

AN EXAMINATION OF THE RIGHT TO COMPENSATION FOR COMPULSORY ACQUISITION OF LAND IN NIGERIA

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ABSTRACT

The Constitution of the Federal Republic of Nigeria guarantees individual ownership of property. However, the same Constitution permits compulsory acquisition of land from the rightful owners provided it is made in accordance with the law. The Land Use Act 1978 is the principal statute regulating land management in Nigeria. This paper seeks to examine the effectiveness of the Land Use Act in regulating compensation for compulsory acquisition of land rights in Nigeria. Suggestions are proffered in the area of reformation of land rights with the aim of addressing perceived lapses in the law.

INTRODUCTION

The Land Use Act of 1978¹ is the principal statute regulating land management in Nigeria. The Act was given a prominent mention and protection in the Constitution of the Federal Republic of Nigeria.² Our treatment of the Act will be restricted to the areas of relevance to this paper. The preamble to the Act shows the reasoning behind its enactment. It provides:

Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law: AND WHEREAS it is also in the public interest that the right of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved...

The preamble shows that “public interest” is the driving force of the Act; and “the public interest” is the right of all Nigerians to use and enjoy land. The Act vests the Governor of each state of the federation the power of revocation of right of occupancy for overriding public interest which includes the requirement of the land for public purpose.

Compulsory acquisition of land is a procedural legal device through which government authorities compulsorily acquire land from private owners upon payment of compensation. The subject matter of compulsory acquisition is land owned by private individuals.³ The rationale for compulsory acquisition is to the effect that although protection of individual property is guaranteed in Nigeria, it is desirable that private rights or interest must give way to overriding public interest, otherwise private interest will hold up schemes that are beneficial to the community at large.⁴ Also revoking title over parcels of land is aimed at enhancing the land for the overall good of the citizens or as the case may be, to cite projects, ventures or some other tangible and beneficial things for the good of the generality of the people.⁵

PROPRIETARY RIGHTS UNDER THE LAND USE ACT 1978

While the whole thrust and purpose of the Act is to assert government's powers and rights over the land, it nevertheless, concedes some proprietary right in land to the individual in the form of right of occupancy. Under the Act, a right of occupancy is either statutory or customary. Section 5 makes it lawful for the

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1. Cap L5, Laws of the Federation of Nigeria, 2010 herein after referred to as the Act
2. Constitution of the Federal Republic of Nigeria 1999, Cap C23 Laws of the Federation of Nigeria 2010, S 315 (5) (d)
3. *Attorney-General of Bendel State v Aideyan* (1989) 4 NWLP (Pt 118) 464
4. Oluyede, P. A., *Modern Nigerian Land Law* (Evans Brothers (Nigeria Publishers) Ltd: Ibadan, 1989) 375
5. *Boniface B. Gwar v S. O. Adole* (2003) 3 NWLR (Pt 808) 516 at 504-541



Governor to grant statutory rights of occupancy to any person for all purposes in respect of any land whether or not in an urban area. Rental may⁶ or may not be⁷ attached to the grant. It must be granted for a definite term in accordance with Section 8. Sub-section 2 of Section 5 states that upon a grant of a statutory right of occupancy, all existing rights to the use and occupation of the land which is the statutory right of occupancy are extinguished.

Customary right of occupancy, like its statutory counterpart, may be expressly or impliedly acquired. A local government is empowered to grant a customary right of occupancy over any land which is not in an urban area to any person or organization for agricultural use and such other purposes ancillary to agriculture.⁸

However, a limit is placed on the extent of the area a single customary right of occupancy can cover. Thus subsection 2 of Section 6 restricts a customary right of occupancy granted for agricultural and grazing purposes not to exceed 500 and 5000 hectares, respectively, unless with the consent of the Governor.

The right of an individual to own, access and enjoy property is an inviolable one that is constitutionally guaranteed. Proprietary interest is expressly protected against governmental infringement under the two provisions of the constitution: the right to property and the payment of prompt compensation.⁹ The doctrinal and philosophical foundation of proprietary right is the right of a landowner to enjoy and use his property absolutely to the exclusion of others. He enjoys a certain liberty to do as he wills with certain things, which he “owns”, and a certain flow of benefits (utility, welfare or good). The practical boundaries of his liberty and the practical relationship between it and benefits derived are in part determined by the existing social order. *Strictu jure*, property confers exclusive benefits and utility on the owner. In such a case, one expects the direct users to be able to organize, calculate and bid for the opportunity to enjoy those benefits.

Government intervention and reallocation of land for socially desirable purposes such as housing, health and conservation purposes are on the other hand justifiable. The purpose of governmental intervention is not only to permit a redistribution of land to achieve the most socially beneficial use, but also to put competing resource – users in a position of equality when each of them seeks to make use of land. Thus, if the government wants to convert a private house into a post office or construct telecommunication facilities,¹⁰ or run a new highway through a farm, or build a dam which will flood nearby land, or convert private land to school¹¹ or shopping complexes it may acquire such land by revoking, the existing interest on the land and compulsorily acquire such land for overall public interest; subject however, to the payment of compensation to the owner of the acquired land. In such cases, courts uniformly hold that though the private property may be taken, but only for public use and not without “prompt compensation”.

