, the concern over supervision was minor, confined to certain remote areas in the North and SouthEast. Under section 10 of the 1955 Act the CAC consists of 2 government nominees, 2 from the County Authority and 2 from farmers' groups. The 1975 Act also requires the Land Board to register all cultivated land, which is not being used and to send specifications every year to the CAC. It must recommend as well what is to be done to the land. The procedure has not yet been completed.

A dispute between the Ministry of Agriculture and the Ministry of Planning concerning the Hardangervidda area reveals the limited scope of the 1955 Land Act. This relates to a mountainous forest region between Bergen and Oslo suitable especially for hunting and recreation, though also for animal grazing. Farmers bordering these estates claimed they wanted the land to support their income through pasture and forestry. It was being used by the very few remaining large landowners for an *exclusive* tourist trade. However, the Ministry of Agriculture felt that the land involved were too large to be suitable simply as additions to small holdings or as a basis for new holdings similar in character, as provided in *section 1 (purposes)* and *section 20 (power to acquire compulsorily)* of the *Land Act 1955*. The Ministry of Planning was really proposing some kind of public management of the area perhaps for recreation purposes and this could not come under even the miscellaneous powers to acquire of *section 27 (3) (especially related to development of forestry)*. It would be outside the scope of the Act. The dispute did not come to court because the key owner involved sold out voluntarily.

France

Legislation: articles 40 and 41 of the Code Rural, decree No 62 – 1217 of 11 October 1962 on inventories of uncultivated land, and *decree No 62 – 1398 of 26 November 1962* on putting into cultivation of unused land.

The legal regime is the responsibility of the state, which has to ensure efficient agricultural production. The SAFER (Land Improvement and Rural Settlements Companies) as a farmers' body has not wanted to be involved. Because of the Mansholt Plan the legislation has never been enforced.

Where land has not been the subject of regular and effective use for a certain time it is *uncultivated* (see below). The amount of time is to be determined by the Perfect on the proposal of the land structure division of the Department, but it must be between 3 and 6 years. The Prefect is responsible for having the lands classified in an inventory. He consults with the aforementioned division about the extent of the area, considering the economic and social interests involved. Before a declaration that lands are *uncultivated* can be made the project, which has been prepared by technical experts, is subjected to an inquiry. For one month interested parties may present comments and receive oral objections. The Prefect decides whether to accept these objections or changes proposed by the local commune as a whole or in part.

The next stage is an order to put the land into cultivation. This is only possible if preceded by an economic study to determine if exploitation is possible and under what conditions. The Department's agricultural division carries out this investigation. Then a plan of cultivation is drawn up. It provides in general terms the conditions under which the land could be put to use, the necessary works of improvement and the financial assistance needed and available. The Prefect transmits this plan to the owner or occupier of the land, who has two months in which to write in objections. If the Perfect adopts the plan and the owner/occupier refuses to implement it, he may be subjected (a) to a forced leasing, where he receives an officially fixed rent on a lease of a duration fixed by the Perfect; (b) to compulsory purchase.

This system is not quite as authoritarian as it sounds. The deciding power has been deliberately given to the Perfect and not to the Mayor because a locally elected politician is not expected to be objective. However, every decision of the Perfect is an ***administrative act***, and as such appeal can be lodged against it in the administrative court. Review is possible not merely on formal legal grounds but also where it can be said that the powers have not been exercised for the purpose for which they were intended or they have been exercised in circumstances in which a reasonable person would not consider them applicable. However, no jurisprudence exists since the laws are not applied.

B: Compulsory Leasing of Underused Land in Western Europe

Within the legal framework for compelling a use of land putting a third party to work on it is usually seen as a second level sanction coming after fines against the owner and before compulsory purchase. This has already been mentioned in the case of Norway and France. There are many possible variants of compulsory leasing. It may be for a fixed term or it may be for the owner to reacquire the land at any time provided that certain procedures are observed. There may be no rent paid at all, or it may be paid to the proprietor. However an essential element of this institution is that ownership of the land is not itself being acquired.

