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RECENT DEVELOPMENTS IN THE LAND LAW OF THE SUDAN: A LEGISLATIVE ANALYSIS

CAREY N. GORDON*

I. INTRODUCTION

With the promulgation of the Sudanese Civil Transactions Act, 1984, in February, 1984, the Republic of the Sudan joined several other Arab countries (e.g. Egypt, Jordan, Iraq and Libya) which have codified major areas of their non-criminal law. The Sudan's previous attempt at such codification was short-lived: the Civil Code, 1971 was repealed in 1973. Although many sectors of the Sudanese legal establishment have been critical of the 1984 legislation, because of questions regarding the quality of the draftsmanship and the absence of its circulation for comment prior to promulgation, it remains the most comprehensive single piece of legislation since the 1971 Civil Code, covering such topics as contract, sales, tort, gift, insurance, bailment and property, both real and personal.

This article will survey all current Sudanese legislation affecting real property, including, most importantly, the Civil Transactions Act, 1984. Because there are more than twenty-five separate legislative acts in the Sudan relating to land, comprising more than six hundred relevant sections, the discussion herein must of necessity be to highlight the major divisions of the current land law, pointing out its distinctive features and those areas in which it appears that conflicts exist as between the various pieces of legislation.¹

The Civil Transactions Act, 1984 (hereinafter sometimes referred to as "C.T.A."), was promulgated on 14 February, 1984, and took effect on that date.² It comprises some 95 chapters with 819 separate sections, more than one-third of which deal with matters relating to land. The original text of the

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¹Two comprehensive texts on Sudanese land law of substantial use to the researcher are Cliff F. Thompson, *The Land Law of the Sudan: Cases and Materials*, Khartoum, 1965 (3 vols.); and Saeed Mohamed Ahmed El Mahdi, *Introduction to the Land Law of the Sudan*, Khartoum, 1979. An excellent work containing material on land tenure practices respecting agricultural land is J. D. Tothill, ed., *Agriculture in the Sudan*, London, 1948.

²The Civil Transactions Act, 1984 was drafted by a small committee within the Presidential Palace, and borrowed heavily from the Civil Codes of Jordan, Egypt, and Iraq. These three latter Civil Codes, in turn, borrowed from the *Majalla*, a codification of the Islamic law of obligations made during the Ottoman Empire in the years 1869-76 based on the rules of the Hanafi school of Islam. See generally, N. Coulson, *A History of Islamic Law*, 1964, 151-52; Onar, "The *Majalla*", in M. Khadduri & H. Liebesny (eds) *Law in the Middle East, Vol. 1: Origin and Development of Islamic Law*, 1955, 292-308; Badr, "The New Egyptian Civil Code and the Unification of the Laws of the Arab Countries", (1956) *Tulane L. Rev.* 30, 299; Jwaideh, "The New Civil Code of Iraq", (1953) 22 *Geo. Wash. L. Rev.* 176; Liebesny, "Impact of Western Law in the Countries of the Near East", (1953) 22 *Geo. Wash. L. Rev.*, 127; Anderson, "The Shari'a and Civil Law: The Debt Owed by the New Civil Codes of Egypt and Syria to the Shari'a", (1954) 1 *Islamic Q.* 29. On the process of the codification of Islamic Law, see Schacht, "Problems of Modern Islamic Legislation", (1960) 12 *Studia Islamica*, 99. Two English translations of the *Majalla* from the original Turkish are contained in C. Hooper, *The Civil Law of Palestine and Trans-Jordan*, Jerusalem, 1933, and C. Tyser, D. Demetriades & I. Effendi, *The Majelle*, Nicosia, 1901; reprinted Lahore, 1967.

law was promulgated in Arabic. However, this writer has had the benefit of a draft English translation of the C.T.A. prepared primarily by the Attorney General's Chambers in Khartoum. Although Sudanese law requires that an official English translation of all legislation be published in the government *Gazette*,³ the English text has yet to be published. Unfortunately, this has been the case with most legislation promulgated in the last several years, to the detriment of those Sudanese lawyers more comfortable working with English-language texts.

II. THE RECENT SUDANESE LEGAL ENVIRONMENT

During the period from August 1983 to 1984, the former Sudanese President, Ga'afar Mohamed Nimeiri, promulgated a wide range of new legislation, the stated intention of which was to bring the Sudanese legal system into accord with Islamic law (*Shari'a*).⁴ The volume and scope of new legislation during this period was all-encompassing, including about thirty new ordinances and the amendment of many more. In addition to the C.T.A., new legislation during this period includes the Penal Code, 1983; Civil Procedure Act, 1983; Criminal Procedure Act, 1983; Evidence Act, 1983; Road Traffic Act, 1983; Judiciary Act, 1984; Zakat and Taxes Act, 1984; and the Customs Act, 1984 to list but a part. Although many of the new laws closely follow the organisation and language of the laws they were repealing, (earlier versions of which were originally drafted by the British during the Anglo-Egyptian Condominium period, 1899–1956), several of the new legislative Acts contain a provision stating that sections thereof shall be interpreted in accord with Islamic law. More generally, the Civil Procedure Act, 1983, states:

In cases not provided for by any law, the courts shall act according to Shari'a law, Sudanese judicial precedents, custom, justice and good conscience.⁵

In an important variation of the foregoing provision, however, the Judgments (Basic Rules) Act, 1983, states in part:

Notwithstanding any provisions in any other law, and in the absence of a legislative provision governing an event: (a) a judge shall apply the existing Shari'a rule as established by the Koran and the Sunna^{5a}

The Civil Transactions Act, 1984, contains a provision to the same effect.⁶

Following the change in Sudan's government on 6 April, 1985, which involved the removal of Nimeiri as President and the institution of a Transitional Military Council and Council of Ministers as the governing

³ Interpretation of Laws and General Clauses Act, 1974, sec. 7(1), 7 *Laws of the Sudan* 136 (5th ed. 1982).

⁴ For a discussion of recent legal developments in the Sudan, see Gordon, "The Islamic Legal Revolution: The Case of Sudan", (1985) 19 *Int'l Law*, 793.

The continued retention of *shari'a*-based legislation in Sudan is controversial as among various Sudanese political parties. The campaign leading up to national elections in Sudan scheduled for April 1986 involved in part a debate regarding whether or not this legislation, particularly the criminal provisions, should be repealed or amended. On this controversy, see *Sudanow*, Jan. 1986, at 8–13.

⁵ Civil Procedure Act, 1983, s.6(2) (promulgated 18 August, 1983). The history of this provision as set forth in earlier legislation is detailed in Gordon, *above* n.4, at 801, n.48. See generally, Z. Mustafa, *The Common Law in the Sudan: An Account of the "Justice, Equity and Good Conscience" Provision*, Oxford, 1971.

^{5a} Judgments (Basic Rules) Act, 1983, s.3 (promulgated 28 September, 1983).

⁶ Civil Transactions Act, 1984, s.3.

authorities (later replaced in April 1986 by an elected parliamentary system), a decree was issued providing that all laws in effect as of the date of the change in government shall remain in force until such time that they may be repealed or amended.^{6a} As a result, at least as provided for by legislation, the Courts of the Sudan are to apply Islamic law, where it is applicable, even in the face of conflicting legislation.⁷

III. THE SOURCES OF SUDANESE LAND LAW

The governmental regulation of land in the Sudan in the twentieth century has been a complex product of various sources. As stated by one scholar some twenty years ago, still accurate today:

The land law of the Sudan is a unique combination of Sudanese legislation, judge-made rules, customary laws, and Shari'a law. Many of these rules are wholly of local origin, whereas others have been received from abroad with a varying degree of modification in the Sudan.⁸

This article primarily discusses one of the sources of Sudanese land law, albeit the most important, that of legislation. It is important to note, however, that by considering the legislative rules, even though such presumably enunciate the most important policies of the state regarding the regulation of land, one is considering but part of the applicable picture.^{8a} To state the point differently,

^{6a} Decree no. 5 issued by the Chairman of the Transitional Military Council on or about 9 April, 1985. Soon after the change in government, Sudan's 1973 Constitution was suspended, the national and regional legislative assemblies were dissolved, and the sole legal political party under the 1973 Constitution, the Sudan Socialist Union, was dissolved. On 10 October, 1985, the Transitional Military Council promulgated The Transitional Constitution of the Sudan, 1985 which replaced the 1973 Constitution. Article 133 of the 1985 Constitution states:

"Subject to the provisions of this Constitution, all laws valid immediately before this Constitution took effect shall continue unless repealed or amended by the competent authority."

Article 3 of the 1985 Constitution provides that the Constitution shall prevail over the provisions of any inconsistent legislation.

⁷ This was the position taken in rulings by certain judges during the last year of the Nimeiri government. For the future, it is unclear whether s.3 of the Judgments (Basic Rules) Act, 1983 will be similarly construed. An English translation of the full text of this latter Act is contained in Gordon, *above* n.4, at 814-15.

⁸ C. Thompson, *above* n.1, vol. 1, 5.

^{8a} Customary law has played an important role in the evolution of the Sudanese legal system. In *Shandag Adam Niem Alla v. Ibrahim Yousif Khamgan*, (1973) Sudan L. J. & Rep. 33, 35, the Sudan Supreme Court stated:

"Even though the existence of an alleged custom is proved, the Court may refuse to accord it judicial recognition if it does not conform with the demands of justice or public order." The Evidence Act, 1983 (promulgated 6 October, 1983) states at s.17(3)(f) that a court shall take judicial notice of "general Sudanese customs recognized by the courts provided that they are not in contravention of the provisions of Shari'a law." On the history of customary law in the Sudan, see generally Deng, "The Future of Customary Law in the Sudan", (1969) 11 *Malaya L. Rev.*, 268; Thompson, "The Formative Era of the Law of the Sudan", (1965) Sudan L.J. & Rep. 474, 477; Rannat, "The Relationship Between Islamic and Customary Law in the Sudan", [1960] 4 *J.A.L.* 9. With respect to customary law relating to land, see El Mahdi, "Some General Principles of Acquisition of Ownership of and Rights Over Land by Customary Prescription in the Sudan", [20] *J.A.L.* 79; P. Howell, *A Manual of Nuer Law* 181-90, Oxford, 1954; R. O'Fahey, *State and Society in Dar Fur*, 49-68, London, 1980; Guttman, "Land Tenure Among the Azande People of Equatoria Province in the Sudan", (37) Sudan Notes & Rec. 48. On the role of customary law in *Shari'a*, see generally Schacht, "Usul", in H. Gibb & J. Kramers (eds) *Shorter Encyclopaedia of Islam*, 1974, 611, 614-15 par. 8; El Awa, "The Place of Custom ('Urf) in Islamic Legal Theory", (1973) 17 *Islamic Q.* 177; Coulson, "Muslim Custom and Case-Law", (1961) 6 *Die Welt Des Islams* 13 (new ser.); Bousquet, "Islamic Law and Customary Law in French North Africa", (1950) 32 *J. Comp. Legis. & Int'l L.* 57 (3d ser.).

“there is often no relationship between formal legislation and what actually takes place ‘on the ground’.”⁹ As a result, in order to determine the land tenure practices being followed in a particular locale of the Sudan, one should physically inspect the area in question, and speak to the respective regional and local government officials for the district, as well as the persons in possession of or interested in the subject land. A study of the land legislation is an important starting point in an attempt to determine the applicable rules, consistent with the procedure which would be used by a Sudanese court of law, but one must keep in mind that the customs and practices actually being followed may vary from the legislative scheme provided for in the law books. This is particularly so with regard to new legislation, the texts of which may be unevenly distributed, even as among judicial and other government officers.

The Civil Transactions Act, 1984, states that its provisions shall apply to all obligations and rights arising, *inter alia*, out of lease, ownership, incidents of ownership, and mortgages.^{9a} More generally, in conformity with well-established *situs* choice-of-law rules, the C.T.A. states that the law of Sudan shall govern the possession, ownership and rights regarding land in the Sudan, including contracts with respect to Sudanese land.¹⁰

Sudanese legislation regulates the demarcation of boundaries between various parcels of land. The Survey Department of the central government is vested with the authority to demarcate boundaries both within the country and with regard to the international borders of the state. In particular, the Survey Department has authority to undertake cadastral surveys, defined as surveys “concerned with ownership of agricultural and residential tenure, mines and quarries, forests, agricultural schemes whether irrigated artificially or by rainwater. . . , their demarcation or redemarcation, as well as . . . the preparation of plans showing the boundaries of such lands, with dimensions, areas and levels to achieve their development and assist in the preservation of peace.”¹¹ The Regional Governor and the Director of Surveys may authorise any officer of the government to enter upon any lands for the purpose of surveying and determining the boundaries applicable thereto.¹² In carrying out such duties, the authorised officer may order any person occupying or interested in the land to provide information regarding the boundaries of such land, and to demarcate the land by erecting stones, pillars, posts or such other landmarks as the officer may direct.¹³ Additionally, an owner of land may compel his neighbour to demarcate the boundaries of their adjoining properties, with the costs of the demarcation to be shared equally between them.¹⁴ Once land has been officially demarcated, the owners and occupiers of such land are obligated to keep and maintain the land boundary marks in good repair and to replace any which are destroyed or removed.¹⁵

⁹ Raymond Noronha and Francis J. Lethem, *Traditional Land Tenures and Land Use Systems in the Design of Agricultural Projects*, Washington, D.C., The World Bank 1983 (Staff Working Papers, no. 561), 2.