Since the enactment of the Land Use Act, proprietary rights have received considerably less constitutional protection than have personal liberty rights, such as freedom of speech and free exercise of religion, which receive preferential treatment through strict judicial scrutiny of restrictive

6. Section 5 (1)(c) of the Act

7. Section 17(1) of the Act

8. Section 6(2) of the Act

9. Sections 43 and 44 of the 1999 Constitution of the Federal Republic of Nigeria; see also *Provost, College of Education v Edun* (2004) 6 NWLR (Pt 870) 476 at 509 para. G

10. *Ogunbiyi v NITEL* (1992) 7 NWLR 43

11. *AG Lagos State v Sowande* (1992) 8 NWLR 589



governmental action. When acquisitions of property are challenged, courts generally defer to legislatures, finding such compulsory expropriation of land as proper except where it could be established that such revocation power was injudiciously exercised. The question therefore, is whether the exercise of the revocation power of the Governor under the Land Use Act falls within the land redistribution and transformation theory whereby proprietary interest in land is redistributed to meet the socially beneficial purpose of the society? Prima facie, given the objective of the Land use Act as stated in the preamble to the Act, one may hasten to conclude that the Act serves this purpose.

However, this has not been the position in reality as private interests are being divested for other purposes other than the statutorily permissible purpose. Constitutionally, private property can be acquired compulsorily provided “prompt compensation” is paid and the right to access to court to challenge the quantum of compensation payable is not denied.¹² The constitution does not define those circumstances when land may be compulsorily acquired but the statutory framework for the revocation of proprietary right in land is well articulated in the Land Use Act.¹³ The Act provides for the revocation of existing proprietary interest in land for “overriding public interest” and for “public purpose”. Such revocation must also comply with the statutory procedure for revocation.¹⁴ The Act further classifies overriding public purpose depending on the nature of interest held by the landowner. Where the interest is covered by a statutory right of occupancy, overriding purposes include the requirement of land by all the tiers of government for public purpose, requirement for mining or oil pipeline and where the grantor alienates the land without consent of the Governor.¹⁵ He may also revoke a statutory right of occupancy on the ground of a breach of any of the provisions implied in a certificate of occupancy or any term contained in the certificate or any special contract made under Section 8 of the Act.

The Land Use Act provides for two modes of revoking a right of occupancy. The express mode is set out in Section 28 and the implied mode is set out in Section 5(2) of the Act. The latter provision states that upon the grant of a statutory right of occupancy under the hand of the Governor in Section 5(1), all existing rights to the use and occupation of the land shall be extinguished.

There have been calls for the repeal of Section 5(2) of the Act as it is contrary to the Supreme Court's holding that the Act has not and a Governor cannot, abolish existing titles and rights to possession of land without a religious compliance with the revocation provisions of the Act. It was surprising the same Supreme Court in *Dapus v Kolo*¹⁶ stuck to a literal interpretation of Section 5(2) of the Act. In that case, Jos Local Government Council granted a statutory right of occupancy over a parcel of land to the appellant. Subsequently the Governor granted a statutory right of occupancy over the land, which adjoins the land subject of the earlier grant. There was overlap in the land given to both parties and the parties were unable to establish the identity of the land stated in their respective certificates of occupancy. Their claims and countercharges were thus dismissed. All the same, the Supreme Court per Ogundare JSC, obiter, stated that Section 5(2) of the Act, was plain and should be so construed. His Lordship emphatically stated as follows:

A grant of a statutory right of occupancy extinguishes all rights existing on the land at the time of the grant. The subsection is clear and unambiguous. In my respectful view, that is the only reasonable interpretation that can be given to it.¹⁷

12. Section 44(1) of the 1999 Constitution of FRN

13. Item 60 of the Exclusive Legislative List

14. Section 28(6) of the Land Use Act

15. Section 28 of the Land Use Act

16. (1993) 9 NWLR (Pt 317) 24. The Supreme Court followed its earlier decisions in *Titiloye v Olupo* (1991) 7 NWLR (Pt 205) 519; *Saude v Abdullahi* (1989) 4 NWLR (Pt 116) 387

17. *ibid* 279



Similarly, in *Lang v Mohammed*,¹⁸ it was evident that the appellant was the customary owner of the disputed land. The Governor granted a statutory right of occupancy over the land to the respondent. The appellant claimed damages for trespass and nullification of the respondent's right of occupancy. The trial judge refused to grant the claims, but awarded him N10, 000.00 (Ten thousand Naira) as compensation for the land. The Court of Appeal upheld the decision; it held that Section 5(2) has the potency of a statutory revocation of all existing rights on any land over which a governor grants a right of occupancy.

Section 28(6) of the Act provides that revocation shall be signified under the hand of a public officer duly authorized in that behalf by the Governor.¹⁹ The officer who signs a revocation notice must show that the Governor duly authorized him to do so. It cannot be presumed that the commissioner in charge of land matters, for example is the authorized officer nor is there a place for ratification after an unauthorized revocation. In *Majiyagbe v AG*,²⁰ a case decided under a provision similar in verbiage in the Land Tenure Law, the Governor endorsed "revocation approved" on a note that was filed away in his office. Subsequently, an officer who could not prove his authority wrote to the right holder that his right of occupancy had been revoked. The revocation was annulled. Bairemian, SPJ said, reliance could not be placed on the endorsement made by the Governor since that did not constitute notice.

However, it may be that a revocation effected by a Governor himself is valid. There is nothing in the Act that excludes the Common Law rule that a person can do that which he can authorize his servant to do. *Qui per alium facit per seipsum facere videtur* (he who does an action through another is deemed in law to do it himself).²¹ Indeed in *Are v Adisa*,²² the Supreme Court held that statutory delegation of governor's authority to his officials does not deprive him of the exercise of such power.

