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INTRODUCTION

By DREW L. KERSHEN*

This symposium issue marks the third consecutive year the *South Dakota Law Review* has devoted an entire issue to articles discussing the legal problems in the agricultural sector of our society. Although to my knowledge this is the only law review to establish an annual agricultural symposium, it is not the only law review to publish such a symposium within the past several years. The *North Dakota Law Review*, the *Nebraska Law Review*, and the *University of Illinois Law Review* have also sponsored a symposium in agricultural law.¹

Within the law schools, I have personal knowledge of four courses in agricultural law which have been taught over the last several years. Professor Robert Beck of the University of North Dakota has for a number of years offered a seminar in agricultural law which has dealt with a wide variety of legal issues. Professor John Davidson of the University of South Dakota and myself have both recently developed seminars in agricultural law which range broadly through the possible relevant legal topics. And at the University of Texas, Professor Robert Bard taught a seminar in agricultural law which focused specifically on international law in relation to world food-population problems.²

In light of these symposia and seminars, three questions immediately come to mind: 1) Why has this interest in agricultural law arisen?; 2) Why did this interest not exist in the past?; and 3) What meaning, if any, can be found undergirding this interest in agricultural law?

To answer the second question first, the present interest in agricultural law should more accurately be described as renewed or heightened interest in the subject. My academic colleagues in the Colleges of Agriculture, specifically the Departments of Agricultural Economics and the Cooperative Extension Services, have evidenced a long and continuous interest in the topics which fall under the rubric of agricultural law. The agricultural economists have been particularly interested in how various legal arrangements or institutions have affected the production and marketing

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1. *Agricultural Law—A Symposium—Parts I & II*, 54 NEB. L. REV. 217 (1975); *Agricultural Law Symposium—Parts I & II*, 50 N.D.L. REV. 249 (1974); *Symposium: Agriculture and the Law*, 44 N.D.L. REV. 447 (1968). An agricultural law symposium is scheduled for publication by the University of Illinois Law Review in either the spring or summer of 1976.

2. I do not mean to imply that no other courses in agricultural law have been taught during the last several years; but the four courses I have listed are the only ones of which I have knowledge.

of agricultural products. They have consistently shown a clear understanding that economic efficiency in agriculture is affected by various laws such as those regulating land tenure, landlord-tenant relations, and debtor-creditor relations.³ At the same time, cooperative extension services have put forth a steady stream of publications for the American farmer⁴ to provide information concerning estate planning, applicable tax and social welfare legislation, and various contractual or leasing arrangements.⁵ Through these publications the cooperative extension services have hoped to provide a basic familiarity with legal arrangements or legal problems commonly encountered by farmers, to enable them to make better informed judgments with respect to the management of their affairs.

I think it is fair to say, however, that the work of the agricultural economists and the cooperative extension services has not really penetrated the consciousness of lawyers, law professors, or law students. The work of the agricultural economists was considered relevant to their academic discipline—economics—but not to the academic discipline of law. The work of the cooperative extension services was oriented toward a non-professional audience rather than toward the lawyer who might be counseling persons involved with agriculture. As a result, the concept of agricultural law is probably new, or relatively new, to most members of the legal profession.

Even though the concept is relatively new, and even though the interest of the law reviews and law schools is also relatively recent, agricultural law is not a discovery or invention of the law reviews and law schools in the late 1960's and early 1970's. On the contrary, it does have a previous history in the law reviews and the law schools. Perusal of the *Index to Legal Periodicals* reveals a surprising number of articles classified under "Agriculture." Moreover, during the early and middle 1950's, a number of courses on agricultural law were introduced into the curricula of various law schools including, to my surprise, Yale and Harvard.⁶ During

3. E.g., Barrows, *African Land Reform Policies: The Case of Sierra Leone*, 50 LAND ECON. 402 (1974); Schickele, *Effect of Tenure Systems on Agricultural Efficiency*, 23 J. FARM ECON. 185 (1941); Timmons, *Integration of Law and Economics in Analyzing Agricultural Land Use Problems*, 37 J. FARM ECON. 1126 (1955) [hereinafter cited as Timmons].