^{9a} Civil Transactions Act, 1984, s.4.

¹⁰ *Id.*, s.11(12) and (13)(b).

¹¹ The Survey Department (Organization) Act, 1974, ss.2 and 3(e), 7 *Laws of the Sudan* 132 (5th ed. 1982).

¹² The Demarcation and Survey Act, 1905, s.3(1), 1 *Laws of the Sudan* 19 (5th ed. 1976) (as amended 1982).

¹³ *Id.*, ss.4, 5(a).

¹⁴ Civil Transactions Act, 1984, s.529(1).

¹⁵ The Demarcation and Survey Act, 1905, s.7.

IV. REGISTRATION OF RIGHTS AND INTERESTS IN LAND

The registration of rights and interests in land is the process by which a government agency keeps a record of title to land, whereby no dealing in respect of any parcel of land in that record is valid unless it is registered. The purpose of registration is to facilitate proof of title and so make transfer of land simple, quick, cheap and certain.¹⁶ In the Sudan, The Land Settlement and Registration Act, 1925,¹⁷ provides the major provisions regarding registration of land rights, at least as to those privately held.¹⁸

The Land Settlement and Registration Act, 1925, empowers the Attorney General, whenever "it appears expedient" to do so, to publish a notice in the Gazette stating that it is intended to effect a settlement and registration of land within a specified area.¹⁹ Following such publication of notice, the head of the judiciary in the governmental region in question appoints a settlement officer and demarcation officers to carry out the demarcation, settlement and registration of the settlement area.²⁰ The settlement officer then issues a notice fixing the period within which any person claiming land or any right or charge upon land within the settlement area is required to present his claim.²¹ The 1925 Act specifies in detail the principles to be followed in determining outstanding rights and interests to land,²² and provides dissatisfied parties with a method of appealing the decisions reached.²³ Provision is also made for the correction of information contained in land registries in the event of fraud or mistake.^{23a} The compiled land registers are to be maintained by the judiciary subject to the supervision of the Chief Justice of the Supreme Court,²⁴ with a copy of each register maintained in a land registry office established in the province in question.²⁵

Prior to 1970, the registration and settlement of rights and interests in land had not been effected throughout the Sudan. As to land which had been registered before 6 April, 1970, no right or interest therein was valid unless it was effected through the applicable land registry,²⁶ or as a result of prescription (obtaining rights in land as a result of passage of time).²⁷ On 6

¹⁶ Simpson, "Land Tenure: Some Explanations and Definitions", (1954) 6 J. African Administration 50, reprinted in Thompson, *above*, n.1, vol. 1, pp. 82ff.

¹⁷ 1 *Laws of the Sudan* 403 (5th ed. 1976). See generally, Saeed M.A. El Mahdi, *A Guide to Land Settlement and Registration*, Khartoum, 1971; Miskin, "Land Registration", (1950) 31 Sudan Notes & Records 274; Simpson, "Land Law and Registration in the Sudan", (1955) 7 J. African Administration 11.

¹⁸ See also, Civil Transactions Act, 1984, ss.558, 559(6), 615(2), 728, 782. Regarding state-owned lands, see Civil Transactions Act, 1984, ss.559(3), 615(2).

¹⁹ Land Settlement and Registration Act, 1925, s.4.

²⁰ *Id.* s.5 (as amended 2 December, 1984).

²¹ *Id.* s.6.

²² *Id.* ss.13, 16.

²³ *Id.* ss.15(2), 19, 97.

^{23a} *Id.* s.85.

²⁴ *Id.* s.20 (as amended 2 December, 1984).

²⁵ *Id.* s.23.

²⁶ *Id.* s.28. Notwithstanding this section, there are reported judicial decisions providing exceptions. See, e.g., *Siddiq Babiker El Kabis v. Hamad Mohamed Hassan*, (1962) Sudan L.J. & Rep. 17.

²⁷ Land Settlement and Registration Act, 1925, s.27(f), 85(c). See generally, Thompson, *above* n.1, vol. 2, pp. 563-64, vol. 3, p. 655. But see, Prescription and Limitation Act, 1928, ss.2 (last par.), 6A (repealed 1984).

April, 1970, legislation was promulgated stating that "all land²⁸ of any kind whatsoever, whether waste, forest, occupied or unoccupied, which is not registered before the commencement of this Act, shall, on such commencement, be the property of the Government and shall be deemed to have been registered as such."²⁹ The Civil Transactions Act, 1984, now provides that land registered on or after 6 April, 1970, as freehold in the name of an owner shall be deemed merely the ownership of the "usufruct" thereof.³⁰ "Usufruct" is defined as the right to use property that belongs to another person.³¹ In other words, the 1984 legislation maintains the rule, originally enunciated in 1970, that as to land for which full ownership was not registered in the name of a private person prior to 6 April, 1970, the state is deemed to be the owner thereof, although the right to use such land may belong to a private party.³² The 1970 legislation, reconfirmed in the C.T.A., 1984, was nothing less than a major act of land reform, which vested the ownership of the greatest majority of Sudanese land in the government. According to one estimate in 1971, out of a total area in the Sudan of 596.6 million feddans,^{32a} only 6 million feddans were privately owned (i.e. approx. 1 per cent).^{32b} As one author stated with respect to the 1970 legislation, "The Act has made the Government the biggest landlord in the Sudan. It is now in full ownership of all unregistered land and can control the property market."^{32c}

In conclusion, it may be said that, other than with respect to a person who has utilised waste land,³³ no right or interest may be obtained in state-owned land unless such right or interest is registered at a government registry.³⁴ Similarly, with respect to privately-owned land the title of which is registered, no transfer, charge, or other dealing is valid unless also registered,³⁵ or unless obtained through prescription.³⁶ The C.T.A. expressly provides that with respect to land used for financing purposes, no mortgage³⁷ or pledge³⁸ is enforceable unless registered.

V. GENERAL PRINCIPLES OF OWNERSHIP OF LAND

As indicated above, the major division in land ownership in the Sudan is between land owned by the state and that which is privately owned. In

²⁸ The use of the word "land" in this provision was defined broadly to include any interest in land including the right of cultivation. See, Unregistered Land Act, 1970, s.2(1) (repealed 1984); Land Settlement and Registration Act, 1925, s.3.

²⁹ The Unregistered Land Act, 1970 (Act no. 23), s.4 (repealed 1984). Exceptions were provided for in cases where a private person could prove his usage of the land "for a long time", and for cases where the government was satisfied that a person had made "any beneficial use" of the property in question. See, *Id.*, ss.3, 8(4).

³⁰ Civil Transactions Act, 1984, s.559(3).

³¹ *Id.*, s.693.

³² *Id.*, ss.559, 560.

^{32a} One feddan equals 1.038 acres, or 4200 square metres.

^{32b} Mohammed Hashim Awad, "The Evolution of Landownership in the Sudan", (1971) 25 Middle East Jour., 212, 218.

^{32c} El Mahdi, *above*, n.1, at 95.

³³ Civil Transactions Act, 1984, s.560.

³⁴ *Id.*, ss.615(2), 651, 687(2).

³⁵ See n.26.

³⁶ See n.27. See also, Civil Transactions Act, 1984, s.641(1), 642(1), 649-50.

³⁷ Civil Transactions Act, 1984, s.728.

³⁸ *Id.*, s.782.

general, however, the C.T.A. provides that "Land belongs to God."³⁹ Notwithstanding this provision, however, the state is declared to be responsible for the control of land, and owner of all land which was not registered in the name of a private party prior to 6 April, 1970.⁴⁰

The state, of course, may permit private parties to use state-owned lands. The C.T.A. provides that the central, regional, and National Capital authorities shall organise the procedure for granting the usufruct of land to private persons, through the establishment of committees consisting of not less than three members.⁴¹ Under legislation recently enacted, however, the authority previously given to the regional governments, the National Capital, and the local governments to regulate land matters was granted to the central government.⁴² A private party having merely the right to use state-owned land may not, of course, attempt to dispose of the ownership of such land by sale, gift, will or mortgage without first having obtained the ownership from the government⁴³ in a registered transaction.⁴⁴

The Civil Transactions Act, 1984, provides that ownership of land is the "absolute authority of the owner to dispose of his property and its use and enjoyment," which includes the rights to its crops, fruits and other natural products.⁴⁵ A land-owner, however, must not act contrary to the law, or cause injury to others beyond that permitted by normal custom.⁴⁶ Further, it is impermissible to impede the passage of a public road, and a land-owner without egress to a public road is entitled to a right of way over the adjoining land to the extent necessary for the normal use and enjoyment of his land.⁴⁷ An owner may not when transferring his property impose restrictions on the transferee unless such restrictions are for a specified period and designed to protect the legitimate interests of the transferor, the transferee, or another person.⁴⁸

VI. CO-OWNERSHIP OF LAND (JOINT OWNERSHIP)

Subject to the rules of inheritance, when two or more persons acquire ownership of land, Sudanese law presumes that the owners hold the land in undivided and equal shares, unless there is evidence of a contrary intention.⁴⁹ This means that each of the co-owners is without a claim to a particular portion of the land, but rather only to an undivided interest in the whole

³⁹ *Id.*, s.559(1). This provision is consistent with the *Qur'an* 3: 189 which states:

"To God belongeth the Dominion
of the heavens and the earth;
And God hath power over all things."

See also, *Qur'an* 4: 126.

⁴⁰ Civil Transactions Act, 1984, s.559(1)-(3).

⁴¹ *Id.*, s.556(1)-(2).

⁴² Miscellaneous Amendments Act, 1405 (promulgated by the Transitional Military Council on 16 July, 1985). With respect to the problem of the division of authority over land matters, as between the national, regional and local levels of government in the Sudan, see part XIII of this paper.

⁴³ Civil Transactions Act, 1984, s.519(1).

⁴⁴ *Id.*, s.615(2).

⁴⁵ *Id.*, s.516(1)-(2). A more detailed discussion of the permissible use of private land is contained in part VIII of this paper.

⁴⁶ Civil Transactions Act, 1984, ss.518, 522.

⁴⁷ *Id.*, s.528.

⁴⁸ *Id.*, s.523.

⁴⁹ *Id.*, s.532.

parcel. In general, where land is transferred through succession (inheritance), whether with or without a will, property belonging to the decedent will pass to the heirs or named beneficiaries according either to Islamic law, where the deceased was a Muslim,⁵⁰ or according to the personal laws and customs applicable to the deceased.⁵¹ The method of the division of a Muslim decedent's estate depends on the number of heirs and their relationship to the deceased.⁵² This has often created a phenomenon of fractionalisation of land holdings in the Sudan, resulting from the division of a decedent's estate into shares, ever smaller with each passing generation.⁵³ According to one source,

the fractionalization of holdings in the Sudan is largely a legal phenomenon, and not a physical one. In most cases the division of a plot of land left by a person to his heirs takes the form of a distribution of its yield (or revenue) and it seldom leads to the partition of the plot itself.⁵⁴

In certain locations in the Sudan, a custom (*Idafa*) has existed whereby a male member of the family, as among a group of heirs, registers the land in his name.^{54a} The C.T.A. provides that a co-owner of land "may dispose of his share in the common property in the manner he thinks fit, provided that he does not prejudice the rights of the other co-owners."⁵⁵ A possible legislative conflict with this provision arises from separate legislation which provides that:

where land is registered in the names of proprietors in undivided shares, the Registrar may refuse registration of any dealing with an undivided share by any of the proprietors in favour of any person other than another proprietor unless the remaining proprietors consent or unless a partition is effected prior to registration.⁵⁶

In cases of conflict between the Civil Transactions Act, 1984 and earlier legislation, it is probable that the provisions of the C.T.A. will be determined to prevail.⁵⁷

The C.T.A. provides that the management of the property held in common is the right of all the co-owners collectively unless there is an agreement to the contrary; however, if one of the co-owners undertakes such management without objection by the other co-owners, he is deemed to be an agent on their behalf.⁵⁸ Otherwise, a majority resolution of the co-owners, calculated on the

⁵⁰ *Id.*, ss.655(2), 676, 683(1). See also, Civil Procedure Act, 1983, 2d Schedule s.101-34; and Fluehr-Lobban & Hillawi, "Circulars of the Shari'a Courts in the Sudan," [27] *J.A.L.* 79.

⁵¹ Wills and Administration Act, 1928, ss.4-6, 2 *Laws of the Sudan* 117 (5th ed. 1976); Civil Transactions Act, 1984, ss.655(3), 679.

