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A COMPARATIVE STUDY OF LEGAL IDEOLOGY: AFRICAN LAND TENURE SYSTEMS†

I. INTRODUCTION

Perhaps the most important legal problem faced by decolonized African nations has been to reform or implement land tenure systems which structure distribution of ownership or possessory rights among their citizens. Land tenure can be considered one of the most significant vehicles for postindependence nation-building in Africa. Distribution of land and the definition of property rights in general are two preliminary steps in building a strong agricultural base and initiating the industrial development which is necessary to form a politically and economically independent nation.

Land tenure systems are the products of many factors, including the ideological path a nation chooses through acquiescence in a colonial system, revolution, or democratic choice. For example, in the land tenure system of a nation which has a predominantly free market economy, there is generally an institutionalized respect for individual property rights and laws designed to provide incentives to maximize production.¹ A new socialist² nation, on the other hand, will more likely implement laws which collectivize land holdings or somehow vest all ownership rights in the sovereign, with occupation as the greatest right an individual can have in land.³ African states whose legal systems are rooted in or have some elements of Islamic law tend to honor the rights of family units above all others.⁴

† The author wishes to thank Nathan Gould, Associate Professor of Anthropology, John Jay Criminal College, New York, and P. Ehi Oshio, Lecturer-in-Law, University of Benin, Nigeria, for their comments on an earlier draft of this Note.

¹ Kenya's system, discussed in section II.A., is such a system. See, e.g., Coldham, *A Comparative Study of Land Tenure Legislation in Africa*, ACTA JURIDICA, 189, 191-96 (1985). The term "free market" as used in this Note does not necessarily imply Western-style democracy, but is used instead in cases where nations discussed are predominantly capitalist.

² The term "socialist" is used in this Note to describe nations whose economies are basically socialist in nature, i.e. that include some collectivization of the means of production and state ownership, or whose land tenure laws tend to be socialist, whether or not their governments profess to be socialist *per se*.

³ This is the focus of many Tanzanian land tenure laws, discussed in detail in section III.A. See Coldham, *supra* note 1, at 196-203.

⁴ See section IV; see also *infra* note 123 and accompanying text. A discussion of Islamic land tenure is included here because Islam and Islamic law have become increasingly important international political forces. See Hiro, *Riding the Wave of Islam's Past*, THE NATION,

In measuring the success of such systems, it is easiest to compare a nation's stated goals to statistical performance; but such quantitative measurements cannot adequately evaluate a system of laws. Instead, in the context of decolonized Africa, the success of land tenure laws is most accurately measured in terms of a country's ability to accommodate indigenous or customary law⁵ and to modernize these legal systems with a view towards economic self-sufficiency and, ultimately, prosperity.

This Note compares selected free enterprise, socialist, and Islamic nations in Africa in their efforts to reform or establish land tenure systems, and to draw from them a model of an effective land tenure system. Specifically, it will address the issue of how each of these legal systems incorporates elements of customary law and the needs of indigenous peoples, and whether these systems are practical in terms of the realities of modern developmental needs. The Note seeks to demonstrate that no single ideological land tenure system guarantees complete success and suggests that nations should choose from among the most successful elements of these systems when creating or seeking to improve systems of their own.

II. A FREE MARKET MODEL

A number of decolonized African countries have chosen to follow systems of laws, government, and economics similar to those

Feb. 9, 1985, at 143 (the late Ayatollah Khomeini and the Iranian Revolution have affected fundamentalist movements in Saudi Arabia, Iraq, Egypt, Tunisia, Morocco, Malaysia, Indonesia, the Soviet Union, and among members of the Palestinian Liberation Organization). See also *Legal Entanglements: Zia Raises Hackles with New Efforts to Expand Islamic Law*, FAR E. ECON. REV., June 30, 1988, at 30; Jacobs, *The Sudan's Islamization*, CURRENT HIST., May, 1985, at 206. In countries which have adopted it, Islam is more than a spiritual force; it is a philosophy which pervades virtually every element of the society, affecting political and economic relationships to the extent any conventional ideology does. See, e.g., H. SMITH, THE RELIGIONS OF MAN 242-53 (2d ed. 1965).

⁵ As used in this Note, the term customary law refers to the laws of the native peoples of Africa. In much of colonial Africa, a dual system of laws existed. One set, the English (or other European) system, applied to colonists, while the customary system applied to the native peoples. There were occasional exceptions, where one system of laws applied to people and activities of the other group. Through time, customary law has been forced to change in many respects to accommodate major changes introduced by European law. See Allott, *What is to Be Done with African Customary Law?*, 28 J. AFR. L. 56, 56-59 (1984). One distinctive attribute of customary law is that it is unwritten and is handed down from generation to generation, unlike most Western legal systems. Bennett & Vermeulen, *Codification of Customary Law*, 24 J. AFR. L. 206, 212 (1980). As is discussed in the various sections of this Note, in most African countries the customary law with respect to land recognized communal ownership and limited individual interests to usufructuary rights. Alienability of land was also limited.

of their former colonial powers.⁶ Kenya, a former British colony, is one of the continent's most capitalistic nations. While some of its neighbors have chosen more revolutionary forms of government, Kenya seems content to follow the free enterprise which it inherited from its British occupiers.⁷ To some degree, the same can be said for Malawi, whose president once extolled the virtues of private incentive in proposing new land tenure legislation.⁸ The following survey of statutes represents, for the most part, the modern history and status quo of land tenure legislation in Kenya and Malawi.

A. Kenya

Numerous statutory schemes evidence the desire of both the departing colonial administration and the postindependence government of Kenya to institutionalize private property rights. As a colonial power, the British emphasized individual ownership of land in their African colonies.⁹ Much of the land tenure legislation of the late colonial period reflects that emphasis. The land adjudication and land registration program initiated in the 1950s, shortly before Kenya's 1963 independence, embodies one of the most significant approaches to land tenure reform legislation in that era.¹⁰

Kenya's is a two-part program, which consists of adjudication and subsequent registration of title to lands in the "Native Areas" of Kenya.¹¹ The program, first put into effect in the Kikuyu Land

⁶ Both Kenya and Malawi, discussed at length in this section, have kept capitalism as their economic model. Regarding Kenya, it has been written that its economy is a "pragmatic blend of laissez-faire capitalism and indigenous African socialism (the traditional economic, political, and social philosophy regulating the activities of African rural society)." FOREIGN AREA STUDIES, THE AMERICAN UNIV., KENYA: A COUNTRY STUDY 135 (H. Nelson 3d ed. 1983) [hereinafter KENYA: A COUNTRY STUDY].

⁷ Since its independence from Great Britain on December 12, 1963, "[t]he postindependence government has continued the earlier emphasis on the private sector's role in development, in marked contrast to the actions of many other Sub-Saharan African countries after independence." *Id.* at 136.