4. I use the term "farmer" as a generic term to encompass farmers, stockmen, ranchers, and agricultural laborers. I do not mean to imply that the perspectives or interests of the various groups encompassed within the generic term are identical. In many instances, in fact, the various farmers have divergent perspectives and interests.

5. E.g., E. HILL & M. HARRIS, *FAMILY FARM-OPERATING AGREEMENTS* (North Central Regional Publication 143); J. LOGAN & W. PINE, *KANSAS LAWS FOR FARM LANDLORDS AND TENANTS* (Kansas State University Agricultural Extension Statistical Circular 384, 1974); J. O'BYRNE, N. KRAUSZ, N. HARL, & H. JURGENSON, *THE FARM CORPORATION* (North Central Regional Extension Publication No. 11, 1973).

6. Ellis, *Collaboration Between Law and Agriculture*, 7 J. LEGAL ED. 65, 69-70 (1954) [hereinafter cited as Ellis].

the same period of the 1950's, a number of agricultural economists made a strong effort to involve law schools and law professors in interdisciplinary research and teaching.⁷ Articles on law and agriculture, which usually appeared singly in the law reviews, have continued; but the agricultural law courses disappeared and the interdisciplinary programs faded away. The present state of agricultural law among lawyers and professors, and in the law school curriculum, can best be illustrated by recalling the prediction made in 1954 by Professor Ellis, an agricultural economist, that a law school coursebook in agricultural law would most likely soon appear.⁸ No such text, to my knowledge, has ever been written.

If an interest in agricultural law existed among law schools and law professors in the 1950's but waned until the last few years, the first question raised earlier becomes even more significant—why has this interest now revived? I do not pretend to have done any careful research on this question, nor do I make any claim to possess a definitive answer. I would like to suggest, however, several possible reasons.

Throughout American history, agricultural interests have exerted strong political influence through the exercise of the vote and the representation of rural legislators. From the 1950's to the 1970's the political power of the rural farm population has been greatly diminished. Those who consider themselves farmers, and those who consider their interests directly tied to rural communities, have diminished in number. Urban voters dominate the election process to a much greater extent today than was true 20 years ago.⁹ The decline in the electoral power of the rural population has been further reinforced by the decisions of the Supreme Court requiring the reapportionment of state legislatures and the federal House of Representatives.¹⁰ The state and federal legislatures are no longer tied to rural electoral districts as in the 1950's. Consequently, farmers cannot directly influence legislation to the same extent in the 1970's. To make their voices heard, and to insure that their interests are protected, farmers have turned increasingly to the exercise of power through economic and legal techniques.¹¹

7. E.g., Kanel, *Discussion: Integration of Research in Law and Economics as Applied to Agriculture*, 37 J. FARM ECON. 1153 (1955); Timmons, *supra* note 3. See generally, Ellis, *supra* note 6.

8. Ellis, *supra* note 6, at 77.

9. Between 1950 and 1970 the number of persons counted as rural population decreased by 591,985. Even more dramatic, the percentage of the population considered rural declined from 36% in 1950 to 26.5% in 1970. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CHARACTERISTICS OF THE POPULATION: NUMBER OF INHABITANTS, Table 3, at 1-42 (1972).

10. Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

11. For a very fine discussion of the interplay between political, economic, and legal power in the agricultural sector, see R. TORGERSON, PRODUCER POWER AT THE BARGAINING TABLE (1971). An example of the turn toward legal techniques for asserting farmer interests is the proposed suit by the National Association of Wheat Growers to challenge executive in-

The 1950's were a time of surplus. Millions of acres of land were withheld from production because the corn, feed grains, wheat, and cotton produced was greatly in excess of demand. In contrast, the 1970's are a time of relative scarcity. World population has increased significantly, with consequent increased world wide demand for agricultural products. American agricultural export potential has become a major concern of American foreign policy, not only as a means of insuring a favorable balance of payments for American trade, but as an instrument for the achievement of foreign policy goals.¹² Through involvement in the humanitarian concern for feeding the world population, and the strategic concern for balance-of-power diplomacy, American agriculture has attracted much more attention from a broader spectrum of people than was true in the 1950's, when agriculture could be considered solely a domestic concern with, arguably, limited parochial significance.¹³ In the 1970's, American farmers perhaps do not exercise the power of food, but certainly American agriculture is a significant source of power with global impact.