⁵² See, generally, N. Coulson, *Succession in the Muslim Family*, Cambridge, 1971; D. Pearl, *A Textbook of Muslim Law*, London, 1979, 144ff; S. Vesey-Fitzgerald, *Muhammadan Law: An Abridgement According to its Various Schools* 111 *et seq.*, Oxford 1931, 11ff; Anderson, "Recent Reforms in the Islamic Law of Inheritance", (1965) 14 *Int'l & Comp. L.Q.* 349; Makdisi, "Fixed Shares in Intestate Distribution: A Comparative Analysis of Islamic and American Law", (1984) *Brigham Young Univ. L. Rev.* 267.

⁵³ See, Tothill, "The Problem of Land Fractionation", in Tothill, ed., *above*, n.1, at 210ff.

⁵⁴ Awad, *above*, n.32b, at 227. See also, "Report of the Land Registration Committee," 14 April, 1929, reprinted in Thompson, *above*, n.1, vol. 2 at 399, 419.

^{54a} *Hassan Fadl El Mula v. Zeinab Fadl El Mula*, 1956 *Sudan Law Jour. & Reports* 90; *Heirs of Neima Khidir*, 1959 *Sudan Law Jour. & Reports* 53; *Heirs of Siddig Ahmed Kambal v. Said Ahmed Kambal*, 1962 *Sudan Law Jour. & Reports* 152.

⁵⁵ Civil Transactions Act, 1984, s.533(1). See also, s.664 as to disposition of property obtained from a decedent's estate, and s.540(1) regarding land held in family ownership.

⁵⁶ Land Settlement and Registration Act, 1925, s.30.

⁵⁷ Civil Transactions Act, 1984, ss.558(1), 819; Interpretation of Laws and General Clauses Act, 1974, s.6(3).

⁵⁸ Civil Transactions Act, 1984, s.534(1)-(2).

basis of the value of shares, is binding on all the others.⁵⁹ Separate legislation provides for the appointment of a statutory trustee to manage property where its management is unwieldy due to the number or status of the owners.⁶⁰ The expenses of administering land held in co-ownership, including taxes, are to be borne by all the co-owners in proportion to their respective shares.⁶¹ Special provisions relate to land held within a family, which, with the agreement of the family owners, may be managed by one or more of their number, for a period not exceeding 15 years.⁶²

The partition of land held in undivided shares by co-owners (i.e. its division into separate parcels) may be obtained through court order except where partition would be detrimental to the interests of the co-owners⁶³ or incompatible with the purposes for which the land was held.⁶⁴ Partition of land is permissible either pursuant to the agreement of all the co-owners,⁶⁵ or on the application of one or more of the co-owners, a creditor of one of the co-owners in whose favour an order of sale has been obtained, or the state if the property is registered land.⁶⁶ Where it is impractical physically to divide a parcel of land, or where its partition would result in shares smaller than the minimum size allowed by law to be registered,⁶⁷ the court may order the sale of the property, with the proceeds to be divided among the co-owners in the proportion to their shares.⁶⁸

VII. ACQUISITION OF OWNERSHIP OF LAND

This section will discuss the methods by which land may be acquired either by the state or private persons.

(i) Acquisition by the state

Reference has been made above (in section IV regarding the registration of land) to legislation in 1970, reconfirmed in 1984, which vested the ownership of all land unregistered prior to 6 April, 1970, in the Sudan government.⁶⁹ As a result of this legislation, the government obtained ownership of all land not previously registered in the name of a private party. The state, of course, held land in its name prior to 1970 as a result of land settlement proceedings, in which a presumption operated that all waste, forest and unoccupied land was deemed to be the property of the government unless the contrary was proved.⁷⁰

Sudanese legislation provides for the forced acquisition by the state of land privately held when a determination has been made that such land is

⁵⁹ *Id.*, s.534(4).

⁶⁰ Land Settlement and Registration Act, 1925, ss.99–100. See also, Civil Transactions Act, 1984, s.534(5), which provides for the appointment of a director to manage the property.

⁶¹ Civil Transactions Act, 1984, s.536.

⁶² *Id.*, ss.538–42.

⁶³ Civil Procedure Act, 1983, s.135.

⁶⁴ Civil Transactions Act, 1984, s.537(2).

⁶⁵ *Id.*, ss.537(1), 678(2).

⁶⁶ Civil Procedure Act, 1983, s.134.

⁶⁷ Land Settlement and Registration Act, 1925, ss.31–32.

⁶⁸ Civil Procedure Act, 1983, ss.137(1)(b).

⁶⁹ See particularly, Civil Transactions Act, 1984, ss.559.

⁷⁰ Land Settlement and Registration Act, 1925, ss.16(c), 19A.

“required permanently or temporarily for any public purpose.”⁷¹ It is stated that no person shall be deprived of property except through the payment of prompt consideration and in accordance with due process of law.⁷²

The procedure to be followed in state acquisition is that an expropriation officer is to be appointed,⁷³ who gives notice to occupiers of the land and other interested persons, identifying the land and stating its intended acquisition “for a public purpose.”⁷⁴ Where the land in question has not previously been registered, it shall be registered before the acquisition is carried out.⁷⁵ The expropriation officer is to attempt to reach an agreement as to compensation with the persons having rights or interests in the land;⁷⁶ in the absence of agreement, the amount of compensation is to be determined by a board of arbitration according to set standards,⁷⁷ with provision made for appeal.⁷⁸ Compensation may be made either through the payment of money or the grant of other land.⁷⁹ In addition to the foregoing statutory provisions, which have general application to land in the Sudan, other legislation relates to the acquisition of land by the state for the purposes of specified agricultural and development schemes.⁸⁰

(ii) Acquisition by Private Persons

Land may be obtained by private persons in the Sudan through a variety of means, including deed, intestate succession, will, possession, prescription, and pre-emption.

(a) Acquisition by deed

Title to land may be transferred by a deed, which must be in writing,⁸¹ set forth in Arabic,⁸² signed by all parties thereto,⁸³ and witnessed by at least one person.⁸⁴ The parties must normally use a printed form for a deed issued by the government.⁸⁵ A deed for government land must be registered in order to be valid,⁸⁶ similarly, a deed for privately-owned land must also be registered in cases where the land was previously registered.⁸⁷

⁷¹ Land Acquisition Act, 1930, ss.4(1), 31, 2 *Laws of the Sudan* 239 (5th ed. 1976). See also, The Acquisition Act, 1970 (Act no. 20).

⁷² Civil Transactions Act, 1984, s.517(2). See also, Permanent Constitution of the Sudan, 1973, art. 34 (suspended 1985); Transitional Constitution, 1985, art. 25.

⁷³ Land Acquisition Act, 1930, s.8.

⁷⁴ *Id.*, s.10.

⁷⁵ *Id.*, s.9.

⁷⁶ *Id.*, s.14.

⁷⁷ *Id.*, s.19.

⁷⁸ *Id.*, s.23.

⁷⁹ *Id.*, s.22.

⁸⁰ Gezira Land Act, 1927, 2 *Laws of the Sudan* 42 (5th ed. 1976); The Rahad Corporation Act, 1972, 6 *Laws of the Sudan* 231 (5th ed. 1982); The Western Savannah Development Corporation Act, 1978, 11 *Laws of the Sudan* 48 (5th ed. 1982). These schemes are discussed in part XII of this paper.

⁸¹ Civil Transactions Act, 1984, s.615(2); Land Settlement and Registration Act, 1925, ss.33–36, 54.

⁸² Land Settlement and Registration Act, 1925, s.33(a).

⁸³ *Id.*, s.36.

⁸⁴ *Id.*, s.37.

⁸⁵ *Id.*, ss. 34, 54. See, e.g., Land Registration Rules, 1925, s.5, 7 *Laws of the Sudan* 40 (4th ed. 1955).

⁸⁶ Civil Transactions Act, 1984, s.615(2).

⁸⁷ Land Settlement and Registration Act, 1925, s.28.

(b) Acquisition by Intestate Succession

Land owned by a decedent who died without a will is transferred to the heirs in accord with Islamic law, where the deceased was Muslim, or according to the personal laws and customs applicable to the deceased.⁸⁸ Where a decedent's estate contains land used for agriculture, industry or trade, constituting "an independent economic unit," and the heirs do not agree to retain it as a going concern, such property is to be allocated to the heir most able to carry on with the business, provided that its value shall be deducted from the share of that heir in the estate; if the heirs are equally capable of carrying on the business, the property is to be allocated to the heir who offers the highest price for it, provided that such price shall not be less than the value of the property.⁸⁹

(c) Acquisition by will

Land may be obtained as a result of a provision contained in a decedent's last will.⁹⁰ The requirements of Islamic view apply to the wills of Muslims,⁹¹ while the personal laws and customs apply to other persons.⁹² In general, a Muslim who dies leaving heirs may only bequeath by will up to one-third of his estate, in the absence of the agreement of the heirs; the balance of the estate must be distributed to the heirs entitled thereto under provisions of Islamic law.⁹³

(d) Acquisition by Possession and Prescription^{93a}

The Civil Transactions Act, 1984, provides that "whoever possesses an unclaimed and ownerless property, with intent to own it acquires the ownership thereof."⁹⁴ Notwithstanding this general provision, the C.T.A. makes clear that the ownership of all land not registered prior to 6 April, 1970 belongs to the government.⁹⁵ A person who uses waste land, however, whether by agriculture, building or irrigation, obtains a right to use the land in question, even where such right of use has not been registered.⁹⁶

Possession is defined in the C.T.A. to mean "actual control . . . by the person in possession either by himself or through another in a manner which in its external manifestation and in the intent of the person in possession is tantamount to an exercise of ownership of or a real right thereon."⁹⁷ A person who possesses land is deemed to be the owner thereof unless the contrary is proved.⁹⁸ Such a person in possession may institute legal proceedings to prevent the interruption of his possession by another person,⁹⁹ or recover his possession when it has been wrongfully usurped.¹⁰⁰

⁸⁸ See notes 50–51, *supra*.

⁸⁹ Civil Transactions Act, 1984, s.679(a).

⁹⁰ *Id.*, s.682(2).

⁹¹ *Id.*, s.683(1).

⁹² *Id.*, s.683(2); Wills and Administration Act, 1928, ss.5–6.

⁹³ Coulson, *Succession in the Muslim Family 235 et seq*; Tanzil Ur Rahman, *A Code of Muslim Personal Law*, Karachi, Islamic Publishers, 1980, vol. 2, 302–312.

^{93a} This subject was previously regulated by the Prescription and Limitation Act, 1928, 2 *Laws of the Sudan* 109 (5th ed. 1976) (repealed 1984).

⁹⁴ Civil Transactions Act, 1984, s.555(1).

⁹⁵ *Id.*, s.559.

⁹⁶ *Id.*, ss.560(1) and (4), 568, 572(1).

⁹⁷ *Id.*, s.631(1). See also s.31.

⁹⁸ *Id.*, s.641(1).

⁹⁹ *Id.*, ss.644–45.

¹⁰⁰ *Id.*, ss.641(2), 642–43.

Once a person has been in uninterrupted possession of land for a period of ten years, no legal suit of ownership or other right respecting the property by another person will be permitted.¹⁰¹ Three exceptions to this ten-year rule, however, are provided for: first, no ownership or other right respecting land, with the exception of the use of waste land,¹⁰² can be obtained by virtue of possession of state-owned lands.¹⁰³ Second, a claim for the right of usufruct against land may not be instituted after a period of 15 years of non-use has lapsed.^{103a} Third, the period of possession must be 33 years in order to be successful as against a claim put forward by another person seeking to enforce his rights of inheritance to land from a decedent's estate.¹⁰⁴

From the foregoing, it can be seen that the fact that land has been duly registered in the name of a private party "is now allowed to override the primary importance of the principle that the person who possesses land should be the owner of the land,"¹⁰⁵ at least as to non-governmental land.

(e) *Acquisition by Pre-emption*¹⁰⁶

Pre-emption is the right to acquire the ownership or usufruct of land which is intended to be sold to another person, without the seller's or intended purchaser's consent.¹⁰⁷ Three categories of persons have the right to exercise pre-emption, in the following order of priority: co-owners, the holders of servitudes on the subject property, and owners and holders of usufruct on adjoining property.¹⁰⁸ The right of acquisition by pre-emption arises after the land is sold to a person outside the three named categories.¹⁰⁹ A person intending to exercise the right of pre-emption must institute a legal proceeding to enforce his rights within thirty days of learning of the registration of the sale, and in no event after the lapse of six months from the date of registration.¹¹⁰ The right of pre-emption does not exist in cases involving gift without consideration, inheritance, partition, or *waqf* (Islamic charitable trusts).¹¹¹

The effect of the right of pre-emption is to give a right of acquisition of property to those classes of persons deemed closest to the property other than the seller. Stated differently, pre-emption is "for precluding the entry of a stranger into land which is of intimate importance to the persons given the right to pre-empt."¹¹² The doctrine of pre-emption (*shufa*) has its origins in Islamic law.¹¹³

¹⁰¹ *Id.*, s.649.

¹⁰² *Id.*, ss.560, 651. See text adjacent to notes 95–96, *supra*.