What takes place is a form of requisition. The owner is not accepted as having suffered any financial loss relative to his previous position hence no question of compensation arises. In these circumstances, however, if used as anything more than a means of ensuring that land is not agriculturally neglected it could amount to the substance of expropriation. The practice of *extending leases* in Italy has given rise to constitutional difficulty and legislation is being considered at the moment. In Baden-Wurtenberg in practice adjoining farmers with respect to relatively small areas usually do the compulsory working of land. *Compulsory leasing* as a means of public control of rural land exists in Norway, France, Spain, Baden-Wurtenberg, Italy, and is under advanced consideration in Switzerland. It is proposed to examine that last of these.

In 1972 ***Baden-Wurtenberg*** passed a *Landwirtschafts und Kulturgesetz*. The two states have a tradition of *compulsory leasing* because extensive farmland is combined with much greater density of population than, for instance, in Bavaria. The particular law was passed because an economic boom at the beginning of the 1970s was making it increasingly unattractive economically to farm some, especially marginal lands. The economic recession has meant that the law has not had to be so much used. The 1975 Annual Report of the Stuttgart Parliament about the operation of the Act said that the part concerned with compulsory use had been effective in halting the tendency to leave land fallow. The law allows for the context of the Mansholt Plan as much as France. Overproduction in agriculture is not desired. However at the same time the quality of land which could be used in future must not be allowed to deteriorate and adjoining farmers must not suffer. The importance attached to employing local labour on the land is minimal and hence the law is extremely attentive to the special circumstances of the owner/occupier. It provides:

Section 26:

(1) Where the occupier is also the owner he may make an application that he is not in a position to cultivate the land, showing that despite attempts he has not been able to find another farmer or association of leasers, willing to take up the duty in return for the longest possible term lease at the usual rent for the area.

(2) Then he is under a duty to allow the use or care of the land by the local authority or by a person whom it chooses.

Section 29 (2)

The local authority has the duty to apply the law in agreement with the Ministry of Agriculture.

Section 28 (2)

It has however only the sanction that an owner who does not comply may be fined up to 10,000DM.

The explanatory memorandum to the Bill in 1972 says that the restriction placed on the owner is slight in view of the overriding duty in the public interest to maintain the quality of

cultivated and recreational land. The owner/occupier has a minimum of duties. Section 27 ensures that where it is unreasonable to expect a person, for instance because of age, to cultivate the land, he may avoid prosecution simply by advertising the land twice. There is no duty actually to pay a third party. So no question of compensation arises.

In ***Switzerland*** the problem of land use as such is the same but there are much stronger pressures coming from *land-hungry* farmers in poorer areas, who wish to improve inadequate holdings at the expense of those who under-use their land because they can find more profitable employment. About 80,000 hectares, out of 1.2 million in Switzerland are involved. The proposed sections of the ***Bundesgesetz uber Bewirteschaftsbeitrage*** (a law to regulate the granting of subsidies) are supported by the farmers' organisations. Section 6 provides simply:

"*The owners of fallow land (Brachland) have to allow (dulden) the cultivation of the land in so far as the public interest requires."*

The Kanton decides whether a public interest exists. Regulations under this section would provide that while in principle the owner of the land may reacquire possession of land at any time he will have to (1) give 6 months or such other fixed period of notice as may be sufficient to allow the third party to recover his investment and labour, (2) prove that now he can and will cultivate the land. Section 7 (2) provides that the owner must pay a reasonable sum for any improvements made to the land. No question of compensation can arise because the owner would then have to show that section 6:

" … prevents an existing use or a very probable use in the near future, or renders very difficult a use for which the property is suitable,"

a formula of the Federal Supreme Court expressed in section 48 of the projected 1974 Federal Planning Law

In ***Italy*** *compulsory public leasing* is the principle means of bringing uncultivated land, often-large estates owned by absentee landlords, into use. Numerous laws were passed between 1944 and 1950 and in these compulsory leasing comes close to land reform. Especially striking is the speed of the procedure, for every stage must take place within a very short time. There is no appeal on the merits of the decision of the Perfect or the advice of his Commission, but merely upon the size of the indemnity given to the owner. The basic procedure is simply that cultivators of land complain to the Perfect that neighbouring land is not being used. He refers the matter to an expert commission. It advises how the land could be used and he grants a concession of the land to the original applicants.