Although the trend toward increasing concentration in the production and marketing of agricultural products was already evident in the 1950's, this trend has greatly accelerated over the last 20 years. The face of the American agricultural producer may well be changing from that of a tanned, weather-beaten person to that of a shiny, freshly-painted corporate or cooperative logo. Not only have family farms diminished in number, but they also may be corporate entities. The changing face of American agriculture simply reflects its increasing penetration by agri-business entities and perspectives. Truly gigantic structural changes are presently occurring;¹⁴ as a result, older institutions and legal arrangements may no longer be able to cope with new demands. Hence, courts and administrative agencies are called upon to settle disputes which have arisen from tensions generated by the structural changes;

vovement with the international grain trade. *Nat'l Ass'n of Wheat Growers, Report from Washington*, Jan. 23, 1976.

12. In 1955, agricultural exports from the United States were \$637 million less than agricultural imports, while nonagricultural exports had a favorable trade balance of approximately \$5 billion. In 1975, the situation has been completely reversed. Agricultural exports now provide a favorable trade balance of \$12 billion, while non-agricultural products create a trade deficit of \$10 billion. ECONOMIC RESEARCH SERVICE, DEP'T OF AGRICULTURE, U.S. FOREIGN AGRICULTURAL TRADE STATISTICAL REPORT, FISCAL YEAR 1975, Table 2, at 2 (1975). The use of agriculture to achieve foreign policy goals can best be illustrated by recalling to mind the recent U.S.A.-U.S.S.R. wheat for oil agreement.

13. Attention has been attracted to American agriculture from both foreign and domestic sources. Witness the World Food Conference held in Rome in November, 1974, and the consumer uproar over the nexus between Soviet wheat sales in 1972 and the price of bread in American food stores.

14. For an excellent presentation of the various structural changes underway, see UNIVERSITY OF ILLINOIS COOPERATIVE EXTENSION SERVICE, WHO WILL CONTROL U.S. AGRICULTURE? (North Central Regional Extension Publication 32, 1972).

lawyers are called upon to be innovative in the creation of new voluntary arrangements which accommodate the structural changes; legislators are called upon to authorize the creation of new legal institutions when previous institutional arrangements can no longer adequately respond.

The three reasons I have presented for the renewed interest in agricultural law also provide, in my opinion, a springboard for preliminary speculation about the answer to the third question previously posed—what meaning can be found undergirding this renewed interest in agricultural law?

My impression is that most farmers, at least until recently, have believed that an attorney was to be consulted only after a particular legal problem had arisen. Farmers felt that the kind of legal information they needed was adequately provided by publications of the cooperative extension services—information which permitted a farmer to decide by himself whether he had a legal problem which would require legal consultation. Now, for the same reasons which I listed as spurring renewed interest in agricultural law, farmers are beginning to realize that they can no longer wait to consult with attorneys “after-the-fact.” They recognize that their legal problems are no longer limited to private legal actions between two individuals. Legal problems in agriculture now often involve multiple parties with a resolution affecting agriculture as a whole.¹⁵ Farmers now need legal information which requires involvement of attorneys in the planning and formulation of institutional arrangements, legislative strategy, and agricultural interests. At the same time, I think that attorneys themselves are recognizing that, although farmers will continue to have private legal problems like other citizens, farmers also have legal problems—some individual, some group—which are unique to agriculture.

I would analogize the changing relationship between farmers and lawyers to the changing relationship between businessmen and lawyers in the second half of the 19th century.¹⁶ At first, businessmen consulted lawyers only after informal agreements had unraveled or specific damages had been suffered by or alleged against the business enterprise. Then businessmen began to consult lawyers to have the various decisions and arrangements which the businessman had already reached put into a final, legal form. Finally, businessmen began to consider lawyers as necessary consultants and advisors during the decision-making process itself. Farmers and lawyers, it seems to me, are now relating more fre-

15. An example is the class action law suit filed by wheatgrowers that arises out of the 1972 wheat sales to the Soviet Union. *Zinser v. Palmby*, M.D.L. Doc. No. 129 (W.D. Okla., filed Aug. 15, 1974). See also note 11 *supra*.

16. Cf. Hurst, *Lawyers in American Society 1750-1966*, 50 MARQ. L. REV. 594 (1967).

quently to one another in such pre-decision consultant-advisor capacities.