⁸ Ng'ong'ola, *The Design and Implementation of Customary Land Reforms in Central Malawi*, 26 J. AFR. L. 115, 115 (1982); see also *infra* note 43 and accompanying text.

⁹ See Coldham, *supra* note 1, at 189.

¹⁰ *Id.* at 191. Land adjudication and registration is a system in which disputes over title to land are officially settled (adjudicated) with title subsequently registered in the name of the person in whose favor the dispute is resolved. This system was designed to afford a mechanical transition from the nebulous system of customary land ownership to one based on English property concepts. *Id.* at 192.

¹¹ Land in Kenya was commonly referred to as Highlands or White Highlands, and Native Areas or Native Lands. Says author Coldham: "In the Highlands the farms were large, the agriculture was primarily export-oriented and the applicable land law was based, indirectly, on English law. In the Native Lands farms were generally small, agriculture was

Unit,¹² involves adjudication and consolidation of landholdings, and registration of title.¹³ This system typically involves surveying tens of thousands of plots of land, settling and adjudicating titles, and consolidating and officially registering holdings.¹⁴ Much of this process involves administration at the local level, with officials and committees from the affected areas helping to adjudicate the holdings and to facilitate the entire procedure.¹⁵ While the Kenyan Minister of Lands and Settlement hears ultimate appeals, local entities administer the rest of the process and judge disputes using customary law.¹⁶

Upon the adjudication of a title dispute, the victor gains registration as the individual owner of the plot and wins

absolute ownership of that land subject only to leases, charges, encumbrances, etc[.] shown on the register and to overriding interest. The land ceases to be subject to customary law and is governed by the complete code of substantive and conveyancing law, based broadly on English law, contained in the Registered Land Act.¹⁷

Such security of title and simplified conveyancing are the legal guarantees of private ownership of property.¹⁸ Theoretically, a farmer will make a greater financial or labor commitment to develop the plot he farms if his ownership is secure. The same is true of the simplification of title registration. Ideally, landowners in Africa, as in all places, should be able to alienate their land easily and efficiently in order to guarantee maximum productivity on an individual and national level.

This economic incentive theory was also the focus of the so-called Swynnerton Plan, which seems to have provided much of the

for subsistence or (less commonly) for the local market and customary law applied." *Id.* at 191.

¹² The Kikuyu Land Unit was a native land unit where much of the land in question was disputed, overcrowding was a serious problem, and landholding was critically fragmented. *Id.*

¹³ *Id.*

¹⁴ For an informative and detailed description of the adjudication process, see Coldham, *supra* note 1, at 191.

¹⁵ *Id.* at 192.

¹⁶ *Id.* It is presumed from this description of the law that the local boards do not rely on English property law principles in resolving the disputes that come before them, but instead use native customs or customary laws.

¹⁷ Coldham, *supra* note 1, at 192.

¹⁸ *Id.* at 194.

basis for the land tenure reform in Kenya.¹⁹ It proposed that “the African farmer . . . be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against financial credits.”²⁰ Ideally, with guarantees that title to their lands would be secure, farmers with poor or unworkable plots would sell them to others in a better position to develop them.²¹ This design would maximize efficiency, it was argued, because “. . . energetic or rich Africans [would] be able to acquire more land and bad or poor farmers less [although this would create] a landed and a landless class”²²

Another very significant piece of land tenure legislation in Kenya was the Land Control Act of 1967.²³ In order to strengthen the rule of the official system of registration, the original version of the Land Control Act provided, in section 6, that transactions in land controlled by the adjudication and registration system would become void after three months unless the parties obtained the consent of the Land Board.²⁴ The apparent purpose of this provision was to ensure reliance on the official system of land transfer. The Act goes further in its attempts to discourage transactions in land that do not respect the new registration system: section 7 of the Act provides that no damages other than the price paid for such a void transaction can be recovered by one who has purchased land and failed to comply with section 6.²⁵

During the 1950s and 1960s, Kenya implemented several other land tenure programs which tended to further this policy of pri-

¹⁹ The Swynnerton Plan was completed in 1954 at the height of Kenya's Mau Mau emergency—an uprising of a secret organization of native Kenyans allegedly seeking to expel Europeans from the country—and proposed serious agricultural reforms for Kenya. It was headed by R.J.M. Swynnerton who was director of the Department of Agriculture at the time. Aside from the philosophical bases discussed in the text, the plan also proposed expansion of export crops, a major source of foreign exchange. KENYA: A COUNTRY STUDY, *supra* note 6, at 29–31; *see also* Coldham, *supra* note 1, at 195.

²⁰ Coldham, *supra* note 1, at 195 (quoting R.J.M. SWYNNERTON, A PLAN TO INTENSIFY THE DEVELOPMENT OF AFRICAN AGRICULTURE IN KENYA § 13 (1954) [hereinafter SWYNNERTON]).

²¹ Coldham, *supra* note 1, at 195.

²² *Id.* (quoting SWYNNERTON § 14). Swynnerton thought this “a normal step in the evolution of a country.” *Id.*

²³ *Id.* at 196; *see also* Cotran, *The Development and Reform of the Law in Kenya*, 27 J. AFR. L. 42, 59 (1983).

²⁴ *See* Cotran, *supra* note 23, at 59. A 1980 amendment to the Act apparently tried to alleviate this hardship, but it is not clear if it has succeeded in doing so. *Id.*

²⁵ *Id.*

vation. A favorite of the British colonial administration was the so-called Million Acre Scheme, first introduced in 1962, just a year before Kenya's independence. Under this plan land was to be divided "into relatively large plots to be owned by wealthier and more experienced 'progressive' farmers These wealthier farmers were thought to be the only Africans capable of keeping the former European farms commercially viable."²⁶ The British government provided funding for the purchase of European lands from these so-called Scheduled Areas, so that Africans could settle and register the lands.²⁷ Eventually, however, authorities divided the land into smaller plots.²⁸ The purpose of the Million Acre Scheme was to force more rapid redistribution of land.²⁹ Following the Scheme, a government report³⁰ reevaluating Kenya's land settlement programs concluded that, contrary to the original plan which intended distribution of already divided plots, Kenya should distribute, through private sales, the majority of the remaining European farms.³¹

This overall emphasis on individual title to land ran contrary to the customary land law of Africans who lived in Kenya. Under customary law, the rights of individuals to plots of land were usufructuary only, though individual farmers could pass land on to their heirs.³² Ownership was generally vested in a lineage or clan, and a chief or a group of elders controlled the lands held by such groups.³³ Clearly, government efforts toward privatization of land ownership were bound to conflict with this system of land tenure.