¹⁰³ Civil Transactions Act, 1984, s.27(2), 651.

^{103a} *Id.*, s.697(4).

¹⁰⁴ *Id.*, s.650.

¹⁰⁵ Thompson, *above*, n.1, vol. 2, 563. See, Land Settlement and Registration Act, 1925, s.27(f).

¹⁰⁶ This subject was previously regulated by the Pre-Emption Act, 1928, 2 *Laws of the Sudan* 100 (5th ed. 1976) (repealed 1984).

¹⁰⁷ Civil Transactions Act, 1984, s.616.

¹⁰⁸ *Id.*, ss.617–18.

¹⁰⁹ *Id.*, s.620(1).

¹¹⁰ *Id.*, s.626(1)–(2).

¹¹¹ *Id.*, s.623.

¹¹² Thompson, *above*, n.1, vol. 3, 878.

¹¹³ *Mohamed Osman El Mubarak v. Abdel Rahim Salih Saeed*, (1963) *Sudan Law Jour. & Reports* 209, 217; Vesey-Fitzgerald, *above*, n.52, at 230–1; Abdur Rahman I. Doi, *Shari'ah: The Islamic Law*, London, 1984, 341–45.

VIII. THE RIGHT TO USE LAND

In the Sudan, particularly in light of the large amount of land owned by the government, the right to use land is a subject of primary importance. The question arises not only as to the rights of an owner to use his land for particular purposes, but also to the non-owner using land belonging to another.

The C.T.A. provides that the owner of land has the exclusive right to its crops, fruits and other natural products.¹¹⁴ It further provides that the owner of land owns the airspace above it and the soil below it.¹¹⁵ An owner may not use the property in such a manner that it causes damage to his neighbour.¹¹⁶

(i) Usufruct (Manfa'a)

Usufruct is the right to use land belonging to another person.¹¹⁷ The right of usufruct may be acquired through deed, inheritance, will or the exercise of possession.¹¹⁸ Whoever uses rural waste land, through cultivation, building, or irrigation, becomes entitled to usufruct over the land in question.¹¹⁹

The central and regional governments in Sudan are charged with promoting land use, and toward that end, have the power to divide, survey, and register land.¹²⁰ Committees at the central and regional levels, comprised of 3–5 members, are to handle the grant of usufruct over public lands.¹²¹ In granting the usufruct regarding agricultural land, the government authorities are to consider the following:

- a. preservation of villages, natural resources, animal health and natural pasture areas;
- b. preservation of small agricultural enterprises;
- c. large tracts of land should not be granted without a determination that the grantee will exploit the whole of such area in the most favourable way;
- d. protection of drainage and other servitudes;
- e. particular land may be granted to more than one person, family, or company for the purpose of agricultural production by modern technique.¹²²

A stipulation may be made, in the public granting of usufruct, that prior government consent be obtained before the grantee of usufruct transfers his interest to a non-Sudanese.¹²³

If the grantee of usufruct rights from the government fails to exploit the property according to the grant thereof for a period of three years, the state authorities must issue a notice requiring the grantee to use the land within a period of six months from the date of the notice. If the grantee continues to fail to exploit the property, the state shall announce its intention to reclaim the subject property after the passage of another six months. After the expiration of the second notice, the government may reclaim the usufruct rights over the property.¹²⁴ The holder of usufruct rights who fails to use the property has no right to transfer such rights to any other person, and any such attempted transfer is void.¹²⁵ Usufruct shall not be appropriated by the government

¹¹⁴ Civil Transactions Act, 1984, s.516(3).

¹¹⁵ *Id.*, s.516(4). But see, s.556, and the Mines and Quarries Act, 1972, and the Petroleum Resources Act, 1972, which vest the ownership of oil and minerals in the government.

¹²⁰ *Id.*, s.560(6). But see part XIII of this paper at notes 360ff.

¹²¹ *Id.*, s.566(1)–(2).

¹²² *Id.*, s.561.

¹²³ *Id.*, s.569(4).

¹²⁴ *Id.*, s.570(1)–(3).

¹²⁵ *Id.*, s.570(5).

except in the "public interest" and for adequate compensation calculated according to the type and extent of actual use of the land.¹²⁶

In general, the rights and obligations arising from usufruct are governed by the conditions imposed in the instrument creating it.¹²⁷ The grantee is entitled to the products resulting from the use,¹²⁸ including all crops, buildings, and construction undertaken by the grantee on the property, unless contrary to the granting instrument,¹²⁹ and the proprietor of the usufruct is entitled to court protection from the attempted encroachment of others.¹³⁰

The holder of the right of usufruct has the following obligations:

- a. to use and exploit the property in the best manner which does not cause permanent damage to the land in question;¹³¹
- b. to pay any rent agreed upon;¹³²
- c. to notify the owner of the land of any damage to the property;¹³³
- d. to exercise due care in preserving the property; however, in the event of damage through no fault of the holder of the usufruct, he shall not be liable;¹³⁴
- e. to bear the ordinary expenses of preserving and maintaining the property during the period of use.¹³⁵

A person's rights to usufruct continue in duration so long as such rights are exploited or utilised in a lawful manner.¹³⁶ Such rights terminate, however, if the obligations incumbent on the holder thereof are breached,¹³⁷ at the expiration of the usufruct period granted,¹³⁸ or upon the total destruction or expropriation of the property.¹³⁹ If the holder of usufruct rights dies before exercising them, his rights therein vest in his legal heirs.¹⁴⁰ If the deceased holder of usufruct had improved the property through construction or agriculture, such improvements become the property of the deceased's heirs.¹⁴¹ Whoever owns the usufruct to land has the right to transfer such rights to another except where agreed otherwise,^{141a} or where the holder thereof has failed to use the property.^{141b} Such transfer must be in writing.^{141c}

(ii) Servitudes (Easements)

A servitude is a right which restricts the use of one parcel of land for the benefit of another parcel or the public.¹⁴² A servitude is created by legal disposition, for example in a deed,¹⁴³ by possession, when a lawsuit for the

¹²⁶ *Id.*, s.560(3).

¹²⁷ *Id.*, ss.573(1), 695.

¹²⁸ *Id.*, s.659(a).

¹²⁹ *Id.*, s.569(1).

¹³⁰ *Id.*, s.568.

¹³¹ *Id.*, s.573(4).

¹³¹ *Id.*, s.573(2).

¹³³ *Id.*, ss.573(3), 695(h)(2).

¹³⁴ *Id.*, s.695(f).

¹³⁵ *Id.*, s.695(d).

¹³⁶ *Id.*, s.572(1).

¹³⁷ *Id.*, s.573(6).

¹³⁸ *Id.*, s.696(a).

¹³⁹ *Id.*, ss.572(3), 696(b). *But see* s.707(2).

¹⁴⁰ *Id.*, s.570(6).

¹⁴¹ *Id.*, ss.569(1), 697(1).

^{141a} *Id.*, s.692(2).

^{141b} *Id.*, s.570(5).

^{141c} *Id.*, s.615(1).

¹⁴² *Id.*, s.574.

¹⁴³ *Id.*, ss.523, 576.

recovery thereof is time-barred;¹⁴⁴ by inference, i.e., implied from the physical relationship of two parcels of land;¹⁴⁵ or by necessity, for example in the case of the need for access to a public road.¹⁴⁶ A servitude may be acquired over state-owned land provided such servitude does not impede the use of such land.¹⁴⁷ The expenses necessary for the enjoyment of a servitude are to be paid by the owner of the land (the dominant estate) for whose benefit the other land (the servient estate) is encumbered.¹⁴⁸

(iii) Water Rights

A water right is defined in the C.T.A. to be a right to use water for the purpose of irrigating land or plants.¹⁴⁹ A water right is inheritable and may be bequeathed by will, but it may not be sold separately from the land or usufruct rights to which it is applicable, nor may it be disposed of by gift or be leased.¹⁵⁰

Every person is entitled to make use of public water sources in accord with provisions of law and custom.¹⁵¹ A Nile Water Use Control Board regulates the mechanical pumping of water from the Nile River (including the White Nile, the Blue Nile, the Atbara, and their tributaries) through the issuance of mandatory licences.¹⁵² In addition to licensing water-users, the Board also has power to fix the conditions of land tenure which must be met before a licence will be issued, to regulate the use of water pumped from the Nile for purposes of irrigation, and to regulate the rotation of crops on land irrigated by water pumped from the Nile.¹⁵³

If a person constructs a channel or water-course to irrigate his land, no other person is entitled to make use of the water therefrom except with his permission.¹⁵⁴ In the event the amount of water passing through a private water-course exceeds the requirements of the owner, however, the adjoining property owners may share in the water so long as they contribute to the cost of constructing and maintaining of the watercourse in proportion to the area of the total land benefited.¹⁵⁵ A person who digs a well, whether on waste land¹⁵⁶ or otherwise¹⁵⁷ is entitled to the exclusive use of the water therefrom.

Where water drains naturally from one owner's land to another, neither the owner of the high land nor of the low land shall obstruct the water flow thereof.¹⁵⁸ When a land owner is entitled to the use of water for irrigation, which has first flowed across the land of another, the owner of the land over which the water has passed has no right to use such water.¹⁵⁹

¹⁴⁴ *Id.*, ss.576(1), 584.

¹⁴⁵ *Id.*, s.576(3).

¹⁴⁶ *Id.*, ss.528(2), 588–91.

¹⁴⁷ *Id.*, s.575.

¹⁴⁸ *Id.*, s.581(1).

¹⁴⁹ *Id.*, s.592(1).

¹⁵⁰ *Id.*, s.593.

¹⁵¹ *Id.*, s.592(2).

¹⁵² Nile Pumps Control Act, 1939, 3 *Laws of the Sudan* 2 (5th ed. 1976). For a discussion of pump schemes operating in the Sudan, see, Tothill, *above*, n.1, at 611–18.

¹⁵³ *Id.*, s.9. With respect to riparian land rights, see, Civil Transactions Act, 1984, ss.602–05.

¹⁵⁴ Civil Transactions Act, 1984, s.592(3).

¹⁵⁵ *Id.*, s.524.

¹⁵⁶ *Id.*, s.560(1).

¹⁵⁷ *Id.*, s.524.

¹⁵⁸ *Id.*, ss.597, 525.

¹⁵⁹ *Id.*, s.594.

(iv) Grazing and Wood-cutting

The central and regional governments have general authority to impose restrictions on animal grazing, taking into account the benefit of the whole community and the protection of animal resources.¹⁶⁰ The central and regional governments also have general authority to impose restrictions on the cutting of trees, after considering the protection of the environment and the interests of the community.¹⁶¹ The policy of protecting trees is made clear in the Civil Transactions Act, 1984, in the following question:

Apart from the traditional clearing for agricultural purposes and the removal of shrubs injurious to the land use, no standing tree shall be cut down without the previous permission of the competent authority, and no such permission shall be given except in case of necessity.¹⁶²

In addition to these sections of general application, separate legislation regulates specified forest preserves in the Sudan.¹⁶³ Within the areas set aside as central and provincial forest preserves, the pasturing of cattle and the cutting or use of trees is prohibited except by obtaining a licence.¹⁶⁴

(v) Cultivation of Crops

The right to grow crops on land belongs, of course, to the owner of the land.¹⁶⁵ A general provision of the C.T.A. provides that the owner of land has the exclusive right to the crops thereon.¹⁶⁶ Other sections, however, detail the rights arising out of agricultural leases,¹⁶⁷ and provide that the holder of usufruct shall own the crops on the land in question.¹⁶⁸

The right to grow crops on the land belonging to another may arise by virtue of an agreement with the land-owner, by possession of the property,¹⁶⁹ or through the act of cultivation itself.¹⁷⁰ In the absence of an express agreement with the land-owner, if a person, using his own materials, grows crops on the land of another which he knows does not belong to him, the owner of such land can claim the removal of the crops plus any consequent damages within one year of their being planted.¹⁷¹ If the crops were planted on the land of another pursuant to a licence or an honest belief that he had the right to do so, the landowner does not have the right to claim removal of the crops, but has the option either to pay for the value of the materials and labour used, or to pay a sum equivalent to the enhancement in the value of the land brought about through the cultivation.¹⁷² If a person plants crops on land and with materials belonging to another, the owner of the materials may proceed against such

¹⁶⁰ *Id.*, s.565(1)(a)–(b).

¹⁶¹ *Id.*, s.565(1)(c)–(d).

¹⁶² *Id.*, s.565(1)(e). But see s.531 regarding the cutting of overhanging branches from adjoining property.

¹⁶³ *Sec. The Central Forests Act, 1932, 2 Laws of the Sudan 299 (5th ed. 1976); The Provincial Forests Act, 1932, 2 Laws of the Sudan 310 (5th ed. 1976).*

¹⁶⁴ *Central Forests Act, 1932, s.9; Provincial Forests Act, 1932, s.6.*

¹⁶⁵ *Civil Transactions Act, 1984, s.516(1).*

¹⁶⁶ *Id.*, s.516(2).