REVOCATION FOR OVERRIDING PUBLIC INTEREST

Revocation or acquisition of interest in land is not novel. It dates back to the colonial era under the State Land Law, Public Lands Acquisition Act and Land Tenure Law. In all these statutes, the phrase used to justify revocation is public purpose or interest. The Land Use Act introduces for the first time the word "overriding" to qualify 'public interest' in Section 28. If the presumption that no word in a statute is a tautology is applied, a person whose right of occupancy is about to be revoked can challenge the procedure on the ground that the purpose for which he put his land is more important to the public than the purpose for which the governor attempts to revoke it. For instance, where a governor attempts to revoke a right of occupancy over which a person farms for the purpose of building a recreational centre, the right holder can argue that production of food overrides recreation. Suppose a farmer's land is to be acquired for agricultural development, a heavy onus would be on a governor to prove that there is something overriding in that purpose.

What constitutes public interest and public purpose are listed in Sections 28 and 51 of the Act. In defining public interest, Section 51 uses the word "includes". The question now is, is the governor at liberty to revoke for other purposes not expressly listed in the Act on the ground that the object is public all the same? In *Olatunji v Military Governor, Oyo State*,²³ Salami, JCA opined that, other public purposes not stated under Section 51 must take their coloration or meaning from the public purposes stated therein; they must be similar to those stated in the section.

18. (2000) 3 NWLR (Pt 700) 389

19. Section 6(3) (5) empowers a local government to revoke a customary right of occupancy for public purposes

20. (1957) NRNL 158

21. *Okeowo v Migliore* (1979) 12 NSLC 210

22. (1967) NMLR 304, 309

23. (1995) 5 NWLR (Pt 397) 586, 606



On the other hand, in *Osho v Foreign Finance Corporation*,²⁴ Obaseki, JSC says other purposes not specified as public purpose in the Act cannot be lawful purpose. We believe that Sections 28 and 51 are expropriatory and must therefore be given a very restrictive construction.²⁵ It is difficult to envisage a public purpose that will not come within the very broad listing in Section 51.

The courts have held that a right of occupancy cannot be revoked for the purpose of granting the land to a private individual or corporate body.²⁶ Where it is granted to a corporate body, it must be shown that government holds shares, stocks or debentures in it.²⁷ A revocation that does not accord with this provision is invalid *ab initio*. A revocation that is in accord with the Act but which is subsequently altered for private use can be nullified.²⁸

JUDICIAL PRONOUNCEMENT ON INTERPRETATION OF THE REVOCATION POWER

The case of *Osho & Anor v Foreign Finance Corporation & Anor*²⁹ gave the Supreme Court the opportunity to make judicial pronouncements on the correct interpretation of Section 28 of the Act even though the lower courts had earlier made some remarkable pronouncement on this matter.³⁰ In this case, the Plaintiff/Respondent instituted an action against the 1st, 2nd and 3rd Defendants/Appellants claiming special and general damages for the destruction of Plaintiff's property and goods and for trespass to land. The Plaintiff's claimed that it was granted a lease of State's land by the 1st defendant in 1971 for a period of 90 years and was in possession and made some development on the land. However, in 1980, the 1st, 2nd and 3rd Defendants broke into the land and demolished the structures built on the land and thereafter the 1st Defendant granted the land to the 3rd Defendant. The Defendants' defence was that the Plaintiff's interest in the land had been forfeited by the Lagos State Government on the ground that the Plaintiff had committed breaches of the terms of the grant to him to wit, failure to pay rents which had fallen due in arrears and failure to develop the land. In the alternative, the Defendants pleaded that the Plaintiff's interest in the land had been determined by the revocation of its right of occupancy over the land by the Governor of Lagos State under the provision of the Land Use Act, 1978. From the decision of the court in the case, several legal principles for the determination of the validity of revocation of interest could be established as follows:

Revocation to be Within the Statutorily Permissible Purpose of the Act

The court reiterated and applied the age - long statutory construction principle that allows the court to construe *fortissimo contra proferentem* against the acquiring authority, any provision of the law that gives the acquiring authority extra-ordinary powers of compulsory acquisition of the property of citizens.³¹ By this rule, the court insisted that the revocation of interest in land must be within the statutorily permissible purpose of the Act. Although the court did not redefine nor expand the scope of public purpose, it gives a restrictive interpretation to this terminology. It becomes a question of law and not fact whether an acquisition is for public interest. Any revocation outside the statutory "overriding public interest" or "public purpose" is illegal and unlawful. To revoke a statutory right of occupancy for public purposes, the letter and spirit of the laws must be adhered to. Since revocation of a grant deprives the holder of his proprietary right, the terms must strictly comply with the strict construction of the provision made.³²

24. (1991) 5 SC 59

25. *Bello v The Diocesan Synod of Lagos* (1973) 3 SC 131

26. *Kyari v Alkali* (2001) 11 NWLR (Pt 724) 412 SC

27. Section 51 (1) (b) of the Act

28. *Ukwa v Awka Local Council* (1966) NMLR SC 20; *Estates of Gen. Sani Abacha v Samuel David Eke-Spiff & Ors* (2009) 4 NSCR 48

29. (1991) 5 SC 59

30. *Lawson v Ajibulu* (1995) 5 NWLR 587, *Obikoya v Governor of Lagos State* (1987) NWLR (Pt 50) 385; *LSDPC v Foreign Finance Corp.* (1987) NWLR (Pt 50) 413

31. *Re Bowman*, South Shields (Thames)