There is one notable exception to this privatization and individualization of property in Kenya, however, which serves as an excellent example of legal accommodation of custom. In the case of Masailand, the government implemented a different system establishing large group ranches, pursuant to Kenya's Land (Group Representatives) Act of 1968.³⁴ The government implemented this

²⁶ Sampliner, *Zimbabwe's Land Resettlement Program: Lessons from Kenya and Algeria*, 5 N.Y.L. SCH. J. INT'L & COMP. L. 49, 63 (1983).

²⁷ KENYA: A COUNTRY STUDY, *supra* note 6, at 142.

²⁸ Sampliner, *supra* note 26, at 63.

²⁹ *Id.*

³⁰ The report was the end product of the Stamp Mission, created in 1965 to reevaluate the Million Acre Scheme. Maxwell Stamp, the head of the mission, was a British economist. *Id.* at 65.

³¹ *Id.*

³² KENYA: A COUNTRY STUDY, *supra* note 6, at 141.

³³ *Id.*

³⁴ Coldham, *supra* note 1, at 193. This law was enacted in 1968. *See also* KENYA: A COUNTRY STUDY, *supra* note 6, at 142-43.

system to "protect [the Masai, who are nomadic pastoralists] from increasing encroachment on their traditional grazing grounds by individual farmers and partly to settle them on ranches where they could be provided with credit and services and gradually drawn into the national economy."³⁵ By providing special large ranchlands for the Masai which would not be divisible into individual plots, the Kenyan government was able to legislate without completely disrupting the customs of this population. This appears to have been virtually the only major exception to the adjudication program.³⁶

Another statute, the Magistrate's Jurisdiction (Amendment) Act of 1981, has won praise for its accommodation of some elements of customary law.³⁷ Under this act, a panel of community elders hears some of the disputes.³⁸ This is the first act in Kenya which actually brings lay people back into such an important area of the law.³⁹ The act is noteworthy as a successful attempt by Kenyan officials to restore some credibility to the country's land tenure legislation through respect for the customary use of elders in land dispute resolution.

B. *Malawi*

Malawi, like Kenya, was a British colony for many years. After gaining independence in 1964,⁴⁰ Malawi's government pursued an economic course consistent with the capitalism of its mercantilist predecessors.⁴¹ Its land tenure reform policies reflected this course:

³⁵ Coldham, *supra* note 1, at 193.

³⁶ Masai in Kenya's Narok District have said that there is, nevertheless, a tendency there to seek to subdivide the ranches for individual ownership. KENYA: A COUNTRY STUDY, *supra* note 6, at 143.

³⁷ *Id.* Cotran also criticizes this act for the conflict inherent in providing that a district officer will serve as an administrator of the act yet also serve as an adjudicating officer. *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Malawi was a British colony from 1891, when a protectorate was first established, until its independence on July 6, 1964. H. NELSON, AREA HANDBOOK FOR MALAWI 1 (1975) [hereinafter AREA HANDBOOK FOR MALAWI].

⁴¹ One source says this of Malawi's economic policies:

The policies pursued by the government in managing the economy since independence had drawn exceptional praise from world organizations as being both prudent and dynamic. The cautious, conservative approach to fiscal and monetary policy and the generally deliberate pace of nationalization during the first ten years of independence had created a climate unusually attractive to foreign investment and foreign aid.

Id. at 192.

in 1967 the President of Malawi⁴² implored the legislature to adopt land tenure reform legislation which would strongly encourage and reward private initiative in the agricultural sector.⁴³

In the 1960s, the legislature enacted several major statutory schemes to reform Malawi's land tenure system. The Registered Land Act, enacted in 1967,⁴⁴ "provided the machinery for registering titles to land, including allocated land, and the new substantive land law applicable thereto."⁴⁵ Another significant part of this legislative scheme was the Local Land Boards Act, also enacted in 1967,⁴⁶ which, in turn, "provided the machinery for controlling dealings in allocated land after registration."⁴⁷ These statutes, taken together, worked very much like the Kenyan adjudication and registration legislation mentioned previously in this Note.⁴⁸

Arguably, the single most important land tenure legislation in postindependence Malawi is the Customary Land (Development) Act (C.L.D.A.), also enacted in 1967.⁴⁹ As with many of the land tenure laws of Malawi, the C.L.D.A. "shows an ingenious blend of indigenous provision and borrowings from legislation of other countries . . ."⁵⁰ The primary purpose of the C.L.D.A. was to determine officially and to register ownership interests in land, much like the Kenyan adjudication process.⁵¹ The C.L.D.A. placed a premium on allocating land in areas of the country where "it appear[ed] expedient to the Minister [responsible for land matters] that the ascertainment of interests in customary land and the better

⁴² Dr. H. Kamuzu Banda became President in 1966 and Life President in 1971. THE STATESMAN'S YEAR-BOOK 826 (J. Paxton 126th ed. 1989-90).

⁴³ Ng'ong'ola, *supra* note 8, at 115. This passage set the tone of the legislation, which was supposed to help land development:

First by accepting and recognising the principle or idea of individual ownership of land and secondly by insisting that anyone who owns land, whether as an individual or as the head of his or her family, is strictly responsible for the economic and productive use of his or her land; otherwise it must be taken away.

Id.

⁴⁴ AREA HANDBOOK FOR MALAWI, *supra* note 40, at 239.

⁴⁵ Ng'ong'ola, *supra* note 8, at 116.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *supra* section II.A.

⁴⁹ Ng'ong'ola, *supra* note 8, at 116; see also AREA HANDBOOK FOR MALAWI, *supra* note 40, at 239.

⁵⁰ Ng'ong'ola, *supra* note 8, at 117. In fact, "[t]he basic provisions in the C.L.D.A. on ascertainment of rights and interests in customary land were adapted from Part II of the Sudan Land Settlement and Registration Ordinance, 1925." *Id.*

⁵¹ See generally *id.*

agricultural development of such land in any area should be effected”⁵²

While the adjudication process in Malawi was equally ambitious in its promotion of capitalist property institutions, it was far more respectful of customary law than its Kenyan analog. The C.L.D.A. established small local committees with simple duties which were responsible participants in the process.⁵³ The C.L.D.A. designed these committees to work in conjunction with the official allocation team assigned to the area in question, and they concerned themselves with the role of customary law in the process.⁵⁴ The allocation teams, on the other hand, were agents of the state, in which the authority for land allocation under the program ultimately rested.⁵⁵ The inclusion of the local committees allowed Malawi to avoid some of the conflicts between the new laws and custom which Kenya experienced.⁵⁶

The Malawi allocation system itself is a multipart process.⁵⁷ The allocation stage entails division of the designated development area into sections, with subsequent publication of notices defining the limits of the area so that people with potential disputes would have sufficient time to make a complaint and to defend whatever rights they feel have been threatened.⁵⁸ As soon as this is done, “the powers of customary authorities over [the] land cease. [In addition,] except with the consent in writing of the Allocation Officer, no person or customary owner can proceed with or take cognisance of any dispute concerning land.”⁵⁹ Then, at the second stage of the process, a demarcation officer entertains claims on lands allocated pursuant to the terms of the allocation statutes.⁶⁰ The C.L.D.A. also retains for the government a degree of regulatory control with respect to the public’s need for land:

Section 13 [of the C.L.D.A.] empowers the Demarcation Officer to set aside land required for the present and future needs of the community, such as roads, village sites, public buildings and open spaces; effect measures prescribed for any development scheme; demarcate rights of way to provide access to public

⁵² *Id.* (quoting section 3 of the C.L.D.A.).