¹⁶⁷ *Id.*, ss.322–348. Agricultural leases are discussed in part IX of this paper.

¹⁶⁸ *Civil Transactions Act, 1984, s.569(1), 697(1).*

¹⁶⁹ *Id.*, ss.694, 704(1).

¹⁷⁰ *Id.*, s.560(1).

¹⁷¹ *Id.*, s.608(1).

¹⁷² *Id.*, s.608(2).

person for damages, and against the landowner to the extent of the value of the materials remaining on his land.¹⁷³

The right to plant crops on land belonging to another terminates at the expiration of the period agreed upon,¹⁷⁴ if the holder of the right fails to pay the rent agreed to for two years, unless otherwise agreed;¹⁷⁵ or, in the absence of agreement, so long as the person continues cultivating the land,¹⁷⁶ unless legal proceedings are brought to evict the grower.¹⁷⁷

(vi) Oil and Mineral Rights

A general provision of the C.T.A. provides that the owner of land owns the subjacent soil below it to the extent of its useful limit.¹⁷⁸ There is a conflict in the legislation, however, regarding the ownership of minerals discovered on land. The C.T.A. provides that minerals discovered on land owned by the state shall be deemed state property,¹⁷⁹ but that minerals discovered on privately-held land shall be deemed the property of the owner of the land (with one-fifth of such minerals payable to the state).¹⁸⁰ The Mines and Quarries Act, 1972, however, provides that the state owns all minerals and quarried material (defined as rocks, stones, gravel, sand and clay) lying in, upon or under the land of the Sudan,¹⁸¹ and that no mining or prospecting may be undertaken without first obtaining a licence from the state.¹⁸² As with other conflicts between the C.T.A. and prior unrepealed legislation, it is the opinion of the writer that the provision's of the C.T.A. should be deemed to prevail.¹⁸³

With respect to petroleum products, including oil and natural gas,¹⁸⁴ legislation declares that all such products are deemed to be the property of the state, for which no one may search or produce without a licence or lease granted by the government.¹⁸⁵ As in the case of minerals, however, there may be a conflict with other legislation¹⁸⁶ which purports to confirm that all "things discovered" on land privately-owned belong to the land-owner.

IX. LEASES (IJARA)

(i) General Provisions

A lease is a contract by which the lessor gives to the lessee the possession and use of a specified thing for a stated period at a fixed price.¹⁸⁷ A lease relating to land constitutes an express grant of usufruct by the landowner to a third

¹⁷³ *Id.*, s.610(1).

¹⁷⁴ *Id.*, ss.707(a), 696(a). With respect to the duration of leases, see ss.301-02.

¹⁷⁵ *Id.*, ss.573(2) and (6), 707(c).

¹⁷⁶ *Id.*, ss.570, 572(1).

¹⁷⁷ See notes 101-104 for references to provisions setting forth the length of the period of time for which possession must be maintained after which the grower cannot be evicted.

¹⁷⁸ Civil Transactions Act, 1984, s.516(4).

¹⁷⁹ *Id.*, s.556(2).

¹⁸⁰ *Id.*, s.556(1). It is unclear how this section inter-relates with the Zakat and Taxes Act, 1984, s.17, which refers to a levy on minerals at the rate of 2.5 per cent. See also, Civil Transactions Act, 1984, s.695(a), which purports to give the holder of usufruct rights to all things produced on the land.

¹⁸¹ The Mines and Quarries Act, 1972, s.4, 6 *Laws of the Sudan* 261 (5th ed. 1982).

¹⁸² *Id.*, s.11.

¹⁸³ *Above*, n.57.

¹⁸⁴ As defined in the Petroleum Resources Act, 1972, s.3, 6 *Laws of the Sudan* 250 (5th ed. 1982).

¹⁸⁵ *Id.*, s.4.

¹⁸⁶ Civil Transactions Act, 1984, s.556. But see s.695(a).

¹⁸⁷ *Id.*, s.295.

party.¹⁸⁸ With the exception of leases in force as of 14 February 1984 (the date the Civil Transactions Act, 1984 came into effect), all leases must be made and renewed in writing.¹⁸⁹ Prior to February 1984, all leases determinable on a life or lives or for a term of three years or more had to be registered, and no such lease was valid until so registered.¹⁹⁰ A lease for a period of less than three years could also be registered, thus putting the public on notice as to the existence of the lease affecting the land in question.¹⁹¹

The amount of the rent payable by the lessee must be specified in terms of money or other property; if the amount of rent is unspecified, the lease may be revoked with "similar rent" imposed for the period prior to such revocation.¹⁹²

The concept of "similar rent" imposed by the Civil Transactions Act, 1984, replaces the system of rent control previously in existence in the Sudan.¹⁹³ Under the 1984 law, if the lessor and lessee cannot agree as to the value of "similar rent", the court is to determine the question.¹⁹⁴ The following principles are to be applied in determining the assessment of "similar rent":

- a. the availability of property according to supply and demand;
- b. the locale where the property is situated;
- c. the purpose for which the lease was made;
- d. the condition of the property in question;
- e. the rate at which real estate taxes for the property are paid.¹⁹⁵

The rent agreed upon in a lease must be roughly in accord with what would be considered as "similar rent;" if not, the lease rental may be adjusted up or down accordingly.¹⁹⁶ Any contract which purports to nullify the application of "similar rent" is deemed void,¹⁹⁷ and any lessor or lessee may request the payment of "similar rent" at any time after the passage of three years from the date of the last rent increase.¹⁹⁸ If the time for the payment of rent is not fixed in the lease, the rent shall be due after the period of use of the property, in segments according to custom or as determined by the court.¹⁹⁹ The lessee's duty to pay rent ends if the use of the leased property becomes impossible,²⁰⁰ or if the government, through no cause of the lessee, prohibits the total use of the property.²⁰¹

¹⁸⁸ Compare the definition of "usufruct" in s.693.

¹⁸⁹ Civil Transactions Act, 1984, s.296(4).

¹⁹⁰ *Id.*, s.558(1); Land Settlement and Registration Act, 1925, s.48.

¹⁹¹ Land Settlement and Registration Act, 1925, s.52(1). Under s.52(2) of this 1925 Act, the land register may order that any lease be registered.

¹⁹² Civil Transactions Act, 1984, s.298(1).

¹⁹³ See, The Rent Restriction Act, 1953, 4 *Laws of the Sudan* 25 (5th ed. 1976) (repealed 1982); The Rent Restriction Act, 1982, Sudan Gazette Legislative Supp. no. 1304 (28 September, 1982) (repealed 1984). See generally, Thompson, "The Sudan Law of Landlord and Tenant and the Judicial Interpretation of the Rent Restriction Ordinance, 1953", (1962) Sudan L.J. & Rep. 411; El Mahdi and Thompson, "Report of Law Reform of the Sudan Law of Landlord and Tenant", (1970) Sudan L.J. & Rep. 108.

¹⁹⁴ Civil Transactions Act, 1984, s.299 (as amended December 1985). Under the Civil Transactions (Amendment) Act, 1406, promulgated by the Transitional Military Council on 4 December 1985, after consultations with the Council of Ministers, see Provisional Constitution, 1985 art. 36, 52, ss.298-300 of the C.T.A. were amended.

¹⁹⁵ Civil Transactions Act, 1984, s.300(1) (as amended December 1985).

¹⁹⁶ Under *Id.*, s.300(3) (as amended December 1985), the increase or decrease in rental pursuant to court order is to take effect only from the date of the court's judgment without retroactive effect.

¹⁹⁷ *Id.*, s.298(7) (as amended December 1985).

¹⁹⁸ *Id.*, s.300(2) (as amended December 1985).

¹⁹⁹ *Id.*, s.298(3).

²⁰⁰ *Id.*, s.316(3).

²⁰¹ *Id.*, s.317(1).

The duration of the lease period must be stated at the inception of the lease.²⁰² The period of the lease may be for the life-time of the lessor or lessee;²⁰³ or it may be specified as the time during which the lessee pays the rent and legal increases thereto.²⁰⁴ If the contract does not provide for a specified duration, the lease period shall be deemed to be the shortest period according to custom, or in the absence of applicable custom, for a period not exceeding one year.²⁰⁵ If the period of the lease has ended but there exists a necessity for its extension, the lease period shall be extended to the extent required to meet the necessity, provided that the lessee pays the applicable "similar rent" to the lessor.²⁰⁶

The lease shall terminate under the following circumstances:

- a. in the manner agreed upon by the parties to the lease contract;²⁰⁷
- b. on the death of the lessee or lessor, if the heirs elect to annul the contract;²⁰⁸
- c. on the occurrence of unforeseen circumstances, however subject to the payment of appropriate damages;²⁰⁹
- d. if it becomes impossible to use the leased premises, if the lessee elects to annul the contract;²¹⁰
- e. if the government prohibits the use of the leased property;²¹¹
- f. if the lessor prevents the lessee from using the property, on the election of the lessee.^{211a}

If the lessee has undertaken any construction or cultivation of crops on the leased property, and such construction or crops remain on the property at the end of the lease, the lessor shall be entitled either to retain the crops or buildings, where the removal of same would damage the land; or to order the lessee to remove the crops or buildings, where such removal would not damage the land.²¹²

The lessor is obliged to repair any defects in the leased property which affect its intended use,²¹³ unless the lessee is aware or should have been aware of such defects at the time of entering into the lease contract.²¹⁴ The lessor is further obliged not to interfere with the agreed used of the property.²¹⁵

The lessee has the following obligations:

- a. not to exceed the agreed use of the property;²¹⁶
- b. to exercise reasonable care that the property is not damaged;²¹⁷
- c. not to effect any changes in the property without the permission of the lessor;²¹⁸
- d. to pay the agreed rent;²¹⁹

²⁰² *Id.*, s.301(1).

²⁰³ *Id.*, s.301(2).

²⁰⁴ *Id.*, s.301(3).

²⁰⁵ *Id.*, s.301(4)–(5).

²⁰⁶ *Id.*, s.304.

²⁰⁷ *Id.*, s.321(1).

²⁰⁸ *Id.*, s.321(4).

²⁰⁹ *Id.*, s.321(5).

²¹⁰ *Id.*, s.316(4).

²¹¹ *Id.*, s.317.

^{211a} *Id.*, s.311.

²¹² *Id.*, s.319(3)–(4).

²¹³ *Id.*, ss.309(1), 312(1), 327(b).

²¹⁴ *Id.*, s.312(2).

²¹⁵ *Id.*, ss.310, 312(5).

²¹⁶ *Id.*, s.315(3)–(4).

²¹⁷ *Id.*, s.315(1).

²¹⁸ *Id.*, ss.315(5), 327(a).

²¹⁹ *Id.*, s.298.

- e. to maintain the property as agreed or as required by custom;²²⁰
- f. to return the leased premises to the lessor at the end of the lease period in a sound condition;²²¹
- g. not to sub-lease the property to another person without the approval of the lessor, unless it is done without payment to the lessee.²²²

On the transfer of leasehold property, unless the contrary is agreed, there is implied in the transfer an agreement by the seller that all obligations of the lessor and lessee regarding the property have been performed up to the date of the transfer.²²³

(ii) Agricultural Leases

In addition to the general provisions relating to leases contained in the Civil Transactions Act, 1984, several sections deal specifically with leases for the purpose of agriculture.²²⁴ For example, land may not be leased to one party if it contains unripened crops planted by another person unless the lessor is the owner of the crops.²²⁵ If the land was illegally cultivated, however, the land may be leased whether the crops are ripe or not.²²⁶ If the period of a lease ends before the crops have ripened without the fault of the lessee, the lease shall be extended, provided the lessee pays "similar rent," until the crops have ripened and are harvested.²²⁷

If leased land cannot be planted because of flooding or otherwise, the lessee has the right to annul the lease and is not obligated to pay any rent.²²⁸ If the land has been planted, however, but the crops destroyed before harvesting, the lessee is only required to pay the rent for the period before the destruction unless there is sufficient time within the lease period to plant and harvest the same type of crops; in such latter case, the lessee is obligated to pay the rent for the balance of the lease.²²⁹ The lessee is not authorised to annul the lease or relieved of the obligation to pay rent in the above circumstances if the lessee has received any compensation from any person for damage he sustained (e.g. through insurance).²³⁰

(iii) Muzara'a and Musakat: Two Types of Agricultural Partnership

The Civil Transactions Act, 1984 codifies rules relating to two types of agricultural leases which in essence are forms of partnership: *muzara'a* and *musakat*.

Muzara'a is a contract for the use of agricultural land between the land-owner and another person who will farm the land where the parties agree

²²⁰ *Id.*, ss.315(6), 327(c), 324(2).

²²¹ *Id.*, s.319(1).

²²² *Id.*, s.320(1)-(2).

²²³ Land Settlement and Registration Act, 1925, s.56.

²²⁴ See also, Civil Transactions Act, 1984, ss.703-06; and the sections of this paper in part VIII relating to usufruct and the cultivation of crops.

²²⁵ Civil Transactions Act, 1984, s.323(1).