32. *ibid* 543



The Supreme Court in *Awaogbo v Eze*³³ further demonstrated its firmness on strict adherence to the statutorily defined power to curtail any excessive exercise of revocation by the Local Government. In this case, the Plaintiff claimed against the Defendant jointly and severally general damages for trespass and injunction restraining the Defendants or their servants from entering into or committing any further acts of trespass on a plot of land. It was the Plaintiff's case that the disputed land was granted to him under native law and custom for purpose of exploitation and cultivation. He alleged that after the civil war, the Defendant hatched a scheme to dispossess him of the land. After the promulgation of the Land Use Act, the community conspired with the Local Government to divest the Plaintiff of his land and reallocate the land jointly to the community and the Local Government. The Ikwo Local Government in July 1979 issued a Public Notice No. 20 of 1979 prohibiting the Plaintiff and the entire community from further entry into the land. The Local Government thereafter proceeded to issue temporary occupation license to prospective farmers wishing to cultivate on the land on payment of N1.25 per hectare as rental to the Council. Thereafter, the Defendants acting in concert forcibly entered and took over control and management of the land belonging to the Plaintiff. The Supreme Court deprecated the intervention of the Local Government and held that the procedure for the revocation offends the provisions of Sections 28(3) and 6(3) of the Act.

Revocation Must Comply With the Statutory Procedure

Another principle is that the revocation of interest must comply with the statutory procedure for revocation and service of revocation notice. The Governor must duly sign the revocation notice or any public officer duly authorized in that behalf by him.

In addition, the notice of revocation must be properly served on the landowner. In order to constitute "proper service", the courts generally insist on personal service except in appropriate cases where personal service is impossible or impracticable when substituted services may be accepted. Thus in *Osho v Foreign Finance Corp*³⁴ the Supreme Court held that the notice of revocation not having been duly served on the Plaintiff was invalid. In a latter case of *NITEL v Ogunbiyi*,³⁵ decided by the Court of Appeal, the Court nullified a revocation notice that was not personally served on the property owner at the address known to the Government. The facts of the case were fairly straightforward. By a notice issued by the Kwara State Government, it purportedly acquired the Respondent's large tract of land adjacent to the General Post Office for the purpose of construction of telephone exchange building for the Appellant. The respondent had four structures on the said land and was at all material times resident in Lagos, a fact that the Appellant conceded. The notice of compulsory acquisition was not served on the Respondent in Lagos where he resided but pasted on the building. The respondent thereupon instituted an action challenging the validity of the said acquisition and averred that since the service of the notice was not personal, the revocation was invalid and acquisition illegal. The Court of Appeal upheld the Respondent's claim that the right was not properly revoked as laid down in Section 28(6).

Even though the provision of Section 44 of the Act appears exhaustive and explicit on the mode of serving notice, construction and application of the provisions have occupied our courts. The section provides for service to be personal, or notice may be left at the right holder's usual or last known place of abode, or by registered post, or if it is not practicable after reasonable inquiry to ascertain the right holder's name or address, to deliver it to any person on the premises or posting it to some conspicuous part of the premises to be revoked. A sensible reading of the section would suggest that the list in the

33. (1995) 1 NWLR 393; see also *Ibafon Company Ltd v Nigeria Ports Plc* (2008) 8 NWLR (Pt 667) 86 at 103

34. (1991) 5 SC 59

35. (1992) 7 NWLR (Pt 255) 543; *Nigeria Engineering Works Limited v Denap Limited & Anor* (2002) FWLR (Pt 89) 1062



section is in the order of priority. Leaving the notice at the right holder's usual abode should be resorted to only after effort has been made to effect personal service; service by registered post would arise only after effort has been made to ascertain the right holder's usual abode and so forth.³⁶

It has been held that notices served in modes not recognized by the Act are additional to, not as compliance with, the statutory requirement. In *Nigeria Engineering Works Ltd v Denap Ltd*,³⁷ notice of revocation published in Observer daily newspaper was held ineffectual. In *Jegade v Citicon Nigeria Ltd*,³⁸ revocation published in an official gazette was held not to comply with the Act. The Court of Appeal held that publication of acquisition information in a gazette is only a government's way of bringing its activities to the attention of the public. It is not a substitute for the necessity to serve holders or occupiers personally as required under the Act. This decision is welcome because in *Ononuju v. A.G. Anambra State*³⁹ counsel for the Respondent urged that a gazette notice is adequate as it serves as notice to the world at large and the Court of Appeal failed to comment on the argument.

Notice of Revocation

The court will also read into the Act the requirement that a notice of revocation must specify the reason for revoking a person's right of occupancy notwithstanding that the Act does not expressly state that the specific ground must be stated in the notice. Thus in *Osho v Foreign Finance Corporation*⁴⁰ the Supreme Court ruled that the notice of revocation must spell out the public purpose in the notice.⁴¹

In *Nigeria Engineering Works Ltd v Denap Ltd*⁴² the ground for revocation relied on by government was a right holder's failure to develop the property within two years as set out in the certificate of occupancy in breach of Section 28(5). Even so the revocation was annulled for government's failure to state the purpose of revocation, Counsel's contention that the right holder is deemed to know the purpose was rejected.

However, these cases were decided under Section 33 of the 1979 Constitution; they are even more potent now that Section 43 of the 1999 Constitution recognizes the right to every Nigerian citizen to acquire and own land anywhere in the country.

The notice must contain the actual ground for revocation. Government is not at liberty to state one reason and revoke for another. In *M/S O. Ilemobola Co Ltd v Governor of Kaduna State*,⁴³ the reason stated in the revocation notice was the Appellant's failure to obtain consent to a sublease under Section 28(3) (d).⁴⁴ On its inability to establish that ground, it sought to validate the revocation on the ground that the Appellant failed to pay ground rent as required under the certificate of occupancy. The Court of Appeal held the revocation invalid.