The **1944 law** provides:

Section 1
Associations of farm cultivators (*i.e*. those who work the land), constituted in co-operatives or other bodies technically competent to realise the cultivation of land, may obtain concessions of land which is either in private ownership or in the ownership of public bodies, which appears to be uncultivated or insufficiently cultivated, that is to say, such lands as have the potential to be cultivated more actively and intensively in relation to the necessities of rational agricultural production.

The ***commentary*** explains further that adequacy of cultivation is determined not according to absolute criteria, but in relation to normal standards of the zone in which the land is situated.

The application is made to a Perfect, who must refer it at once to a Commission. This consists of an agricultural expert nominated by the Ministry of Agriculture, 4 members nominated by

the Perfect from farmers' unions, property owners and farm labourers. Within 30 days the Commission must report back to the Perfect, if it has decided that the land is inadequately cultivated, and set out precisely the land involved, the date for taking possession, the date on which cultivation must begin, by whom it must be done and the duration of the concession, usually 4 to 9 years in the case of arable land, and 20 in the case of timbered land.

The procedure before the Commission is quasi-judicial but its primary task is to try to reconcile the owner and the applicants. The Perfect must decide whether to accept this advice within 10 days. Then he must request the provincial inspector of agriculture to formulate the rules for the working of the concession and the size of the indemnity paid to the owner. This must be decided upon once again within 10 days. Appeal is allowed to the Ministry of Agriculture alone, and only on the size of the indemnity, within 30 days. In assessing the latter in the case of unused land the sum may not amount to more than one-fifth of average production in the last 4 years. The concession does not in itself give any pre-emptive right to purchase but the concessioner is entitled to be compensated for all improvements to the land.

C: The Control of Land Transactions and the Right of Pre-emption

Control of acquisition of rural land is the rule in Western Europe. Support is forthcoming from the farming community because the object of control is to restrain competition for farmland from public companies, and those who see the land as recreational. Control many consist simply of regulation or it may go as far as public use of a right of pre-emption. In the former case a public body simply directs that certain categories of persons may not buy land, or may buy it only upon the observance of certain conditions. In the case of pre-emption it intervenes itself, buying land to redistribute in accordance with its land policy. The two powers will go together if only because the seller's right to dispose of the property cannot be too restricted. Control of land transactions is perhaps the most reliable long-term means of ensuring that land is effectively used, but it may serve as a short-term way of penalising an owner who under-uses his land where he has been subjected to certain conditions in purchasing the land.

Nonetheless the question has been posed in the Irish Republic whether a right of pre-emption by the state is really necessary. Instead the state could merely indicate which one of the competing bidders for the land should have priority. The legal machinery does not vary so much from one country to another. So it is not proposed to treat each individually. Instead the common features of land control will be examined. These are:

(1) Qualifications attaching to persons acquiring land;

(2) Procedures used to bring the legal controls into operation; and

(3) The legal characteristics of the right of pre-emption.

Qualifications attaching to persons acquiring land

If those who own rural land reside upon it and actively farm it as their main occupation, this alone should serve to guarantee farmland against gross neglect. In ***Norway, Sweden and Denmark*** companies are excluded from virtually any part in rural land transactions. This is to prevent the use of such land as an investment or the buying up of land on a large scale so as to transform a small owner/occupier farming community into tenants. Exclusion of companies serves as well to depress land prices and thereby allows those who wish to farm the land to obtain adequate return for the capital, which they are able to invest in a purchase. At the same time a strict residence requirement excludes the *part-time* or *weekend* farmer who sees his

holding primarily as a recreation. The professional city-dweller especially engaged in farm-work (*e.g*. vets are viewed with special suspicion by farming communities).