⁵³ *Id.* at 117–18.

⁵⁴ Ng’ong’ola, *supra* note 8, at 118.

⁵⁵ *Id.*

⁵⁶ *See id.* at 119.

⁵⁷ *Id.* at 118–19.

⁵⁸ *Id.* at 118.

⁵⁹ *Id.*

⁶⁰ *Id.*

roads or watering places; re-align boundaries; terminate all unnecessary customary rights; and most important, 'if he considers the existing lay-out of the land to be uneconomic or inconvenient for the use of the land or inconsistent with the development scheme, prepare a fresh lay-out and by exchange of land or otherwise adjust the existing layout.'⁶¹

It is in the third, or registration, stage of the process that the Malawian land tenure regime differs from the Kenyan. As in Kenya, customary ownership of land in Malawi was communal; individuals generally had no more than usufructuary rights and disposal rights were exercised by the chief or headman of the group.⁶² In this third stage of the process, these customary rights are institutionalized: the survey officer surveys the now legally defined property, a recording officer prepares a record of all such plots, and customary owners are recorded as "owners, joint owners or owners in common, or as owners of family land."⁶³

Section 20 of the C.L.D.A. also demonstrates the Malawi government's desire to protect customary rights. The legislation provides that pieces of land which fall "into the category of village residential land; *dambo* land (normally used for grazing); unallocated garden land; or land used for any other special purposes of the community; should be recorded as customary land."⁶⁴ This would seem to contradict the principal terms of the statute, i.e. to divide and privatize customary lands, but authorities suggest that the lands protected by section 20 are not very significant and that future division of these lands remains a possibility.⁶⁵ These elements of the process demonstrate both the government's commitment to private property rights and to maintenance of respect for customary rights.

C. *Free Market Land Tenure: Criticisms and Comments*

In summary, the model free enterprise or capitalist land tenure system ordinarily has at least the following characteristics: a strong

⁶¹ *Id.*; see also J.D.A. BROOKE-TAYLOR, *LAND LAW IN MALAWI (TEXT)* 313 (1977). It is unclear, however, how much more power this provision grants the government compared with the concept of eminent domain.

⁶² AREA HANDBOOK FOR MALAWI, *supra* note 40, at 240. As in Kenya, individuals could inherit the right to use land from kin, though this right was subject to approval by the tribal authority. These descriptions of customary rights in land are general, as there was some variation among different ethnic groups in Malawi. *Id.*

⁶³ Ng'ong'ola, *supra* note 8, at 119 (quoting § 19(2) of the C.L.D.A.).

⁶⁴ *Id.* at 120.

⁶⁵ See *id.*

legal commitment to the concept of private property with little or no regard to contrary ideals of customary law, an aggressive form of determining private, individual ownership of plots of land, and a system of title registration.⁶⁶ Occasionally, countries following this model will demonstrate some institutionalized respect for customary law through statutory recognition of rights of familial, as opposed to individual, succession and joint ownership of lands.⁶⁷ This model, however, invariably produces confusion and conflict, and can actually undermine the very objectives which governments set out to achieve.

Both the Kenya and Malawi programs have been criticized for their inability to accommodate customary law effectively. The resulting friction between the old and new legal systems in these countries illustrates the difficulty which inflexible ideological systems have in effecting the needed transition to economic prosperity. For example, though Kenya has experienced some economic success,⁶⁸ the Kenyan statutory scheme's reliance on the capitalistic notion of security of individual title has created confusion, with true title to target lands often still in dispute. One scholar, Simon Coldham, observes: "if registered proprietors regard the land adjudication programme as simply a means of securing boundaries and continue to deal with their land according to customary law, then the system is not going to operate effectively. Abundant evidence exists to show that this is indeed happening in Kenya."⁶⁹ Coldham adds that "[m]ost striking . . . is the fact that the large majority of successions is not registered" as mandated by the statutes' express terms.⁷⁰ The potential for this friction to turn into disaster is clear:

⁶⁶ The best example of these two characteristics is the Kenyan system found in the land adjudication and registration laws. See generally Coldham, *supra* note 1, at 191-96.

⁶⁷ This is exemplified in Malawi's Customary Land (Development) Act. See generally Ng'ong'ola, *supra* note 8, at 115.

⁶⁸ According to the United States State Department's Bureau of Public Affairs, Kenya's 1986 Gross Domestic Product was \$6.722 billion. Agriculture represented 30% of its G.D.P. in 1985. With a 1987 population of approximately 21,600,000 people, the nation's per capita income was \$322 (1986). Additionally, its annual G.D.P. growth rate was 4.9%. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 8024, BACKGROUND NOTES: KENYA 1 (Jan. 1988) [hereinafter BACKGROUND NOTES: KENYA]. Its G.D.P. (at factor cost) at independence (1963) was approximately \$778 million. A. KAMARCK, THE ECONOMICS OF AFRICAN DEVELOPMENT 250-51 (1967).

⁶⁹ Coldham, *supra* note 1, at 194. Coldham suggests that heads of household frequently ignore the new legal systems and continue to divide and sell land without registration. This problem, if allowed to go unchecked, could clearly undermine the entire land registration system. *Id.*

⁷⁰ *Id.*

"[t]he less the land register reflects what is happening on the ground, the greater the likelihood of disputes arising in the future, of the same kind as were settled at the time of land adjudication. Indeed, in some areas land adjudication may have to be repeated."⁷¹ One can imagine the detrimental effect such a time-consuming endeavor would have on Kenyan land development.

As African scholar Clement Ng'ong'ola describes, Malawi went further in its efforts to codify some customary rights in the C.L.D.A., partly in response to the Kenyan experience:

The Malawi provision was designed to mitigate some of the harsh consequences of [allocation] principles by providing for the demarcation, recording and registration of family titles as an exception to the general granting of individual titles. It was also the prevailing view that individualisation of customary tenure was not as well advanced as it was in Kenya to permit wholesale introduction of individual titles.⁷²

But the Malawi statutes have also failed in certain respects. In fact, Ng'ong'ola suggests that "because of [the] selective approach [of the statutes], the impact of land reforms on peasant agriculture is bound to be minimal for a while yet."⁷³ Such criticism, if valid, indicates that the legislation could conceivably fail in reaching its original objective of encouraging individual ownership and private initiative in the agricultural sector.⁷⁴ Certainly a country as poor as Malawi cannot afford such a failure.⁷⁵

III. A SOCIALIST MODEL

A number of newly independent African nations have chosen some form of socialism as their preferred form of law and gover-

⁷¹ *Id.* This is clearly a possibility if landowners continue to divide and convey land without regard for official registration procedures. See *supra* note 69 and accompanying text.