With the changed perception of the role for attorneys in agriculture has been a concomitant change in perception of the role of law in the agricultural sector. In the past, I would speculate that farmers viewed the law solely as a reflection of the social and economic conditions of the community which the law was meant to serve. Law as a social institution was not considered an active instrument of social policy; law followed the social patterns of the community, but did not create its social patterns. This conservative view of law as a social institution was consistent with the limited role hithertofore played by attorneys in agriculture.

As a result of the three reasons differentiating agriculture in the 1950's from agriculture in the 1970's, however, farmers are concluding that an institutional vacuum presently exists in the agricultural sector. Because this vacuum will be filled somehow, farmers have had to face the questions whether law should be used to foster and create institutional arrangements considered desirable from their viewpoint, or whether law should continue to be considered a passive instrument which will only legitimize institutional arrangements reached through the interplay of presently existing social and economic forces. In my opinion, more and more farmers are deciding that law should be used as an active instrument in the formulation of institutional arrangements.¹⁷

I would analogize the relationship between law and agriculture today to the relationship between law and industrial production in the second quarter of this century. Social and economic conditions had given rise to enormous structural changes affecting industrial production to which the law as a social institution had simply responded. Beginning in the middle 1930's, however, law was used as an active instrument of social policy to foster and create specific institutional arrangements between management and labor.¹⁸ Farmers are now urging that law be used in a similar manner within the agricultural sector to formulate institutional arrangements to serve as the legal framework within which agricultural production and marketing will occur in the coming fourth quarter of this century.

17. Three recent examples come to mind: 1) Agricultural Fair Practices Act, 7 U.S.C. §§ 2301-06 (1970); 2) The resolution adopted at the national convention of the National Farmers Union that legislation be passed to create a farmer-controlled governmental agency to negotiate all export sales of United States grains. *FARM J.*, April 1974, at 12; 3) The adoption, in several states, of legislation dealing with agricultural employer-employee relations; see, e.g., *KAN. STAT. ANN.* §§ 44-818 to -830 (1973).

18. Labor-Management Relations Act (Taft-Hartley), 29 U.S.C. §§ 141-44, 151-67 (1970); National Labor Relations Act (Wagner-Connery), 29 U.S.C. §§ 151-66 (1970).

It is in the changed conception of the role of the attorney and the role of law, as these roles interact with the agricultural sector, that I find the primary meaning of the recent interest in agricultural law in the law reviews and in the law schools. These changed perceptions permit agricultural law to acquire autonomy in the legal profession and in the law school curriculum.¹⁹ With the expanded role for the attorney, the source of legal information switches from self-help legal information obtained from the cooperative extension services to on-going legal advice obtained from attorneys daily engaged in decisions being made by farmers. With the use of law as an active instrument of social policy, agricultural law as an academic subject frees itself from interdisciplinary programs with agricultural economics, in which economic efficiency was the primary focus, to attain independent status in which the creation of institutional arrangements is the primary focus. A primary emphasis upon institutional arrangements is necessary, in my opinion, if agricultural law is to achieve legitimacy within the law school curriculum, for when the focus shifts from economic efficiency to institutional arrangements, law professors and law students can perceive agricultural law as a course in law, as opposed to economics, in the curriculum.²⁰

It is recognition of these changed conceptions about lawyers and law in the agricultural sector that the *South Dakota Law Review* has established an annual agricultural law symposium, to provide a forum for lawyers and law professors actively engaged in agricultural law to communicate their ideas and expand their understanding. Through this symposium, the "new world" of agricultural law is being explored in our midst.

19. Cf. Karst, *Law and the Use of Agricultural Land: Perspectives from the Western Hemisphere*, in *LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES* 349 (J. Hazard & W. Wagner ed. 1970).

20. I want to stress that I am not denigrating interdisciplinary work between agricultural economics and law. In truth, I hope that the interdisciplinary work increases because the quality of the work on agricultural law being done in the colleges of agriculture is high and the knowledge to be gained from this work by lawyers and law professors is great. Agricultural law in the colleges of agriculture emphasizing agricultural efficiency and agricultural law in the colleges of law emphasizing institutional arrangements are complementary, not conflicting, subject matters.