The choice of legal technique is between strictly defining qualifications for land acquisition and leaving a discretion to a public authority. The experience of Denmark and Norway contrasted with Sweden and West Germany suggests that it is only very strict control, which will succeed. ***Denmark's*** *Agricultural Act 1973 sections 16 and 17* provide the strictest controls. They have served to keep farm prices much below those of Holland and West Germany, and to exclude all use of land for *recreation* or *hobby-farming*. As such they have the support of farmers and have been approved by the EEC Commission. No farm may be bought if the main aim is investment of capital or if there is a disparity between the purchase price and the actual operative value of the land.

Furthermore the acquirer must be over 20 years, he must take up residence within 6 months of the acquisition and he must have farming as his main business. This last condition is important because *residence* is too vague a concept. For instance in ***Ireland*** owners travel up to 50 miles from their *farms* to work in towns. In addition the acquirer, his spouse and children under 20 years must not be the owner collectively or in part of more than one agricultural property in Denmark or abroad. A second farm may be purchased if it is within a 15km radius of the first and all other conditions stated above are satisfied, though permission will not usually be granted where the farm is large enough to support another farmer with family.

There are general restrictions on the size of farms. In ***Norway*** the *Concessions Act 1974* is not quite so strict. However, the business community is much smaller and there is much less farm land available on the market. Besides, given Norway's special circumstances (see part B above) a combination of professions is common. *Sections 7 and 8* of the *1974 Act* provide that property shall not as a general rule be sold if there is reason to suppose that the primary aim of the acquirer is to invest capital in the property or if he is amassing real property, or if there is reason to suppose that he intends to make a profit by selling the property or parts thereof within a short period. Special circumstances applying to agricultural property are whether the acquirer is suitably qualified to run it and whether he will take up permanent residence himself on a unit of land sufficient, with or without another occupation, to afford a reasonable income for a family.

Sweden and ***West Germany*** are much larger countries, with larger, richer farmers and a huge financial/industrial background. Neither country provides for automatic exclusions of specific persons or companies form rural land purchases. The *Swedish Land Purchase Act 1965* gives the County Agricultural Board the authority to ensure by prohibition on sales and the exercise of a right of pre-emption that priority will be given to purchasers of whom it an be assumed that they will utilise the land's productive capacity. Companies are allowed to buy land only in exceptional circumstances where their capital is seen as essential to some agriculture or forestry processing operation or, very rarely, where a farm is too large for the *average* farmer to afford. However, apart from the category of companies the law only operates well when a purchaser is clearly unsuitable, *e.g*. a teacher, medical doctor.

There is widespread criticism from farmers that the existing law does not prevent the larger, richer farmer outbidding others, amassing land holdings and inflating prices, leading by degrees to speculation in land and absenteeism. Farmers object also that state authorities inflate land prices by unsound voluntary purchases. The present Government (of which the Farmers Party is part) intends to insist:

(a) that the price of land corresponds to its operative value (as in Norway, see further Part 3);

(b) that land will be actively farmed; and

(c) perhaps, that farms will not expand beyond a certain limit.

In **West Germany** the *Land Transaction Act 1961 section 9* (which applies to agricultural and forest land; marsh and uncultivated land suitable for conversion, etc) provides that a sale of land may be prohibited or subject to conditions where alienation would imply an unsatisfactory distribution of land and soil, an uneconomic division of holdings, or sale at a price which is grossly disproportionate to the value of the land. The price is not relevant if permission is granted to a non-farmer to buy the land. Account must be taken of whether an unreasonable hardship would be caused to the seller by a refusal. The Act is used less frequently than in the past. Its provisions allow for great flexibility at a time when the general government policy is to interfere as little as possible in the freedom of the market. However it still serves to exclude pure speculation in land, the spread of holiday homes and hobby-farms. The farming community is very conscious of the Act and will not sell to a disapproved purchaser. Indeed the main interest of the Act is the procedure for its application, for it rests in practice on the initiative of the farmers themselves, alleging that a sale is contrary to their land consolidation policies or the balanced agricultural development of the region.