⁷² Ng'ong'ola, *supra* note 8, at 119.

⁷³ *Id.* at 131.

⁷⁴ In fact, "[d]espite the growing land hunger, cultivators having customary access to land for cultivation have shown very little interest in taking advantage of the laws that encourage registration of permanent title." AREA HANDBOOK FOR MALAWI, *supra* note 40, at 240.

⁷⁵ At independence Malawi was considered one of the world's 25 poorest nations, a distinction which the country unfortunately has had problems overcoming. *Id.* at 2, 191. United States Department of State statistics on Malawi for 1985 show a population of some 7,100,000 people and a Gross Domestic Product (1984) of \$1.19 billion. Thirty-seven percent of the G.D.P. was derived from agriculture. Its 1984 per capita income amounted to about \$175. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 7790, BACKGROUND NOTES: MALAWI 1 (Sept. 1985) [hereinafter BACKGROUND NOTES: MALAWI]. Malawi's market price G.N.P. was \$147 million at independence (1964). KAMARCK, *supra* note 68, at 250-51.

nance. These countries are similar to the free enterprise or capitalistic countries in that they also must address the problem of land tenure reform in order to establish a viable agricultural and industrial base for their future economic well-being.

A. Tanzania

Tanganyika,⁷⁶ the predecessor nation to Tanzania, was placed under a League of Nations Mandate after World War I, with Great Britain as its mandatory.⁷⁷ The creators of the mandate required that the British "take into consideration native laws and customs and . . . respect the rights and safeguard the interests of the native population" when making laws relating to property rights.⁷⁸ The Tanganyikan Land Ordinance of 1923 could be considered a precursor to today's socialist system in the land tenure area:

[The statute] declared that, apart from titles previously acquired (which were converted into their nearest equivalents in English law, i.e. freeholds or leaseholds), all lands in the territory, whether occupied or unoccupied, were public lands to be held and administered by the Governor for the use and common benefit, direct or indirect, of the natives of Tanganyika.⁷⁹

Nonetheless, the ordinance set up a system of rights of occupancy which was never very successful.⁸⁰ By the time Tanganyika achieved independence, most natives still lived in small settlements, where they practiced traditional methods of farming.⁸¹

⁷⁶ Tanganyika, which achieved independence from Great Britain in 1961, was joined with Zanzibar, which gained its independence from Britain in 1963, to form the modern nation of Tanzania in 1964. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 8097, BACKGROUND NOTES: TANZANIA 4 (July 1986) [hereinafter BACKGROUND NOTES: TANZANIA]. Tanzania had an estimated population of 22,300,000 in 1985. Its 1984 estimated Gross Domestic Product was \$4.1 billion and its per capita income was \$200. Agriculture represented approximately 33% of Tanzania's G.D.P. *Id.* In 1964, Tanzania (without Zanzibar) had a factor cost G.D.P. of \$684 million. Its G.N.P. was \$725 million. KAMARCK, *supra* note 68, at 250-51.

⁷⁷ Coldham, *supra* note 1, at 196. After World War I, the former colonial possessions of defeated Germany and her allies were administered as mandates under the auspices of the newly established League of Nations. See MARGALITH, THE INTERNATIONAL MANDATES 26-34 (1930).

⁷⁸ Coldham, *supra* note 1, at 196 (citing Article 6 of the Mandate).

⁷⁹ *Id.*

⁸⁰ *Id.* at 197.

⁸¹ *Id.* According to author Coldham, this was one of several reasons why the law was unsuccessful. He also mentions the fact that land shortages and increases in landlessness had developed in some parts of Tanzania. *Id.*

The postindependence government of Tanzanian President Julius Nyerere, one of Africa's most committed socialists, was quick to extend "its predecessor's policy of attaching conditions to titles in order to secure development."⁸² This notion, of course, was consistent with Nyerere's vision of an egalitarian Tanzanian society based on communal ownership and production of goods.⁸³ Thus, unlike Kenya, where privatization of land was pursued ambitiously, the Tanzanian government under Nyerere first converted all freeholds into leaseholds.⁸⁴ All government leaseholds, in turn, were converted into rights of occupancy.⁸⁵ This two-step conversion has had the effect of nationalizing land in Tanzania.⁸⁶ The powers of the president under authority of these statutes were tremendous: he was authorized to revoke rights of occupancy, seemingly at will, and could direct that any assessment of compensation to former owners or occupiers of such land could consider any prejudice to the national economy caused by inadequate development of the land in question.⁸⁷

Coldham writes that a unique and curious aspect of land tenure legislation in Tanzania, a nation with a vested interest in strict regulation of rights in land, is the relative paucity of such legislation.⁸⁸ This may indicate a concern for customary law not found elsewhere. Lack of a legal framework for land tenure reform may, in part, be due to the following:

Nyerere and other [Tanganyika African National Union or TANU] leaders [genuinely believe] that reforms should not be imposed from above but should evolve in response to grassroots demands Moreover, Nyerere is committed to creating a classless society in Tanzania and to achieving rural socialism even at the price of reducing agricultural productivity, and no

⁸² Coldham, *supra* note 1, at 197.

⁸³ See FOREIGN AREA STUDIES, THE AMERICAN UNIV., TANZANIA, A COUNTRY STUDY 87 (I. Kaplan 2d ed. 1978) [hereinafter TANZANIA: A COUNTRY STUDY]. Nyerere was President of Tanzania from 1964 to 1985. Since 1985, he has had influence in national politics as chairman of Tanzania's single party, *Chama cha Mapinduzi*, which was granted supremacy over the government by the constitution of 1977. BACKGROUND NOTES: TANZANIA, *supra* note 76, at 6.

⁸⁴ Coldham, *supra* note 1, at 197.

⁸⁵ *Id.* By this method, privately owned lands were gradually taken by the government, which subsequently allowed only occupation, and presumably use, of the land by former owners, tenants, etc. The Freehold Titles (Conversion and Government Leases) Act, 1963 achieved this. See TANZANIA: A COUNTRY STUDY, *supra* note 83, at 196-97.

⁸⁶ See *id.*

⁸⁷ Coldham, *supra* note 1, at 198.