²²⁶ *Id.*, s.323(2)(b).

²²⁷ *Id.*, ss.326, 697. But see ss.319(3)-(4).

²²⁸ *Id.*, s.328(1).

²²⁹ *Id.*, s.328(2).

²³⁰ *Id.*, s.328(3). Provisions relating to insurance are contained in the Civil Transactions Act, 1984, ss.475-83. See also, Insurers (Control) Act, 1960, 4 *Laws of the Sudan* 304 (5th ed. 1976). See generally, M. N. Siddiqi, *Insurance in an Islamic Economy*, Leicester, 1985; M. Muslehuddin, *Insurance and Islamic Law*, New Delhi, 1969; Afzalur Rahman, *Economic Doctrines of Islam: Banking and Insurance*, London, 1979.

to divide the total produce in specified proportions.²³¹ The duration of the farming period must be stated in the agreement so that it coincides with the appropriate crop season.²³² The agreement can either specify the crops to be planted or leave that decision to the grower,²³³ and the parties may agree that either of them supplies the seeds.²³⁴ The landowner in a *muzara'a* transaction is required to deliver the land ready for cultivation, including appropriate irrigation works and rights of way, and to deliver and repair any agricultural equipment required.²³⁵ The grower is required to exert reasonable care in the farming of the land, and if he fails to do so, may be liable to the land-owner.²³⁶ The grower is further required to incur the expenses involved in farming and harvesting the land up until the division of the farm produce.²³⁷ The grower may not sub-lease the land or permit another person to plant on it except with the permission of the land-owner.²³⁸ The contract of *muzara'a* terminates at the end of the stated period; however if unripened crops remain on the land the grower can continue to farm the crops until they are ripened, provided he pays "similar rent."²³⁹ If either the land-owner or the grower dies before the crops have ripened, the heirs of the deceased party shall continue to have the deceased's rights and obligations regarding the land in question.²⁴⁰

Musakat is an agreement between the owner of trees, and another person who will grow and maintain them, whereby the parties thereto agree to share the fruits from the trees in question.²⁴¹ If the duration of the arrangement is not specified in the contract, the period of the agreement shall be considered to last until the first fruits are collected in the year of the contract unless there is a customary practice to the contrary.²⁴² Separate provisions relating to the *musakat* contract relate to the division of work and expenses, in the absence of agreement;²⁴³ the rights of the parties in the event a new party takes over the property;²⁴⁴ breach of the contract by the grower;²⁴⁵ the rights of the parties if fruit is still unripened at the end of the contract period;²⁴⁶ and the disposition in the event of the death of one of the parties.²⁴⁷

A third type of agricultural arrangement, *mugharasa*, wherein one party provides land for the growing of new trees and thereafter the land and trees are to be held in partnership according to a specified agreement, is to be regulated under the same rules as *musakat* insofar as such rules apply.²⁴⁸

(iv) Tenant Protection Legislation

Many of the legislative provisions discussed above can properly be characterised as protective of tenants' interests. The tenant's right to annul a

²³¹ Civil Transactions Act, 1984, s.329, 330(2), 331(1).

²³² *Id.*, s.330(4).

²³³ *Id.*, s.330(1)(b).

²³⁴ *Id.*, s.331(4).

²³⁵ *Id.*, s.332.

²³⁶ *Id.*, s.333(2).

²³⁷ *Id.*, s.333(1).

²³⁸ *Id.*, s.333(3).

²³⁹ *Id.*, s.334.

²⁴⁰ *Id.*, s.335.

²⁴¹ *Id.*, s.337.

²⁴² *Id.*, s.340(1).

²⁴³ *Id.*, s.341.

²⁴⁴ *Id.*, s.343.

²⁴⁵ *Id.*, s.344.

²⁴⁶ *Id.*, s.345.

²⁴⁷ *Id.*, s.346.

²⁴⁸ *Id.*, s.348.

lease where the use of the premises becomes impossible,²⁴⁹ the right of the tenant to extend the term of the lease when there are unripened crops on the leased premises,²⁵⁰ and the tenant's right to annul the lease when his crops on the leased property have been destroyed²⁵¹ all fall in this category.

Separate legislation, however, applicable to specified agricultural schemes is designed to protect agricultural tenants from the perceived abuses of traditional financing methods (known as *shayl*) as well as to protect the integrity of the agricultural schemes themselves.²⁵² The *shayl* system is of essentially three types. In one form, the lender provides the seed to the farmer in return for a share of the crops produced therefrom. In the second form, the merchant-lender agrees to take over the farmer's produce at the market price less an amount approximating the interest rate on short-term loans. In the third form, the lender provides money to the farmer in return for a share of the crops later produced.²⁵³

In order to monitor and police the terms of these *shayl* arrangements, legislation applicable to growers at specified agricultural schemes in the Sudan²⁵⁴ restricts the sale, transfer, or other disposition of crops growing or intended to be grown within the agricultural schemes by declaring all such transactions void unless the government has given its written consent.²⁵⁵ Further, any mortgage or charge secured by the crops or proceeds therefrom, or any transaction whereby a tenant at the agricultural schemes is or may become liable to pay any sum of money calculated by reference to the value of crops, also requires the government's consent.²⁵⁶

X. WAQF (ISLAMIC TRUSTS)

The institution of *waqf* (plural, *awqaf*) arises from Islamic law and custom.²⁵⁷ It denotes the holding of property currently or in the future for charitable or religious purposes. A *waqf* may be established exclusively for charitable purposes (e.g. hospitals, schools, etc.), or for a group of beneficiaries and then for charity, or for both concurrently.²⁵⁸ In all cases,

²⁴⁹ *Id.*, s.316(4).

²⁵⁰ *Id.*, s.334.

²⁵¹ *Id.*, s.328(2).

²⁵² See the "Explanatory Note" issued by the Office of the Legal Secretary at the time of the promulgation of the Agricultural Tenants Protection Act, 1950, which notes the objectives referred to in the text.

²⁵³ See generally, Wilmington, "Aspects of Moneylending in Northern Sudan", (9) Middle East Jour. 139 (1955); Francis A. Lees and Hugh C. Brooks, *The Economic and Political Development of the Sudan*, London, 1977, 94-96.

²⁵⁴ The legislation referred to in n.255 applies to the Gezira Scheme, the Gash Delta in Kassala Province, the Tokar Delta, and some 348 smaller schemes in the areas of Dueim, Kosti, Fung, Sennar, Shendi, and the Northern Sudan (as of 1976). The names and locations of these 348 schemes are listed in a schedule to the Agricultural Tenant's Protection Act, 1950, 3 *Laws of the Sudan* 412 (5th ed. 1976).

²⁵⁵ Agricultural Tenant's Protection Act, 1950, s.4; Tokar Delta (Tenants Protection) Act, 1943, s.3, 3 *Laws of the Sudan* 330 (5th ed. 1976); The Gezira Land Act, 1927, s.13, 3 *Laws of the Sudan* 42 (5th ed. 1976); The Gash Delta Tenants Act, 1928, s.4, 2 *Laws of the Sudan* 141 (5th ed. 1976).

²⁵⁶ *Id.*

²⁵⁷ See generally, Vesey-Fitzgerald, *above*, n.52, at 206-24; Norman Anderson, *Law Reform in the Muslim World*, London, 1976, 162-69; Tanzil Ur Rahman, *above*, n.93, at 101-73; Anderson, "Waqfs in East Africa", [3] *J.A.L.* 152; Fratcher, "The Islamic Wakf", (36) *Missouri Law Rev.* 153; Anon., "Waqf", (1914) (4) *Moslem World* 173.

²⁵⁸ Civil Transactions Act, 1984, s.709(1).

however, the *waqf* must ultimately revert to a perpetual charitable body.²⁵⁹ The *waqf* is a separate legal person established by the instrument of its creation,²⁶⁰ and is to be regulated in accord with principles of Islamic law.²⁶¹ *Awaqaf* are to be supervised by the Supreme Council of Religious Affairs and Waqfs.^{261a}

The creation of a *waqf* or any change thereof must be made in an official declaration (*ishhad*) before a competent court.²⁶² The creator in instituting the *waqf* can retain a power to change the terms of the *waqf* or its property,²⁶³ and may change the administrator of the *waqf* (the *nazir* or *mutawalli*) even if he has not retained the power to do so.²⁶⁴ The administrator may also be replaced by court order.²⁶⁵

Any property may be the subject of the *waqf*, including land and all types of personal property.²⁶⁶ If the *waqf* holds land it must be registered in the land registry office for the locale.²⁶⁷ Minerals discovered on land granted to a *waqf* are deemed to be the property of the beneficiaries thereof.²⁶⁸ The right of pre-emption does not arise either in favour of or against a *waqf*.²⁶⁹ The lease of *waqf* property is governed by special provisions regarding the duration and cultivation thereof, the identity of the lessee, and the amount of rent.²⁷⁰

XI. MORTGAGES AND PLEDGES

In general, a mortgage is the granting of an interest in specific land owned by the borrower (the mortgagor) as security for the payment of a debt to the lender (the mortgagee).²⁷¹ If the borrower fails to pay the debt according to its terms, the lender can force the sale of the property and recover the proceeds therefrom in satisfaction of the debt. The borrower must own the land in question (which may be an undivided share in property^{271a}) at the time the mortgage is instituted, and have a power of transfer over it.²⁷² The amount of the debt must be specified in the mortgage instrument,²⁷³ and on the payment of the debt, the mortgage is extinguished.²⁷⁴ The mortgage is not valid unless it is registered,²⁷⁵ and its priority *vis-à-vis* other mortgages and claims against the land depends on the time it was registered, with an earlier registration having

²⁵⁹ *Id.*, s.709(2).

²⁶⁰ Civil Transactions Act, 1984, s.710.

²⁶¹ *Id.*, s.712, 717. With respect to charitable trusts not governed by Islamic law, see The Charitable Trusts Act, 1971, 6 *Laws of the Sudan* 47 (5th ed. 1982).

^{261a} Civil Transactions Act, 1984, s.725; The Religious Affairs and Wakfs Act, 1980, s.7, 11 *Laws of the Sudan* 136 (5th ed. 1982).

²⁶² Civil Transactions Act, 1984, s.712.

²⁶³ *Id.*, s.711.

²⁶⁴ *Id.*, s.714. But see, The Islamic Charitable (Wakf) Trusts Act, 1970 (Act no. 116, amended by Republican Order no. 48 of 1972), s.7.

²⁶⁵ Civil Transactions Act, 1984, s.726.

²⁶⁶ Islamic Charitable (Waqf) Trusts Act, 1970, s.5.

²⁶⁷ Civil Transactions Act, 1984, s.713.

²⁶⁸ *Id.*, s.556(3).

²⁶⁹ *Id.*, s.623(1).

²⁷⁰ *Id.*, s.302, 303, 349-58.

²⁷¹ *Id.*, s.727, 733(3). See generally, El Mahdi, *above*, n.1, at 200ff.

^{271a} Civil Transactions Act, 1984, s.735(1).

²⁷² Civil Transactions Act, 1984, s.729-30, 733(1).

²⁷³ *Id.*, s.748.

²⁷⁴ *Id.*, s.759(1).

²⁷⁵ *Id.*, s.728; Land Settlement and Registration Act, 1925, s.60.

priority.²⁷⁶ The debtor has the right to administer the mortgaged property and to receive its revenue until such time as the property might be sold to satisfy the debt.²⁷⁷

The borrower has the right to pay off the debt before it is due,²⁷⁸ and may even redeem the property from the mortgage claim under certain circumstances when the debt is over-due.²⁷⁹ If any payment due on a debt secured by a mortgage is at least one month late, the creditor has the right to institute a lawsuit for foreclosure (i.e. settlement of the claim through the sale of the property).²⁸⁰

A mortgage instrument may not contain a provision stating that in the event of default by the borrower in making payments the property shall be transferred to the creditor; in the case of such a mortgage instrument, the provision is void but the balance of instrument remains valid.²⁸¹ A mortgage may provide, however, that the creditor can take possession of the property in the event of the debtor's default.²⁸² The law specifies the procedures to be followed by the court in the event that foreclosure proceedings are instituted.²⁸³

Because the mortgage transaction is dependent on the existence of an underlying debt, it is appropriate to note an important new limitation on loans in the Sudan, one based on Islamic law. It is now provided that a loan agreement may not oblige a borrower to pay interest on money loaned,²⁸⁴ and a court in the Sudan is not empowered to award the payment of interest to a party, at least as to interest accruing after 14 February, 1984.²⁸⁵ The provisions of law relating to foreclosure of mortgage actions no longer permit the court to calculate interest owed by a debtor in settling the accounts of the parties.²⁸⁶

The prohibition against the payment or receipt of interest is based on the Islamic doctrine of *riba* which has its origin in the Koran.²⁸⁷ *Riba* literally means "to grow or inflate" or "increase or excess" and has been defined as "any increase sought through illegal means, such as usury, bribery, profiteering [or] fraudulent trading."²⁸⁸ Banks operating according to Islamic principles employ a number of profit-sharing arrangements to avoid the prohibition of *riba*.²⁸⁹ Thus, for example, a bank might supply funds to a farmer in return for a share of the profits generated by the enterprise, a transaction known as *mudaraba*. Alternatively, both the bank and the "borrower" might contribute capital and expertise to an enterprise and agree to share in the profits generated, an arrangement known as *musharaka*. A third

²⁷⁶ Civil Transactions Act, 1984, s.747, 749, 750, 752.