Procedures used to bring the legal controls into operation

The essential feature of procedures for the application of legal control of land transactions is the balance found between local or democratic elements and direction by civil servants. It is difficult to draw conclusions from the practice. In ***Norway*** local democratic control has been abandoned in principle since 1974 and the Ministry of Agriculture has now responsibility which is more coherently exercised but which may be excessive in terms of the amount of control needed. The ***Swedish*** system mixes central and local government representation on its licensing authority but the general weakness of the *Land Purchase Act* makes it difficult to draw any conclusions. Perhaps ***Denmark*** and ***West Germany*** are more interesting. The formal power rests with the Ministries of Agriculture but the participation of farmers' associations is very extensive.

In ***Norway*** the local communities used to be responsible for administering the Act (which has existed in some form since the late 19th century) but they tended to discriminate against those purchasing from outside the community. Democracy was seen to lead to chaotic differences in standards especially since local boards could reduce the amount of land an outsider bought to nothing. Pressure from farmers on locally elected representatives was too great. However, now that all purchasers of land must receive permission from the Ministry of Agriculture 3,500 applications come every year, and, of these, only 5 percent are turned down in practice. This is usually because the Ministry is not satisfied about the intention to live on the land. There is a power to impose conditions on a purchaser where the Ministry is not sure of their expressed intentions, leaving the County Agricultural Committee to supervise them. Yet it is much simpler to refuse doubtful cases.

In ***Sweden*** the 1965 Act is administered by a Regional (County) Agricultural Board (24 for the country), which has 4 persons chosen by the Government and 4 by the local authority, with a chairman nominated by the Government. Appeals from the Board are to the Ministry of Agriculture. The members have no special training in agricultural matters. It is not successful at screening purchasers; some see the remedy in tightening the substantive provisions of the law.

In ***Denmark*** the 1973 Act is applied by the Ministry of Agriculture. However, it is advised by a Government Committee on Land Settlement, consisting of 18 members, one from each county, half appointed by Parliament and the other half by farmers' associations. Each member has a county to observe. Within the county the member is assisted by a special committee of three, one appointed by the government, one by the farmers' association, and

one by the small-holders' union. This approach appears to combine uniformity of application with participation by those affected.

In ***West Germany*** the 1961 Act is administered by subordinate local (at county level) officials of the Land Ministry of Agriculture (Kreisverwalturgesbehorde). They refer the matter to the Secretary of the Land Farmers' Association, which refers it back to the local farmers for comment. They many then propose a farmer as an alternative purchaser, particularly when the would-be purchaser is a non-farmer. In that case the Farmers' Association will consult with the Land Settlement Company (Siedlungsgesellschaft) which has a right of pre-emption with respect to land over 2 hectares in size: *section 4, Land Settlement Act 1919*. (They will have been informed of the sale by the Land Settlement Office). The decision is then primarily in the hands of the Directors of the Company. The Directors are hired by a Review Council (Aufsichstrat) on the basis of competence. The members of the Council consist of officials of the Ministries of Agriculture and Finance, local authorities and farmers' associations. The Minister of Agriculture is Chairman. The majority of the capital is the Land's and the Review Council decides general financial policy. If the Company decides to pre-empt it will probably accept the farmer proposed by the Farmers' Association. Approval of the Land Settlement Office and the Concession Authority (Kreist Berhorde) will then be virtually automatic. If the right of pre-emption is not exercised the sale will only rarely be prohibited as contrary to agricultural policy, except where the price is excessive. This is understood to mean more than 50 percent of what the best use of the land could yield. The power of pre-emption is not exercised a great deal at present, *e.g.* 20 times per year in Baden-Wurtenberg, but that does depend on the degree of farmers' pressure.

The legal characteristics of the right of pre-emption

Pre-emption means literally that one steps into the position of *would-be* purchaser, a contract of sale having already been concluded. However variations on this are possible. In ***Norway*** and ***France*** the price may be reduced by adjudication if the pre-empting authority demonstrates that it is too high. Another question is the extent to which pre-emption should be used as the means of control of land transactions. In ***Ireland*** it is not felt to be necessary at all once the structure of farms has reached a certain level. Finally the right of pre-emption being itself a considerable restriction on the freedom of the market, to what extent should it be limited? ***West Germany*** has practical restraints. In ***France*** they are more formal.