⁸⁸ *Id.*

doubt he feels that progress towards these goals would be hindered if lawyers and courts were involved.⁸⁹

There are two other significant pieces of legislation in Tanzania which reflect Tanzania's distaste for privatization of property. The first, The Rural Farm Land (Acquisition and Regrant) Act of 1966 allows the government to "acquire" any rural farm land, compensating owners at its discretion, then to grant the land to the person who has been cultivating it if that person has made substantial improvements to the land.⁹⁰ The second, the Urban Leaseholds (Acquisition and Regrant) Act of 1968, essentially gives the government the same powers with respect to urban land.⁹¹ In addition to the Urban Leaseholds (Acquisition and Regrant) Act, the government also instituted the Acquisition of Buildings Act of 1971, enabling the president to acquire buildings where and when he determined it would be in the public interest to do so.⁹² This statute is perhaps the farthest-reaching in expressly providing that compensation need not be provided to an owner who has owned the building in question for more than ten years.⁹³

The most significant and unique aspect of Tanzanian land tenure laws, however, is the village settlement programs, which are examples of home grown collectivization of property and the foundation of Nyerere's vision of African socialism for Tanzania.⁹⁴ The first such program was the village settlement policy, announced in 1962, establishing numerous villages throughout the country "characterized by the detailed provisions regarding land tenure and other aspects of their organization."⁹⁵ Property rights were vested in the Rural Settlement Commission and later in the Village Co-Operative Society, which would administer village lands and allocate use thereof.⁹⁶ The most widely known program, the *ujamaa*⁹⁷ vil-

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Coldham, *supra* note 1, at 198.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ As one commentator said of collectivization of lands and its relationship to socialism in Tanzania: "Collective organizations promote socialist principles and alleviate social problems . . ." R.W. JAMES, LAND TENURE AND POLICY IN TANZANIA 169 (1971). See also TANZANIA: A COUNTRY STUDY, *supra* note 83, at 139.

⁹⁵ Coldham, *supra* note 1, at 199.

⁹⁶ *Id.* The villages were model settlement schemes and were basically economic collectives.

⁹⁷ The word *ujamaa* is often translated as "familyhood." TANZANIA: A COUNTRY STUDY, *supra* note 83, at 7. Since 1962, the Kiswahili word has been used by Nyerere and other

lages,⁹⁸ was initiated by President Nyerere in 1967. This program "reflect[ed] the new emphasis on self-reliance, on socialist ideals and on the need for a frontal approach to the problems of rural development"⁹⁹ These villages, too, are organized on a collective farming model,¹⁰⁰ and by the late 1970s, ninety percent of the population of Tanzania was living in 8000 *ujamaa* villages.¹⁰¹ The Villages and *Ujamaa* Villages (Registration, Designation and Administration) Act of 1975 provides some legal framework for the villages, and directs that the village councils shall have widespread responsibility for allocating farm land to individuals and families within the village unit.¹⁰² Individual ownership by village members is strictly controlled.¹⁰³

B. A Socialist Model: Does It Work?

A socialist model of land tenure legislation would, therefore, include nationalization of landholdings with broad state power to take, redistribute, and designate uses of land.¹⁰⁴ Also, collectivization of land, especially in the agricultural sector, and emphasis on the communal lifestyle of villages or some similar unit, to use the Tanzanian example, would all be key elements of such a model.¹⁰⁵ An important theme in African socialist land legislation and property rights in general is that private interest must give way to the state's perception of the common good.¹⁰⁶ This is a basic tenet of socialism, and its application in Africa has provided some interesting results, including Tanzania's unique villages program.¹⁰⁷

Tanzanian officials to describe the communal society to which they aspire. BACKGROUND NOTES: TANZANIA, *supra* note 76, at 6.

⁹⁸ Coldham, *supra* note 1, at 199.

⁹⁹ *Id.*

¹⁰⁰ *Ujamaa* is the ultimate goal of the village programs, but in order to achieve this stage, people first had to live in villages, cooperating with each other while receiving social services and education, in preparation for the final, or *ujamaa*, stage. TANZANIA, A COUNTRY STUDY, *supra* note 83, at 90; *see also supra* note 97 and accompanying text.

¹⁰¹ Coldham, *supra* note 1, at 200.

¹⁰² *Id.* at 201.

¹⁰³ *Id.* Individual ownership is limited to such things as livestock and small tools and other farm implements. *Id.*

¹⁰⁴ This is evidenced in such laws as Tanzania's Rural Farm Land (Acquisition and Regrant) Act 1966, discussed *supra*, section III.A.

¹⁰⁵ The *ujamaa* villages and the idea of virtually absolute sovereign ownership of lands exemplify these concepts. *See* Coldham, *supra* note 1, at 196-203.

¹⁰⁶ This is evidenced by the statutes discussed in section III.A.

¹⁰⁷ *See supra* section III.A.

The Tanzanian concept that all land belongs to the government appears to have some foundation in the customary law of the pre-colonial period. Under customary African land law in Tanzania, the occupant of a plot of land had only usufructuary rights.¹⁰⁸ These usufructuary rights were essentially guaranteed by the community, which had superior rights in the land, as long as the farmer continued to cultivate the land and "conducted himself properly in the eyes of his society."¹⁰⁹ These rights could be inherited, but could not be disposed of by the individual.¹¹⁰

Despite what seems to be a strong effort by postindependence governments to accommodate these customary notions of communal ownership, socialist land tenure systems such as that of Tanzania are criticized for their insensitivity to customary law and their inability to accommodate it. Much of this criticism is, no doubt, quite valid. The socialist systems do have some merit, however, as they may help to effect a smooth transition from tribal to individual property rights.

With respect to the *ujamaa* village resettlement program in Tanzania, for example, a typical criticism is that the communal lifestyle and collectivized farming of the villages are counterintuitive for native Tanzanians and that, as a result, production as a whole has not met the expectations of the nation's governors.¹¹¹ Coldham observes simply: "the notion of collective production found no place in customary land law."¹¹² Even though there was some idea of collective rights in customary land law regarding community property such as water and wood, "the principles governing the allocation and inheritance of land stressed individual rights and duties, and the basic production unit was the family."¹¹³ There was, then, tremendous conflict between the village settlement concept and tradition because the cooperation and sharing that existed in traditional Tanzanian society was limited to kin groups or tribes and could not be easily extended to groups as large as those envisioned by these programs.¹¹⁴ In their favor, however, one can say that the

¹⁰⁸ TANZANIA: A COUNTRY STUDY, *supra* note 83, at 194.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Evidently, however, transfer of land for a customary price was known to occur in a few places in pre-European Tanzania. Also, a feudal landlord-tenant type of land tenure system existed in a few parts of Tanzania. *Id.* at 194-96.

¹¹¹ Coldham, *supra* note 1, at 200-01.

¹¹² *Id.* at 200.

¹¹³ *Id.*

¹¹⁴ TANZANIA: A COUNTRY STUDY, *supra* note 83, at 140.

socialist models are an aggressive vehicle for the dismantling of an inequitable status quo.