COMPENSATION UNDER NIGERIAN LAW

Compensation is the key issue in any analysis of revocation power. First, of course, compensation provides fairness to the person who is harmed by the revocation or other governmental action. The

36. *NITEL v Ogunbiyi* (n 10)

37. (1997) 10 NWLR (Pt 525) 481

38. (2001) 4NWLR (Pt 702) 112

39. (1998) 11 NWLR (Pt 573) 304

40. (1991) 5 SC 59

41. *Ereku v Military Gov. Mid-Western State* (1972) All NLR 695 at 701; *AG Lagos v Sowande* (1992) 8 NWLR 589

42. (1997) 10 NWLR (Pt 525) 481

43. (2000) 7 NWLR (Pt 666) 633

44. This section states that a right of occupancy may be revoked where the right holder alienates without obtaining the requisite consent; *Agbaje v Bankole* (1971) 1 All NLR 275



classic rationale for compensation is that, in fairness and justice, one individual should not be forced to bear the burden that ought properly to be borne by the society as a whole. Second, compensation tends to limit government action. If government must pay compensation when its actions interfere with private property rights, then its regulations and action must be limited. Finally, the payment of compensation helps encourage the resolution of social problems by private, voluntary contractual arrangements rather than by regulations.

Compensation is payable under the Land Use Act upon the revocation of a right of occupancy for public purpose, or for the extraction of building materials by government only on unexhausted improvement⁴⁵ and not for a bare land. The rationale for this assumption is that since land is owned by the State under Section 1, there is no basis for the State to compensate the expropriated landowner. If however, the land is revoked because the land is required for mining purpose or oil pipelines or other purposes connected with mining and oil pipelines, the occupier shall be entitled to compensation under the appropriate legislation of the Mineral Act or Mineral Oil Act or any legislation replacing it.⁴⁶ Compensation could be assessed on the basis of rental payable by the occupiers on the land during a year in which the right of occupancy was revoked or replacement cost together with interest at the bank rate for delayed payment where building, installation or improvements is involved. Compensation payable on crop is at the discretion of the State Chief Lands Officer or Federal Chief Lands Officer as the case may be.⁴⁷

However, the Act excludes the court in the determination of the adequacy or otherwise of the compensation payable.⁴⁸ Any dispute between the occupier or holder and the Government regarding the amount of compensation payable is to be finally determined by the Land Use and Allocation Committee.⁴⁹ A situation where the acquiring authority is in the position to solely dictate the compensation payable will ultimately lead to executive tyranny and oppression against the people. The courts should be allowed the discretion to determine the appropriate compensation payable in the circumstances of each case. Worthy of note is the fact that the courts have extricated themselves from the legislative entanglement and have consistently held that the ouster clause in Section 47 of the Act, in so far as it conflicts with the provisions of the Constitution, is void.⁵⁰

The right of an individual to acquire and own land in any part of Nigeria is one of the fundamental rights guaranteed by the 1999 Constitution of the Federal Republic of Nigeria. The legal right of the Government to compulsorily acquire land which is subject to right of occupancy by revoking it is also recognized by the constitution. Section 43 of the constitution provides:

Subject to the provision of this constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

Section 44(a) provides:

No moveable property or any interest in an immovable property shall be taken possession of compulsorily in any part of Nigeria except in the manner and for the purpose prescribed by a law that among other things.

45. S 51(1) of the Act defines unexhausted improvement as “anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of long-lived crops or trees, fencing, wells, roads and irrigation or reclamation works, but does not include the result of ordinary cultivation other than growing products”

46. S 29 (2) of the Act

47. S 29 (4) of the Land Use Act

48. S 29 (2) of the Land Use Act

49. Ss 30 and 47 of the Land Use Act

50. *Kanada v Gov. of Kaduna State & Anor* (1986) 4 NWLR (Pt 38) 361



- (a) requires the prompt payment of compensation therefore, and
- (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

Pursuant to these constitutional provisions, Section 29 of the Land Use Act provides that if a right of occupancy is revoked, the holder and the occupier should be entitled to compensation for the value at the date of the revocation and the unexhausted improvements. The holder may also exercise the option to accept resettlement for such revocation.

Section 44(1) of the 1999 Constitution provides that no property of a citizen should be taken from him except in compliance with due process of law.⁵¹ Section 29 of the Land Use Act provide that where the right of occupancy has been revoked on grounds that the lands is required for mining purposes, oil pipelines or purposes connected with it or for the extraction of building materials, there is a corresponding obligation on the Government to pay the holder or occupier compensation.

In *Elf Petroleum Nigeria Limited v Daniel C. Umah & ors*,⁵² the court held that having failed to acquire the Plaintiff's land for the purpose of establishing a gas plant at Obite Community in Ogba /Egbema /Ndoni Local Government Area of Rivers State, by valid revocation and payment of compensation to the Plaintiffs, it was unconscionable for the Defendant Appellant to go on the Plaintiff/Respondent land to conduct oil exploration activities.

Section 29 (3) of the Land Use Act stipulates that if the holder or occupier entitled to compensation is a community, it may be directed by the Governor that such compensation should be made payable to (a) The Community or

- (b) The Chief or Leader of the Community to be disposed of by him for the benefit of the community in accordance with the applicable customary law or
- (c) into some fund specified by the Governor for the purpose of being utilized or applied for the benefit of the community.

Quantum of Compensation

Compensation to be paid to the holder or occupier in accordance with Section 29 (4) relates to:

- (a) the land, for an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy was revoked.
- (b) building, installation or improvement thereon for the amount of the replacement cost of the building, installation or improvement that is to say, such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation, together with interest at the bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works, being such cost thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer.
- (c) crops on land apart from any building installation or improvement thereon for an amount equal to the value as prescribed and determined by the appropriate officer

Where however the land which is subject to compensation in accordance with 29 (4) forms part of a larger area, in computing the compensation payable, it shall be less a proportionate amount calculated in relation to that part of the area not affected by the revocation. Any interest payable shall also be assessed and computed in a similar manner.