²⁷⁷ *Id.*, s.739(2).

²⁷⁸ *Id.*, s.759(3).

²⁷⁹ Civil Procedure Act, 1983, s.122-23.

²⁸⁰ *Id.*, s.124; Civil Transactions Act, 1984, ss.744(1), 750(1), 754(2), 756(1).

²⁸¹ Civil Transactions Act, 1984, s.745.

²⁸² Civil Procedure Act, 1983, s.123, 127.

²⁸³ *Id.*, s.124-33.

²⁸⁴ Civil Transactions Act, 1984, s.281.

²⁸⁵ Civil Procedure Act, 1983, s.110; Civil Circular no. 40 (issued by the Chief Justice of the Sudan Supreme Court on 5 January 1985).

²⁸⁶ Compare The Civil Procedure Act, 1983, ss.121(1), 128(1), 131(1), with the same sections in the now-repealed Civil Procedure Act, 1974.

²⁸⁷ *Qur'an* 2: 275-80, 3: 130, 4: 161, 30: 39.

²⁸⁸ A. Yusuf Ali, *The Holy Qur'an: Text, Translation and Commentary*, Leicester, (3d ed.) 1975, 1062 n.3552.

²⁸⁹ See, e.g., Muhammad N. Siddiqi, *Banking Without Interest*, Leicester, 1983; Muhammad N. Siddiqi, *Partnership and Profit-Sharing in Islamic Law*, Leicester, 1985.

type of transaction is *murabaha*, whereby the bank customer identifies property desired to be owned; the bank then purchases the property at a disclosed price and resells it to the bank customer for a higher price.

A pledge is a contract whereby the creditor receives possession of certain of the property owned by the debtor as security for the payment of a debt.²⁹⁰ The parties may agree that the property be put in the possession of a third party;²⁹¹ in any event, the pledge is not created or enforceable until the property is received by the creditor or a third party.²⁹² Once the pledged property has been received by the creditor or a third party, the debtor has no right to sell, lease or gift the property without the consent of the creditor.²⁹³ The party in possession of the pledged property must safeguard it and is not permitted to use it, whether it is land or otherwise, without the consent of the debtor.²⁹⁴ The creditor may not sell the pledged property without the consent of the debtor or a court order (e.g. where the property is depreciating in value).^{294a} The property must be returned to the debtor once the debt has been repaid.²⁹⁵ Land which is pledged must be registered in the registry office for the locale in order to be protected for the claims of third parties.²⁹⁶

XII. AGRICULTURAL SCHEMES

Since the early years of the Anglo-Egyptian Condominium (1899–1956), the planning for and use of centrally controlled agricultural schemes has played an important role in agricultural production in the Sudan. A brief examination will now be made of three such schemes governed by provisions of legislation.²⁹⁷

(i) The Gezira Scheme

The word “Gezira” means “island” in Arabic, and is a term which has referred to the land between the White and Blue Nile Rivers. The area of the Gezira originally was not stated as having a southern limit, but now the southern demarcation is seen as an East–West line between Kosti and Sennar, thus constituting a total area of some 5 million acres.²⁹⁸ This should not be confused with the smaller area which has come to be administered as the Gezira Scheme.

The first concrete proposal to organise an agricultural plan in the Condominium period came in a report in 1904 by a British official working in the Egyptian government.²⁹⁹ It was ultimately determined that a dam should be built at Sennar to irrigate more effectively the Gezira plain, and the construction of this dam was undertaken in the years 1919–25, made possible as a result of loans guaranteed by the British government in an amount

²⁹⁰ Civil Transactions Act, 1984, s.766, 770.

²⁹¹ *Id.*, s.768(1).

²⁹² *Id.*, ss.767(3), 768(3).

²⁹³ *Id.*, s.777(1).

²⁹⁴ *Id.*, s.779(1), (3).

^{294a} *Id.*, s.786–87.

²⁹⁵ *Id.*, s.779(6).

²⁹⁶ *Id.*, s.782.

²⁹⁷ See also, Gash Delta Tenants Act, 1928; and Tokar Delta Tenants Act, 1943, as discussed in part IX of this paper with respect to tenant protection legislation.

²⁹⁸ Tothill, *above*, n.1, at 598.

²⁹⁹ *Id.*, at p. 600.

totalling £14.9 million.³⁰⁰ Meanwhile, in March 1920, the Condominium government had issued a notice to landowners of some 300,000 *feddans* in the then Sennar and Blue Nile provinces announcing that the government intended to lease or purchase all of the specified land for the purposes of an agricultural scheme.³⁰¹ This programme was later enunciated in the Gezira Land Ordinance, 1921³⁰² (repealed 1927), which set forth the basic principles of land acquisition which remain the rule to this day.

The Gezira Scheme was officially opened in 1926 covering an area of 300,000 *feddans*. The size of the Scheme increased over the years to some 2 million *feddans* by the mid-1970s, which is its current size, thus making it the largest agricultural scheme under one management in the world.³⁰³

During the period 1919–50, the Condominium government granted a concession to a private company, the Sudan Plantations Syndicate, and later also to the Kassala Cotton Company, to administer various aspects of the operation of the Scheme.³⁰⁴ In practice, the operation of the Gezira Scheme during these early years constituted a three-way partnership between the government, the private concession companies, and the agricultural tenant farmers, including a specified division of profit. In 1950, however, when the private concessions expired, the government took over the management of the scheme, creating an entity, The Sudan Gezira Board, to manage and operate the Scheme,³⁰⁵ which continues to operate to this day.

The current legislation governing the operations of the Sudan Gezira Board empowers the Board to undertake the following activities, among others:

- a. the clearing and levelling of land;
- b. the allocation and leasing of tenancies within the Scheme area;
- c. the supervision of farming by the tenant;
- d. the making of loans to tenants;
- e. agricultural research.³⁰⁶

The Gezira Scheme Act, 1984, specifies the manner in which the Board shall handle its finance and accounting,³⁰⁷ and divides the costs of operating the Scheme between the government, the Board, and the tenants.³⁰⁸ Previous legislation set forth the manner in which the profit from Scheme operations was to be determined and distributed among the government, the Board, and the tenants.³⁰⁹ Profits were to be divided as follows:³¹⁰

³⁰⁰ P. M. Holt and M. W. Daly, *The History of the Sudan*, London, (3d ed.) 1979, 139.

³⁰¹ This notice of 15 March, 1920 is reprinted in 1 *Laws of the Sudan* 542 (rev. ed. 1927).

³⁰² Gezira Land Ordinance, 1921, 1 *Laws of the Sudan* 537 (rev. ed. 1927) (repealed 1927). See also, The Gezira Land (Amendment) Ordinance, 1923, 2 *Laws of the Sudan* 618 (rev. ed. 1927) (repealed 1927).

³⁰³ Sudan Gezira Board, *The Gezira Scheme: Past and Present*, Barakat, 1977, 8–9. See generally, *Sudanow*, March, 1980, 33–46; January, 1983, 38–39; February, 1985, 15–16.

³⁰⁴ Some details of this arrangement are set forth in Harold Macmichael, *The Anglo-Egyptian Sudan*, London, 1934, 189–96.

³⁰⁵ The operations of the Sudan Gezira Board were originally set forth in the Gezira Scheme Ordinance, 1950, 7 *Laws of the Sudan* 119 (4th ed. 1955), repealed and replaced by the Gezira Scheme Act, 1960, 4 *Laws of the Sudan* 260 (5th ed. 1976) (repealed June 1984).

³⁰⁶ The Gezira Scheme Act, 1984, s.11 (passed by the People's Assembly on 15 May, 1984, and approved by President Nimeiri on 5 June, 1984). See generally, Beer, "The Social and Administrative Effects of Large-Scale Planned Agricultural Development", (1953) 5 *J. African Administration* 112.

³⁰⁷ The Gezira Scheme Act, 1984, s.25ff.

³⁰⁸ *Id.*, schedule II.

³⁰⁹ Gezira Scheme Act, 1960, schedule III and IV (repealed 1984).

³¹⁰ *Id.*, s.28 and schedule IV (repealed 1984).

To the government	36%
To the tenants	49%
To the local government units	2%
To the Social Development Fund	3%
To the Gezira Board	10%
	100%

In the current Gezira Scheme Act, 1984, however, these matters are not set forth.

The system of land tenure operating within the area of the Gezira Scheme is regulated under the Gezira Land Act, 1927.³¹¹ Land was and is leased and purchased from the owners thereof as a matter of law without the necessity of a formal lease or conveyance.³¹² Land was and is to be acquired by the government in the first instance by hire from the owner for a period not exceeding 40 years, during which the government has the right to purchase the property.³¹³ For land hired from private owners for the purposes of the Scheme, the government is to pay rental of 10 piastres/per *feddan*; in the case of land purchased by the government for the Scheme, the owner is to be paid one Sudanese pound/per *feddan*.^{313a} (These figures have not been changed since the initial Scheme legislation in 1921.^{313b})

As an initial matter, the owners of land integrated into the Scheme have the right to become tenants thereof generally for a period of three years, and are entitled to the renewal of their tenancies so long as they meet the obligations as such.³¹⁴ In practice, these tenancies have passed by succession to the heirs from generation to generation.³¹⁵ All lands not re-leased to the prior owners or their heirs are occupied by the government or leased to other persons on year-long tenancies.³¹⁶ As noted previously,³¹⁷ no person may transfer any right or interest in any land hired by the government except to the government, with the proviso that transfer may be made, with the consent of the local government unit, to children of the holder of the right or interest.³¹⁸ The provisions relating to unregistered land, discussed above,³¹⁹ wherein the ownership of all land not registered in the name of a private person prior to 6 April 1970, is deemed to vest in the government,³²⁰ would have application to land sought to be integrated into the Scheme. The government gave and will give possession of the land within the Scheme area without cost to the Sudan Gezira Board for its administration.³²¹

³¹¹ The Gezira Land Act, 1927, 2 *Laws of the Sudan* 42 (5th ed. 1976).

³¹² *Id.*, s.8(4).

³¹³ *Id.*, s.8(1) and (2).

^{313a} *Id.*, s.9. This section also provides for compensation for any buildings acquired by the government, and for timber or for damage to crops standing on the land at the time when possession is taken.

^{313b} The Gezira Land Ordinance, 1921, s.8, 1 *Laws of the Sudan* 537 (rev. ed. 1927) (repealed 1927).

³¹⁴ Gezira Land Act, 1927, s.11.

³¹⁵ Tothill, *supra* n.1, at 771.

³¹⁶ Gezira Land Act, 1927, s.14.

³¹⁷ See part IX(d) of this paper relating to tenant protection legislation.

³¹⁸ Gezira Land Act, 1927, s.16.

³¹⁹ See part V of this paper relating to land registration.

³²⁰ Civil Transactions Act, 1984, s.559.

³²¹ Gezira Scheme Act, 1984, s.18.

(ii) The Rahad Scheme

The Rahad Scheme is an agricultural development project designed to bring 300,000 *feddans* under irrigated cultivation in the first phase, and an additional 800,000 in a second phase.³²² The area of the project is the vicinity of the Rahad River in Gezira, Blue Nile and Kassala provinces, and involves water pumped along a fifty-mile canal from the Blue Nile to the Rahad River. The first 50,000 acres were inaugurated in December 1977.³²³ The project, designed primarily for cotton and groundnut production, was expected to cost \$240 million, most of which is to be provided by international loans, including approximately one-fourth by the International Development Association.³²⁴

The legislation regulating the Rahad Scheme is the Rahad Corporation Act, 1972.³²⁵ Pursuant to this legislation, a Rahad Corporation was created, to be governed by the Rahad Corporation Council. The main object of the corporation is the promotion of agricultural production,³²⁶ and in furtherance thereof, it has the following powers, among others:

- a. land surveys, and the operation of irrigation;
- b. allocation of tenancies within the project area;
- c. the determination of crops to be grown;
- d. supplying short-term credit to tenants;
- e. research on agricultural and social development;
- f. the marketing of crops; and
- g. the promotion of social development services.³²⁷

Land required for use by the Corporation in the Scheme is to be acquired in the name of the government pursuant to the Land Acquisition Act, 1930,³²⁸ with the proviso that compensation for land acquired by the government is to be paid as specified by the Council of Ministers.³²⁹ Tenancies within the Scheme area are to be allocated by the Rahad Corporation Council to Sudanese citizens in the following order of priority:

- a. those who owned land within the project area;
- b. those who had registered rights in or over land within the project area;
- c. those who ordinarily reside within the project area;
- d. any other Sudanese citizen deemed suitable by the Council.³³⁰

Tenancies are to be granted for an indefinite period,³³¹ however, if the tenant breaches the tenancy agreement, the Corporation may terminate the tenancy and allot the parcel to a new tenant.³³² Decisions of the Council as to the failure of a tenant to observe the conditions of the tenancy are final and may not be called into question before any Court or other authority.³³³ In the case of the

³²² John Waterbury, *Hydropolitics of the Nile Valley*, Syracuse, 1979, 197.