IV. NOTE: AN ISLAMIC MODEL

Islam is one of the world's major religions with over 240 million followers in Africa.¹¹⁵ Islam is not an ideology in the conventional meaning of that word, although it is clearly a philosophy which influences extra-spiritual aspects of its adherents' lives. Islam has a role in economics and a system of laws, both based on the Koran, which numerous Islamic nations have adopted as their complete form of governance.¹¹⁶ With the continued Islamization of northern Africa, the question arises whether, and to what extent, nations with ties to Islam will put more emphasis on adoption of Islamic law, specifically in the area of land tenure legislation. The role of Islamic law deserves some attention in this Note as a potentially important model for developing African nations.

A. Nigeria

Nigeria, though presently ruled by a secular military government,¹¹⁷ is one of many African nations with a historically large

¹¹⁵ THE WORLD ALMANAC AND BOOK OF FACTS 591 (121st ed. 1989). Approximately 860 million, or 12.7%, of the world's inhabitants are Muslims. *Id.*

¹¹⁶ See *supra* note 4. Islamic economics may not be the complex, almost scientific field that capitalism and even socialism are perceived to be, but there are certain presumptions about the economic conduct of Muslims which are based on Islamic thought. Islam is not necessarily anti-capitalist—though it does have certain prohibitions on usury—but distribution of wealth among society's neediest is a basic tenet thereof. SMITH, *supra* note 4, at 244. The legal foundations upon which Islamic law is based are:

- (1) the *Holy Quran* [Islam's holy book] containing the direct injunctions of God.
- (2) the *Sunna*. The facts of the life of the Prophet [Mohammed] and his sayings.
- (3) *Ijma*. The consensus of scholars, which supplemented the words of the Quran and the traditions of the Prophet, and which, according to a reported saying of the Prophet, was infallible.
- (4) *Qujas*. Analogical reasoning *ex consimili casu* from the Quran and Sunna.

Salamone, *The Clash Between Indigenous, Islamic, Colonial and Post-Colonial Law in Nigeria*, 21 J. LEGAL PLURALISM 15, 30 (1983).

¹¹⁷ The military has ruled Nigeria since a December 1983 coup d'etat, when it suspended the sections of the 1979 constitution relating to electoral and legislative procedures. BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 7953, BACKGROUND NOTES: NIGERIA 4 (August, 1987) [hereinafter BACKGROUND NOTES: NIGERIA]. Nigeria had a 1987 gross domestic product of approximately \$24 billion. With a population estimated at 100 million, the per capita G.D.P. was \$225. BACKGROUND NOTES: NIGERIA, at 1. Its market price G.N.P. at independence (1960) was \$4.258 billion. KAMARCK, *supra* note 68, at 250-51.

Muslim population.¹¹⁸ As to the use and role of Islamic law there, one commentator explains that in northern Nigeria, where Islam is strongest, “[t]he Shari’a (Islamic law) both is and is not another customary law in Northern Nigeria.”¹¹⁹ Nevertheless, “[n]o matter how ‘traditional’ or ‘customary’ the Shari’a may be, it has been imposed from *outside* Nigeria, and its current widespread application is of relatively recent origin.”¹²⁰ The mix of customary and Islamic law is curious, and it would seem that no pure form of either exists in northern Nigeria today.¹²¹

Under traditional law in these northern regions, land was communal, tribal, and inalienable.¹²² Islam’s emphasis is on “the more immediate family tie existing between a husband, his wife and their children”¹²³ The inherent danger in this change to an emphasis on familial rights to land from an emphasis on broader communal rights is that it could create a great deal of conflict among family landholders who hold property which was formerly used or “owned” by entire communities or tribes. By narrowing ownership rights in this way, Islamic law conflicts with custom.

While the future role of Islamic law in Nigeria is not now clear, “[t]he general movement in Northern Nigeria has been to ration-

¹¹⁸ One source puts Nigeria’s Muslim population at almost half. FOREIGN AREA STUDIES, THE AMERICAN UNIV., NIGERIA: A COUNTRY STUDY 123 (H. Nelson 4th ed. 1982) [hereinafter NIGERIA: A COUNTRY STUDY]. Of the nineteen federal states in Nigeria, ten are predominantly Muslim. There are also sizable Muslim populations in the south of the country. Tabi’u & Rashid, *The Administration of Islamic Law in Nigeria*, 6 ISLAMIC & COMP. L.Q. 27, 27 (1986).

¹¹⁹ Salamone, *supra* note 116, at 29. See also Tabi’u & Rashid, *supra* note 118, at 28.

¹²⁰ *Id.* (emphasis in original).

¹²¹ See *id.*

¹²² *Id.* at 32. As in the other nations discussed to this point, individual interests in land are generally limited to usufructuary rights. NIGERIA: A COUNTRY STUDY, *supra* note 118, at 148. Possession would generally not be disturbed by the community, which had superior rights in the land, as long as the individual used the land for the benefit of his family and society. *Id.* The right to dispose of the property was reserved to the community and its traditional authorities, though land could generally be inherited. *Id.*

¹²³ Salamone, *supra* note 116, at 33 (quoting Anderson & Coulson, *Islamic Law in Contemporary Cultural Change*, 18 SAECULUM 13, 16 (1967)). At the national level, Nigeria has a rights of occupancy system of land tenure. By the Land Use Act of 1978, lands are vested in the governors of the various states of Nigeria and are held by them for the benefit of all Nigerians. The governors are empowered to grant rights of occupancy—which they can also revoke—to Nigerian citizens. Alienation without prior consent of the authorities is prohibited. Oshio, *The Indigenous Land Tenure and Nationalization of Land in Nigeria*, 10 B.C. THIRD WORLD L.J. 43, 52–53 (1990). Professor Oshio suggests that, although Nigeria’s economic model is neither capitalist nor socialist, but mixed, the land law as embodied in the Land Use Act itself appears to be somewhat closer to the socialist model in principle, though it does not go as far as the Tanzanian model. Letter from Professor P. Ehi Oshio to author (on file at the offices of the BOSTON COLLEGE THIRD WORLD LAW JOURNAL).

alize and modernize the Islamic system in order to suppress non-Islamic traditional systems in the North while opposing westernized ones in the rest of Nigeria."¹²⁴ It appears, however, that Islamic law could play an important role in the future in northern Nigeria.

B. *The Sudan*

Since even before the April 6, 1985 military coup d'état in the Sudan,¹²⁵ that country has also experienced Islamization of its legal system. The Transitional Constitution of 1985, promulgated by the new rulers of the nation, provided that "Islamic [Shari'a] and Custom shall be the main sources of legislation. Personal matters of non-muslims shall be governed by their personal laws."¹²⁶ In a change from the previous constitution, which seemed to emphasize private ownership, the 1985 document provides that "[t]he right of ownership shall be guaranteed to citizens and associations as organized by the law and such property as organized by law and shall not be acquired or appropriated save for public interest and in consideration for fair compensation."¹²⁷

The land law of the Sudan in general, therefore, "is a combination of Islamic Law, Customary Law, statutory and judge-made law."¹²⁸ Ownership of land by the state is pervasive, with the government owning virtually all of the unregistered land.¹²⁹

¹²⁴ Salamone, *supra* note 116, at 41.