51. *Seleh v Monguno* (2006) 15 NWLR (Pt 1001) 26 at 70

52. (2007) 1 NWLR (Pt 1014) 44



Where there are buildings, installations, or improvements or crops on the land the compensation shall be computed in the same manner as stipulated in Section 29(5) of the Land Use Act.

Installation is defined in Section 29(7) of the Land Use Act as relating to mechanical apparatus set up or put in position for use or materials set up in or on land or other equipment but excludes fixtures in or on any building.

Compensation for Leasehold Interest

Section 35 of the Land Use Act stipulates that where the compensation relates to land held under leasehold whether customary or otherwise and is comprised of an estate laid out by any person, group or family entitled to the reversionary interest, the Governor shall in respect of improvement pay to that person, group or family compensation as specified in Section 29 of the Land Use Act.

There shall also be deductible from the compensation payable under Section 35 any levy by way of development or similar charges paid in respect of the improvement on the land by the lessee to the person group or family in which the reversionary interest of the leasehold vests and the amount to be deducted shall be determinable by the Governor taking cognizance of all the circumstances of the case.

Interest Payable on Compensation

Section 29(4) (b) of the Land Use Act empowers the Land Use and Allocation Committee to calculate interest payable at bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works being such cost as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer.

In *Yakubu v M. W.T Adamawa State*⁵³ the Land Use Allocation committee delayed payment of compensation for the demolition of the Appellants building in Yola Metropolis over which the Appellants had valid certificates of occupancy and approved building plans for the property demolished. The court held that the Appellants were entitled to 32 percent interest per annum on the N1,447, 409.34 interest payable by the Respondent as compensation.

Dispute Resolution

Where there is dispute as to the amount of compensation calculated in accordance with section 29 of the Land Use Act, parties are at liberty to refer their dispute to the Land Use and Allocation Committee which is empowered by section 30 of the Land Use Act to resolve such disputes.

Section 44(1) (b) of the 1999 Constitution, also gives a person claiming compensation for being dispossessed of his proprietary rights, a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

THE LAND USE ACT AND THE 1999 CONSTITUTION

Section 47(1) of the Land Use Act provides that: "This [Act] shall have effect notwithstanding anything to the contrary in any law... including the constitution of the Federation..." It must be borne in mind that the Land Use Act was first promulgated as Decree No. 6 of 1978. The Decree was however re-enacted as an Act of Parliament when the military handed over power to the civilians in 1979. That section further precludes the courts from inquiring into (a) the vesting of all land in the state in the military Governor of the state (b) the power of the Governor to grant a statutory right or of the local government to grant a customary right of occupancy and (c) the right of the courts to inquire into issues pertaining to compensation upon revocation of rights of occupancy.

53. (2006) 10 NWLR (Pt 989) 513



It should be noted that for any legal system to function smoothly, it must be built upon a solid foundation. That foundation should be a basic or fundamental norm called the *grundnorm*. In Nigeria today, the *grundnorm* is a written constitution - the 1999 Constitution.⁵⁴ That constitution establishes and validates all the component institutions of government and is the supreme law of the land. Its provisions override every other law. According to Section 1 of the 1999 Constitution:

This constitution shall have the force of law throughout Nigeria... If any other law is inconsistent with this constitution, this constitution shall prevail, and the other law shall be void.

If the 1999 Constitution is the supreme law of the land, is it conceivable to find any other law which is superior to that constitution within the same legal system? If the answer is in the negative, then it is submitted that Section 47(1) of the Land Use Act is *ultra vires* the 1999 Constitution because that section makes the Land Use Act superior to the constitution. For purposes of emphasis, it must be reiterated that the constitution is the organic and fundamental law of the land. It is a charter of government which derives its authority from the people⁵⁵ themselves. For any other law, be it a decree, an edict, or act of parliament,⁵⁶ to claim superiority over the constitution, is to say the least, a non-issue. Hence, in the case of *Nafiu Rabi'u v The State*⁵⁷ the supremacy of the constitution above any other law was affirmed by the Supreme Court of Nigeria. Again in *Kaduna v Governor of Kaduna State*,⁵⁸ it was said that any provision of the Land Use Act which is in conflict with the constitution is void to the extent of such conflict or inconsistency.⁵⁹ Section 47(1) of the Land Use Act is therefore an affront to the 1999 Constitution because it contravenes many sections of that constitution.⁶⁰

Similarly, Section 47(2) of the Land Use Act contravenes the letter and spirit of the 1999 Constitution. This is because Section 44 of the 1999 Constitution provides that no movable property or any interest in any immovable property shall be acquired compulsorily without the prompt payment of compensation, and without giving the person affected access to court or tribunal to determine his interest in the property and the amount of compensation payable. In contrast to this constitutional provision, Section 47(2) of the Land Use Act provides that:

No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid, or to be paid under this Act.