³²³ Holt and Daly, *above*, n.300, 211.

³²⁴ Lees and Brooks, *above*, n.253, 49 and 151 n.11.

³²⁵ 6 *Laws of the Sudan* 231 (5th ed. 1982).

³²⁶ Rahad Corporation Act, 1972, s.4.

³²⁷ *Id.*

³²⁸ Land Acquisition Act, 1930, 2 *Laws of the Sudan* 239 (5th ed. 1976), discussed in part VII(a) of this paper.

³²⁹ Rahad Corporation Act, 1972, s.9(2)-(3). This Act refers to the President of the Republic, however Decree no. 5, 1405 (issued on or about 9 April, 1985) states that all references in legislation to the powers of the President shall be read to mean the Transitional Military Council. Decree no. 5 were superseded by the Sudanese Laws Coordination Act, 1406, s.3, 5(1) (promulgated 8 December, 1985).

³³⁰ Rahad Corporation Act, 1972, s.16.

³³¹ *Id.*, s.17.

³³² *Id.*, s.18(1).

³³³ *Id.*

death of a tenant, the tenancy shall terminate; however the deceased's heirs have the right to nominate one of their number to succeed to the deceased's tenancy unless such nominee is deemed unacceptable by the Council.³³⁴

Tenants within the Rahad Scheme area are to be charged a "land and water charge" based on a flat rate per holding which may be periodically adjusted.³³⁵ The tenants are required to sell "prescribed crops" (to be determined by the Corporation) to the Corporation at a price established before harvest based on estimated world price, and have the right to sell other crops and livestock on their own.³³⁶ If the prices ultimately received by the Corporation for the crops exceed the prices paid therefore to the tenants by not less than 15 per cent., then part of the excess amount "may" be paid to the tenants as a second payment at a time to be set by the Council.³³⁷

(iii) The Western Savannah Development Scheme

In 1978, legislation was enacted creating the Western Savannah Development Corporation, governed by a board of directors, to administer a project area in Southern Darfur, comprised of parts of the Nyala, Idel, Ghanam and Buram Addein Councils, and South East Darfur.³³⁸ The Corporation was created to accomplish the following objectives, among others:

- a. to cause integrated agricultural and rural development in the project area;
- b. to frame and execute programmes for the settlement of citizens in the project area, upon a basis open for livestock, and to endeavour to organize seasonal grazing, stop desert encroachment and increase productivity;
- c. to develop water resources in the project area; and
- d. to establish mixed or non-mixed agricultural and pastoral settlement in the project area.³³⁹

The Corporation is empowered to set policies and provisions with regard to the allocation of land within the project area to individuals and groups,³⁴⁰ and to expropriate any land, easement or interest in land in the project area deemed necessary for the project objectives.³⁴¹ Any such acquisition of land through expropriation must be on the approval of the Council of Ministers,³⁴² and compensation therefore is to be calculated in accord with the Land Acquisition Act, 1930.³⁴³ The Board of Directors of the Corporation is empowered to sell, lease or mortgage any property of the Corporation in the manner it deems appropriate,³⁴⁴ and to market and export any crops or other goods produced by the Corporation.³⁴⁵ Separate provisions govern the financial operations of the Corporation.³⁴⁶ In comparison with the legislation governing the Gezira and Rahad Schemes, discussed above, which details various provisions relating to land tenure within the areas of the schemes, the

³³⁴ *Id.*, s.18(2).

³³⁵ *Id.*, s.34.

³³⁶ *Id.*, s.35-36.

³³⁷ *Id.*, s.37(2).

³³⁸ The Western Savannah Development Corporation Act, 1978, 11 *Laws of the Sudan* 48 (5th ed. 1982).

³³⁹ *Id.*, s.4.

³⁴⁰ *Id.*, s.5(4), 10(9).

³⁴¹ *Id.*, s.5(9).

³⁴² *Id.*, see note 329.

³⁴³ Western Savannah Development Corporation Act, 1978, s.5(9). See note 328.

³⁴⁴ *Id.*, s.10(9).

³⁴⁵ *Id.*, s.10(11).

³⁴⁶ *Id.*, s.22-27.

Western Savannah Development Corporation is given nearly unfettered discretion regarding land acquisition and use, subject only to the general objectives of the Corporation and any directives issued by the Minister of Agriculture and Irrigation.³⁴⁷

XIII. THE PROMOTION OF PRIVATE AGRICULTURAL INVESTMENT

Since shortly after the Sudan became an independent state in 1956, the country has had in existence successive pieces of legislation designed to encourage private investment in Sudan's economy.³⁴⁸ The current legislation designed for this purpose is the Encouragement of Investment Act, 1981.³⁴⁹ This Act is for the development of investment in the fields of agriculture, animals, mining, industry, transport, tourism and housing.³⁵⁰ Toward that end, the Minister of Finance and Economic Planning is authorised to grant various concessions and privileges to enterprises which meet one or more of the following objectives:

- a. the increase of national income;
- b. the removal of any bottlenecks obstructing development;
- c. assist in the realization of self-sufficiency and the creation of surpluses for export;
- d. assist in improving the country's balance of payments;
- e. add to the availability of employment for Sudanese citizens;
- f. have defense or strategic importance; or
- g. contribute to the realisation of the objects of economic cooperation or integration with Arab and African countries.³⁵¹

The types of concessions which the Minister of Finance and Economic Planning is authorised to grant to an approved enterprise include the exemption from taxation and customs duties;³⁵² the allocation of land for the project;³⁵³ the reduction of the price of electricity and transport used in the project;³⁵⁴ and the restriction on the import of competing products.³⁵⁵ Once investment concessions have been granted to a project, no alteration in the size, location or purpose of the project is permitted without the written consent of the Minister of Finance and Economic Planning.³⁵⁶ The legislation also makes certain guarantees regarding the nationalisation or confiscation of

³⁴⁷ *Id.*, s.31.

³⁴⁸ This legislation includes: The Approved Enterprises (Concessions) Act, 1956 (1956 Act no. 8) (repealed 1967); The Organisation and Promotion of Industrial Investment Act, 1967 (1967 Act no. 55) (repealed 1972); The Development and Promotion of Industrial Investment Act, 1972 (1972 Act no. 58) (repealed 1974); The Development and Promotion of Agricultural Investment Act, 1976 (1976 Act no. 19) (repealed 1981). This and other investment promotion legislation is outlined in C. N. Gordon, *A Survey of Sudanese Economic Legislation: Consistency or Conflict?* Univ. of Khartoum Development Studies and Research Center, Seminar paper no. 57 (1984), 9–19. See generally, Fath El Rahman Abdallah El Sheikh, *The Legal Regime of Foreign Private Investment in the Sudan and Saudi Arabia*, Salcuse, "The Law of Foreign Investment in the Sudan", (1979) 1 *Khartoum Law Review* 27.

³⁴⁹ The Encouragement of Investment Act, 1981, 11 *Laws of the Sudan* 225 (5th ed. 1982) (1980 Provisional Order no. 17, confirmed as 1981 Act no. 20).

³⁵⁰ *Id.*, s.5(1).

³⁵¹ *Id.*, s.6.

³⁵² *Id.*, ss.9–10, 12.

³⁵³ *Id.*, s.11.

³⁵⁴ *Id.*, s.13.

³⁵⁵ *Id.*, s.14.

³⁵⁶ *Id.*, s.18(2). For other restrictions on projects granted investment concessions, see ss.18, 21, and 23 of the 1981 Act.

project assets,³⁵⁷ and the transfer of the profits and capital of the project outside the Sudan (regarding projects invested with foreign capital).³⁵⁸

The foregoing references to investment promotion, arising out of the Encouragement of Investment Act, 1981, are the province of the central government in the person of the Minister of Finance and Economic Planning, assisted by the Secretariat-General for Investment which is under the Minister's supervision.³⁵⁹ The question thus arises as to the authority of the regional governments in the Sudan to encourage investment with respect to land in their respective jurisdictions.

Reference was made previously to the role of the regional governments, as specified in the Civil Transactions Act, 1984, in granting usufruct over public lands to private persons.³⁶⁰ A recent change in other legislation, however, probably eliminates this role. In July 1985, the Regional Government Act, 1980,³⁶¹ which regulates the administration of the five regions of the Northern Sudan,³⁶² was amended. The amendment adds the subject of "disposal of lands" to the list of "national matters" over which the regional governments shall not encroach,³⁶³ and deletes the reference to "planning of towns and villages and disposition of land in the Region" which was part of a list of express powers granted by the central government to the regions.³⁶⁴ Although the matter is not without uncertainty, this writer's current conclusion is that the regional governments are without authority to dispose of land in accord with regional interests. It should be stated, however, that the regional governments retain the power to act regarding "utilisation of the water in the Region," and "organisation and provision of care for agriculture, pasture and animal wealth in the Region."³⁶⁵

³⁵⁷ *Id.*, s.19.

³⁵⁸ *Id.*, s.20.

³⁵⁹ *Id.*, s.25-31.

³⁶⁰ Civil Transactions Act, 1984, ss.560(6), 561, 566, 569(4). See parts V and VIII(a) of this paper respecting this matter.

³⁶¹ 11 *Laws of the Sudan* 158 (5th ed. 1982).

³⁶² The writer is unclear as to the current status of regional government in the southern Sudan. Prior to June 1983, the southern Sudan constituted one region governed by the Southern Provinces Regional Self-Governmental Act, 1972, 6 *Laws of the Sudan* 213 (5th ed. 1982), and the High Executive Council and the People's Regional Assembly Act, 1981, 11 *Laws of the Sudan* 366 (5th ed. 1982). In June 1983, however, former President Nimeiri issued Presidential Order no. 1, 1983, which divided the southern Sudan into three regions: Equatoria, Bahr el Ghazal, and Upper Nile. (Pres. Order no. 1, 1983, is reprinted in the Sudan Gazette, Legislative Supplement no. 1317, dated 10 June, 1983). In April 1985, the Transitional Military Council in its Decree no. 14 abrogated Pres. Order no. 1, 1983. The High Executive Council and the People's Regional Assembly Act, 1981 was retroactively repealed effective 25 April, 1985 as a result of the Sudanese Laws Coordination Act, 1406, s.1, 2(5) (promulgated 8 December, 1985 by the Transitional Military Council). A Transitional High Executive Council has been appointed to govern the former three regions in the southern Sudan, but its authority and powers are as yet unclear. Moreover, as of December 1985, the Transitional High Executive Council had apparently not yet undertaken its duties in the southern Sudan. See *Sudanow* December 1985 at 15. The Transitional Constitution, 1985, art. 16(2) provides that the southern Sudan is to be governed in accord with the Southern Provinces Regional Self-Government Act, 1972. In certain areas of the South, however, a civil war is being fought between the Sudan government military and the rebel forces of the Sudan People's Liberation Army. As of late 1985, limited negotiations between the two sides were proceeding in an attempt to resolve the dispute. The north-south dispute within the Sudan dates back to the period preceding Sudanese independence. See generally Mohamed Omer Beshir, *The Southern Sudan: Background to Conflict*, 1968.

³⁶³ Regional Government Act, 1980, s.6 (as amended by the Miscellaneous Amendments Act, 1405, issued by the Transitional Military Council on 16 July, 1985). The National Capital Act, 1983, and the People's Local Government Act, 1981 were similarly amended.

³⁶⁴ Regional Government Act, 1980, s.8(1) (deleted 1985).

³⁶⁵ *Id.*, s.8(h) and (i).

The regional governments have the power to enact regional tax laws;³⁶⁶ however they may not do so as regards certain types of taxes, such as taxes on imports and exports, excise duties, and taxes on commercial dealings.³⁶⁷ With regard to permissible regionally-enacted taxes, therefore, the regional government could determine to provide exemptions therefrom in order to encourage certain types of activity, including particular agricultural projects.

It remains to be said, however, that the division of authority as between the central and regional governments, and as between the regional and local governments, as set forth in the applicable legislation,³⁶⁸ is subject to conflicting interpretations. But this is a matter for separate research.³⁶⁹

³⁶⁶ *Id.*, s.86(1)(d).

³⁶⁷ *Id.*, s.86(2).

³⁶⁸ See note 363, *supra*.

³⁶⁹ In undertaking such research, the terms of "The Amendments (Consequential to the Making of the Decentralization Laws) Act, 1982" (promulgated by former President Nimeiri on 1 July, 1982) must be considered. This Act amended 78 statutes with regard to the assignment of authority within the Sudanese government to undertake various functions. See also, Sudanese Laws Coordination Act, 1406 (promulgated 8 December, 1985).