¹²⁵ BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 8022, BACKGROUND NOTES: SUDAN 1, 4 (August 1985) [hereinafter BACKGROUND NOTES: SUDAN]. The Sudan, discussed *supra* in the section on a socialist model, had an estimated population of 21,100,000 in 1984. Its 1981-1983 estimated Gross National Product was \$27.36 billion, 35%-40% of which was attributable to agriculture, and its estimated per capita income (1982) was \$361. The Sudanese economy's annual growth rate was 2.7% in 1982-83. *Id.* at 1. At independence (1956), Sudan had a market price G.N.P. of \$1.333 billion. KARMACK, *supra* note 68, at 250-51.

¹²⁶ DINA SHEIKH EL DIN OSMAN & CARMELLA PISCOPO KEENER, XV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD—SUDAN 17 (A. Blaustein & G. Flanz 1989) (citing Part I, 4 of the Transitional Constitution of Sudan of 1985).

¹²⁷ *Id.* at 21 (quoting Part III, 25 of the Transitional Constitution of Sudan of 1985).

¹²⁸ SAEED MOHAMED AHMED AL-MAHID, INTRODUCTION TO THE LAND LAW OF THE SUDAN 6 (1979). Though custom varied somewhat among the areas of the country, in agricultural communities an individual who cleared land retained the right to cultivate it, though he could not dispose of it other than to his heirs. FOREIGN AREA STUDIES, THE AMERICAN UNIV., SUDAN: A COUNTRY STUDY, 151 (H. Nelson 3d ed. 1982) [hereinafter SUDAN: A COUNTRY STUDY].

¹²⁹ Gordon, *Recent Developments in the Land Law of the Sudan: A Legislative Analysis*, 30 J. AFR. L. 143, 151 (1986).

C. *The Future of the Islamic Land Tenure Model*

Aside from the problems which surface as a result of the conflict between Islam and custom, and the impracticality of codifying Islamic law at a national level in multicultural nations such as Nigeria at the present time, there are other potential defects in the Islamic system. Keeping in mind the developmental purpose of land tenure reform, a permanent land tenure system whose basic unit of ownership and possession is the family seems unwise.¹³⁰ This would tend to deter extrafamilial succession to land, something which both capitalists and socialists would see as detrimental to maximized production. It would also work against the concept of collectivization, which, although similar to family ownership, has as its goal production beyond mere subsistence. This model's emphasis on rights of families, however, could have some merit as a provisional element in land tenure reform.

V. CONCLUSION: A MODEL FOR FUTURE DEVELOPMENT

The models described above demonstrate that land tenure systems which are firmly grounded in ideology foreign to the nation where they are applied are impractical, awkward, and unlikely to succeed. Instead, African and other Third World nations seeking to reform their land tenure systems should choose from among the better elements of these systems, divorcing successful legal policies from burdensome ideological philosophies whenever possible. What is proposed in the next few paragraphs is a model of land tenure laws using the best elements of the three ideological systems discussed above.¹³¹

The basis of this model must be some form of adjudication and registration of private plots of land, as in the Kenyan and Malawian plans.¹³² Registration of privately held lands is necessary for efficient alienability of land as it is the only true means of guaranteeing title.

¹³⁰ In the Islam-influenced provinces of northern Nigeria, Islamic law tends to recognize the role and rights of the family in the inheritance laws. Salamone, *supra* note 116, at 33.

¹³¹ The author wishes to avoid the temptation, to which many American authors are subject, to adopt outright capitalist property principles and land tenure systems as the most effective for Africa's future development. One important, ultimate objective is accepted to be the focus of the model described herein, however: economic self-sufficiency with some level of internal economic competition as a motivating factor, and a healthy, though not necessarily absolute, respect for private property rights as a means to this end.

¹³² The Kenyan program is discussed *supra* in section II.A. Malawi's is discussed *supra* in section II.B.

By guaranteeing title, investors will feel more secure and are more likely to provide the capital necessary for agricultural and industrial development. To avoid the flaws of the systems implemented in Kenya and Malawi, however, any model must provide for greater respect for customary law and rights.¹³³

The Kenyan Land (Group Representatives) Act provides strong evidence that customary law can be accommodated within virtually any political framework. By providing special large ranchlands for the Masai which would not be divided into individual plots, the Kenyan government was able to legislate without completely disrupting the customs of this population.¹³⁴ Efforts such as this should be imitated and broadened to include other non-nomadic groups in smaller tribal areas. For example, where a rapid shift to a system of individual ownership of land conflicts with customary rights, which may include familial or tribal rights of ownership, occupancy, and succession, laws could be passed which provide for adjudication and registration of land in the name of families or larger groups. Such laws should stop short of the Tanzanian *ujamaa* village concept, however, which by some accounts went too far in its collectivization efforts.¹³⁵ To ensure that land may eventually be held by individuals, these recognition laws should perhaps be made provisional. For example, customary legal units or entities (whether families, tribes, or some other group) could be required to administer over a period of time the allocation of collective landholdings to individuals. The national government would not intrude upon this gradual allocation process. Once the shift from collectively-vested to individually-vested land tenure is accomplished (presumably by the end of the provisional period established in the legislation) the government could reasonably require that the uniform registration system control. Subsequently, only rights to those titles which are legally registered would be enforceable.

This temporary legal collectivization of lands could tap the resources inherent in tribal or communal living and, at the same time, promote among Africans the ideal of a greater community

¹³³ The Kenyan program, especially, is criticized for clashing with customary land law to the point where native Kenyans frequently deal in land without transfer or registration of legal title. Customary and legal ownership are often two very different things. See *supra* note 71 and accompanying text.

¹³⁴ See *supra* section II.A.

¹³⁵ This is the greatest criticism of Tanzania's *ujamaa* village program. See *supra* section III.A. See also Coldham, *supra* note 1, at 196-203; TANZANIA: A COUNTRY STUDY, *supra* note 83, at 140.

while deferring to indigenous traditions. Such collectivization could be used to increase awareness of the need to produce beyond subsistence, and to teach these communities the benefits of competition without social upheaval.

Development will not be successful if leaders and lawmakers do not take into account the customs of the people they govern. Planning without such considerations is a formula for failure, as evidenced by the resistance to the adjudication and registration program and the villages and *ujamaa* villages program in Kenya and Tanzania, respectively. A more compassionate, gradual road to economic development must be adopted, and the legal systems which provide the infrastructure for these programs must be the vehicle for doing so. Recognition of this need can help African nations in their efforts to prosper in the next century.

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