Needless to say, that provision was declared null and void by the Supreme Court of Nigeria in the case of *Kaduna v Governor of Kaduna State*.⁶¹ One fact is however clear; that in spite of the intimidating nature of the decrees and edicts promulgated during the military regime ousting the jurisdiction of courts, the Nigerian judiciary always rose to the occasion. They were at the forefront of protecting, promoting and enforcing respect for the human rights of Nigerians.⁶² According to Oguntade JSC, in *Ubani v Director SSS*,⁶³ even during the military rule:

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54. In the UK e.g. where there is no written constitution, such a *grundnorm* may be the Queen in Parliament. In other countries, a single person or a body of persons with unquestionable power may constitute the *grundnorm*. In the US, the *grundnorm* is obviously the constitution
 55. This is reflected in the preamble to the 1999 Constitution which states *inter alia* "We the people of the Federal Republic of Nigeria...enact and give to ourselves the following constitution"
 56. In the case of *General Abacha v Chief Fawehinmi* [2000] 6 NWLR 228, it was held that a decree is not superior to the constitution of Nigeria. See also *Fawehinmi v Abacha* (1996) 9 NWLR 710
 57. (1981) 2 NCLR 293
 58. (1986) 11 NWLR (Pt 35) 361
 59. That declaration had to do specifically with section 47(2) which ousts the jurisdiction of the courts in respect of the amount or adequacy of the compensation to be paid on expropriation of a person's property
 60. Such as Ss 1, 4(3), 6(1)(2) & (6)
 61. *Kaduna* (n 58). Section 30 of the Land Use Act provides that any dispute arising from the amount of compensation payable shall be submitted to the appropriate Land Use and Allocation Committee
 62. Property rights under sections 43 and 44 of the 1999 Constitution are fundamental rights under Chapter 4 of the said constitution
 63. (1999) 11 NWLR 129



There can be no doubt that several courts in Nigeria, depending on the judicial personnel who manned them, did a Yeoman's job in the attempt to wrest judicial authority from the military rulers.

Notwithstanding anything to the contrary on this issue,⁶⁴ the most absurd and ridiculous paradox in the scheme of things was the entrenchment of the Land Use Act itself into the 1999 Constitution in spite of the overwhelming contradictions, conflicts and discrepancies inherent therein. The Land Use Act was one of the four enactments entrenched into the 1999 Constitution.⁶⁵ Apart from entrenching the Land Use Act into the constitution, Section 315(5) of the Constitution further provides that:

The provisions of these enactments shall continue to apply and have full effect in accordance with their tenor and to the extent as any other provisions forming part of the constitution and shall not be altered or repealed except in accordance with the provisions of section 9(2) of this constitution.⁶⁶

Because of the above provision, it has often been contended that the Land Use Act is part and parcel of the 1999 Constitution and that the provisions of the Land Use Act 1978 has the same weight, might and force as that of the constitution. The interpretation of this provision has posed some difficulty to the courts of law and there have been varying and divergent decisions by the various courts of the land. The fact is that if the Land Use Act is part and parcel of the constitution by virtue of section 315(5) of the constitution, it would then mean that the constitution has contradicted itself. This is so because by providing in one breath, in Section 43, that any Nigerian can acquire and own immovable property anywhere in Nigeria and providing in another section (in the Land Use Act) that one is only entitled to a right of occupancy is self-contradictory. As the saying goes, a kingdom divided against itself cannot stand.⁶⁷ The maxim is *Ubi jus incertum, ibi jus nullum*⁶⁸ or *allegans contraria non est audiendus*.⁶⁹

As already indicated, there have been varying and conflicting decisions on the question whether the Land Use Act is a part and parcel of the constitution or not. In *Nwokolo v Government of Anambra State*⁷⁰ for instance, the legal validity of the Land Use Act itself was questioned. Counsel for the Plaintiff argued that the Land Use Act was inconsistent with the 1979 Constitution. His basic argument was that Section 274(5)⁷¹ of the 1979 Constitution which incorporated the Act into the constitution did not thereby render the Act superior to the constitution. Any inconsistency between the Act and the constitution, he argued, must be resolved in accordance with Sections 1(1), 1(2) and 1(3) of the constitution thereby making the constitution to prevail over the Act. The learned trial judge conceded that the issue presented a difficult and recondite point of constitutional law of which there was no previous decision. He however added that: "It may, if the need arises, need a reference to the Court of Appeal under Section 259 of the constitution"

In spite of this expressed desire by the learned trial judge in *Nwokolo's* case,⁷² the issue of the

64. i.e. the conflict between the provisions of the Land Use Act and that of the 1999 Constitution *vis-à-vis* property law

65. See S 315(5) of the 1999 Constitution. The Act was first entrenched into S 274(5) of the 1979 Constitution. The other enactments so entrenched are (a) The National Youth Service Corps Decree of 1993, (b) The Public Complaints Act, and (c) The National Security Agencies Act.

66. S 315(6) further provides that "Without prejudice to sub-section (5) of this section, the enactments mentioned in the said sub section hereafter continue to have effect as Federal enactments as if they related to matters included in the Exclusive Legislative list set out in Part 1 of the second Schedule to this constitution."

67. The Holy Bible: St Luke, 11:17

68. Where the law is uncertain, there is no law

69. He who makes statements mutually inconsistent is not to be listened to

70. Suit No E/166/81 (Unreported, Enugu High Court)

71. Section 315(5) of the 1999 Constitution

72. *Nwokolo* (n 70)



constitutionality of the Land Use Act *vis-à-vis* the constitution did not get to the Court of Appeal or the Supreme Court until much later. Meanwhile, various High Courts continued to give conflicting decisions on the matter. Fakayode CJ, in *J.N. Aina & Co. v Commissioner for Lands & Housing, Oyo State*,⁷³ for instance, held that the Land Use Act was part of the constitution modifiable in accordance with the provisions of Section 9(2) of the then 1979 constitution.⁷⁴ In *Umar Ali v. Commissioner for Lands & Surveys*,⁷⁵ where the constitutionality of the Land Use Act was again challenged, the same decision was reached. But in *Bola Adewunmi v Ogunbowale*,⁷⁶ Balogun J, held that the Land Use Act is an existing law subject to the provisions of the constitution and not part of the constitution.