In ***Norway*** when the County Agricultural Committee exercises a right of pre-emption under *section 14 of the Concessions Act 1974* it may object that the purchase price exceeds the operative agricultural value of the property and require that the amount due shall be determined by valuation. The background to this is the Expropriation Compensation Act (26/1 – 73 No.4) which applies to all compulsory acquisition of land. Valuation is based on the current use of the land, and changes may be taken into account if they are within the framework of existing operations, profits obtainable from better agricultural methods but not from a different use such as tourism. Market value is excluded, a system being recommended in ***Sweden.***

Denmark and ***France*** also control the purchase price. In France one of the stated purposes of the exercise of the right of pre-emption is to prevent speculation in land and inflation of prices, so the pre-empting authority (SAFER – Land Improvement and Rural Settlement Companies) may refer a price to adjudication if it considers it exaggerated. The SAFER has succeeded in exercising a certain control over land prices.

In ***Ireland*** the ultimate beneficiaries of the compulsory purchase order (CPO), in effect pre-emption, powers of the Land Commission, are now well-established moderately prosperous farmers. In the past the beneficiaries were very poor tenants and small farmers who could not afford a purchase price. So the Land Commission had to intervene and allow the new owners

to pay it back over an extended period. Where farmers can themselves furnish a price the Commission's powers seem to be less needed, so the Inter-departmental Committee considers that it would be more appropriate to replace the expensive and slow CPO procedure by a power of control or regulation of purchases, *e.g.* directing that land may be sold to X rather than Y. The details of a priority list are also being elaborated. A CPO procedure is seen as too random in nature and not sufficiently selective. A negative regulatory power already exists in the case of companies. Under section 45 of the Land Act 1965 no company, public or private, may purchase land without the prior approval of the Land Commission, which may only be obtained where it is satisfied as to the future intentions of the company. The Land Commission has always the sanction of compulsory acquisition at a later date should the need arise. The provision was originally intended to *catch* aliens who tried to avoid restrictions against them setting up Irish companies.

In ***Scandinavia*** and ***West Germany*** there is no territorial restriction on the right of pre-emption. This is hardly necessary if an elected body, especially as in Sweden, is exercising the powers. However, where an almost entirely administrative body has the initiative it may seem more reasonable to restrict the power. In ***France*** the SAFER (Land Improvement and Rural Settlement Companies) have wide powers to exercise a right of pre-emption, for instance, to restructure large areas providing drainage, etc. The local (departmental) farming organisations provide the registered capital and are the shareholders. The Government supervises the SAFER through two Commissioners (from the Ministry of Finance, Agriculture) whose consent is necessary for pre-emption. The election of a Chairman and Director-General needs approval. However, there are many more restrictions.

The right of pre-emption exists only where the SAFER has completed a lengthy procedure. It requests the Prefect to declare a certain area subject to the right of pre-emption. He consults the Departmental Commission for Agrarian Land Structure and any agricultural bodies, after which he may request the Minister of Agriculture to issue a decree of a fixed, if renewable, duration (usually 5 years). In addition the right of pre-emption may be exercised where the purchaser is a farm labourer, a tenant, a former tenant, or a neighbouring farmer wishing to increase his holding. However, all of these persons have to undertake to proceed to an effective agricultural cultivation. Finally, the decisions of the SAFER are *administrative acts* and an individual may appeal to the *administrative court*, just as in the case of the decision of the Perfect with respect to uncultivated land.

Nonetheless the power of pre-emption is very extensively used both to restructure large areas and to assist in particular cases of land structuring.

Source

Appendix Report to the Highlands and Islands Development Board on Methods of compulsory Purchase of Rural Land and Other Public Laws relating to Rural Land in Western Europe, in Proposals for Changes in the Highlands and Islands Development (Scotland) Act 1965 to allow more effective powers over rural land use, HIDB, 1978.