An opportunity however arose for the Supreme Court of Nigeria to rule on the matter in the case of *Chief R.O. Nkwocha v The Governor of Anambra State*.⁷⁷ In that case the civilian governor of Anambra State exercised the power of revocation under Section 28 of the Land Use Act in respect of a plot of state land assigned to the Plaintiff. The revocation was challenged by the Plaintiff as an exercise of power in bad faith. He however lost at the High Court. On appeal to the Court of Appeal he sought a reference under Section 259(3) of the constitution to the Supreme Court on four questions.⁷⁸ In view of the conflicting decisions of the various High courts in some states on the issue, the Court of Appeal referred four questions to the Supreme Court for resolution.

In relation to the issue under discussion, one of the questions referred to the Supreme Court by the Court of Appeal was whether, in accordance with the provisions of Section 1 of the constitution, any provision of the Land Use Act which is inconsistent with the constitution is void to the extent of such inconsistency. The Supreme Court answered that the Land Use Act was a law in force in each state of the Federation of Nigeria on the 30th day of September 1979 immediately before the 1979 Constitution came into force on the 1st day of October 1979, and by virtue of the definition of an existing law in Section 274(4) (b) of the 1979 Constitution, it became an existing law,⁷⁹ a special Federal enactment, which has been accorded an extraordinary status by Section 274(5) of the 1979 Constitution.⁸⁰

The other question relevant to this discussion referred to the Supreme Court by the Court of Appeal, was whether the Land Use Act was an integral part of the constitution. The Supreme Court however replied that the Land Use Act is not an integral part of the constitution, but claims the special protection of Section 9(2) of the 1979 Constitution in terms of its amendment.⁸¹ This majority decision of the Supreme Court in *Nkwocha's* case⁸² has been affirmed and reaffirmed in many subsequent decisions. For instance, in *Adisa v Onyinwola*⁸³ the Supreme Court said *inter alia*:

The Land Use Act is itself an existing law by virtue of section 274(5) of the 1979 constitution, and its validity and continued existence was assured by section 274(3) of that constitution. The Land Use Act is not an integral part of the constitution and could therefore not whittle down or override any provision of the constitution.

73. Suit No 1/439/81, Ibadan High Court (unreported)

74. Now S 9 (2) of the 1999 Constitution

75. Suit No BCM/62/81, Maiduguri High Court. See also the case of *Attorney General for Lagos State v NEPA*, Suit No L.D./372/91, Lagos High Court, (Unreported)

76. Suit No 10/115/81, Ikeja High Court, Lagos (Unreported)

77. (1984) 1 SCLR 634; (1984) 6 SC 632

78. The relevant questions are reflected in this page. The other questions were (a) whether the state High Court had jurisdiction & (b) whether a civilian governor could administer the Land Use Act

79. As already indicated, S 274(4) of the 1979 Constitution is similar to S 315(4) of the 1999 Constitution which defines an existing law as "any law and includes any rule of law or any enactment or instrument which is in force immediately before the date when this section comes into force or which, having been passed or made before that date, comes into force after that date"

80. Nnamani JSC dissenting

81. Nnamani JSC also dissenting

82. *Nkwocha* (n 77)

83. (2000) 79 LRCN 2180



On the question of the relationship between the Land Use Act and the constitution, the Supreme Court also said:

The constitution being the supreme law of the land, stands above other enactments, statutes or laws and its provisions cannot be made subject to any other Act or enactment except by direct and clear provisions to that effect.

However, Justice Ayoola JSC, who read the lead judgment in that case, was of the opinion that the Land Use Act was incorporated into the 1979 Constitution by reference.⁸⁴ Be that as it may, unless the Supreme Court reverses itself in *Nkwocha's* case,⁸⁵ that decision must stand. It has to be accepted as law. Once it is accepted that the Land Use Act is not a part of the constitution, then the problem of interpreting or amending may be minimized. But what is the correct approach? The answer seems to be in the air.

CONCLUSION

Compulsory acquisition of land from private individuals is absolutely necessary for government to embark on its developmental projects. Nigeria is a country that operates under the rule of law. The hallmark of democracy is that every citizen whose property right has been breached has the constitutional right to institute an action before the High Court to have his grievances determined.

Government intervention and re-allocation of land for socially desirable purposes such as housing, health and conservation purposes are therefore justifiable. The purpose of governmental intervention is not only to permit a redistribution of land to achieve the most socially beneficial use, but also to put competing resource – users in a position of equality when each of them seeks to make use of land.

It is suggested that a legislative amendment be made to the definition of the public purpose. The provisions of the Land Use Act excluding the court in the determination of the adequacy or otherwise of the compensation payable in Section 47 (2) should be expunged or redrafted as same is in violation of the provision of fair hearing as provided for in the Constitution of the Federation. Courts should have power to adjudicate on adequacy of compensation in compulsory acquisitions by government.

84. Incorporation by reference means that a statute should not be interpreted *in vacuo*. It is best interpreted with reference to what goes before it and what follows it. The maxim is *ex antecedentibus et consequentibus fit optima interpretatio*. In effect, it is means that the law will judge a statute, a document or other instruments consisting of diverse parts or clauses by looking at the whole and will give to each part its proper office so as to ascertain and carry out the intention of the makers. But where the law is clear and the meaning is clear, resort to construction by incorporation is not possible. The principle is as stated in *Crains on Statutes* (seventh edition at p 210)

85. *Nkwocha* (n 77)

