



THE LAND USE ACT, 1978 AND ITS CONTROVERSIES IN NIGERIA

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ABSTRACT

The land tenure system that had existed during the pre-colonial, colonial and independence in the northern part and southern part of Nigeria had posed challenges to the Government. It therefore, became expedient to re-evaluate the land tenure system in Nigeria as a whole and come up with a uniform system that would be acceptable. As a result of the challenges faced in the entire nation by the Government, the then Federal Military Government in 1977, set up a land use panel. The panel swung into action and submitted its report which brought about the promulgation of the Land Use Decree now the Land Use Act, 1978. The Act is one of the most essential piece of legislation affecting land in Nigeria currently while all other laws had been regional, the Land Use Act 1978 is general and nationwide in its application and effect. This article interrogates the controversies arising from the Act and what it has caused communities, individuals, organizations, institutions and so on with the aim of proffering suggestions for the improvement of the law. To achieve this primary and secondary sources of law were utilized. The study found that there were conflicting judgements emanating from various High Courts on matters arising from Land Use on questions whether or not the Act is an Act of the National Assembly or part of the Constitution of the Federal Republic of Nigeria. Furthermore, there has been contention whether or not the Land Use Act nationalized interest in real property in Nigeria. The study recommends suggestions for a review of the Constitution.

Keywords: Land Use Act, Expropriation, Controversy.

INTRODUCTION

The Land Use Act is a law that regulates land throughout the Federation of Nigeria. The Land Use Act formerly referred to as the Land Use Decree is a law that vests all land within the confines of a State solely in the Governor of that State who will hold the land in trust for the people of Nigeria. The Act which was a Decree promulgated by a Military Government was made part of the Nigerian Constitution in 1979 before it handed over the reign of governance to a democratically element Government.

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This legislation is by far the most reaching and controversial law in Nigeria. This law was an attempt by the then Federal Military Government to try to correct some of the challenges faced by the existing land tenure regimes in the country. This Act was to provide the country with a uniform land tenure system and to ensure fairness, equitable and secure access to the utilization of land and land resources in the country. The Land Use Act remains the most controversial legislation in Nigeria. The Act has reportedly failed to meet its objectives. It is contended to have caused many distortions to the land rights and access to the land of Nigerians, culminating into legal pundits suggesting that the Act should be reviewed.

Consequently, several decisions have been held to justify this outburst. The most problematic challenge of the Land Use Act is that of loopholes created in its provisions. These loopholes are used by persons who understand legislative principles to manipulate the Act. For any legislation to have full effect, it must be free from loopholes and easy to address the issues why it was legislated in the first instance. This article will examine the nature, implications and the application of the Land Use Act with respect to the issues of constitutional inclusion in the 1979 and the 1999 Constitutions, expropriation and ouster clauses controversies.

EVALUATION OF THE CONTROVERSIES

Some legal commentators and Justices of Courts believe that the Land Use Act, 1978 is the most controversial legislation in the legislative history of Nigeria. In *Nkwocha v Governor of Anambra State*,¹ the apex court per Irikefe JSC (as he then was) asserted that “The Land Use Decree... is indisputably the most impactful of all legislation touching upon the land tenure systems of this country before and after full nationhood...” In similar manner, Olatawura JSC in *Abioye v Yakubu*² held that as far as he could remember, there has never been any legislation made by parliament or any decree made by the Federal Military Government that had generated much controversy such as the Land Use Decree. The Learned Justice further held that the Act has been vilified, reviled, and criticized. It is undoubtedly an unpopular law because of its revolutionary provisions which have affected certain families and individuals whose source of income or livelihood were from the sale of land which include leases and various grants under the customary land tenure.³

¹ [1984] 6 SC 362, 363.

² [2001] FWLR (Pt 83) 2212.

³ Ibid.



It should be emphasized that academics and judges had disagreed among themselves as to the nature, implications and application of the Land Use Act. For example, there has been serious argument amongst academics on some essential issues. The issues highlighted are the challenges of constitutional controversy, expropriation and ouster clauses controversies.⁴

CONSTITUTIONAL CONTROVERSY

There were conflicting decisions shunned out from various High Courts in the country on issues arising from the Land Use Act. These decisions vary from the following questions, which are:

- i) Whether or not the Land Use Act is an Act of the National Assembly or part of the constitution of the Federal Republic of Nigeria;
- ii) Whether or not the Act survived under the 1979 constitution.

To respond to these questions posed above, in *Unmar Ali & Company v Commissioner of Land and Survey, Borno State*,⁵ the High Court held that the Land Use Act is part of the Constitution of the Federal Republic of Nigeria. This judgement of the High Court was based on the provisions of *section 274 subsection 5* of the 1979 Constitution (now *section 315 subsection 5*) of the 1999 Constitution of the Federal Republic of Nigeria, as amended which provides the following:

Nothing in this Constitution shall invalidate the following enactments, that is to say, the... Land Use Decree 1978... and its provisions shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution and shall not be repealed except in accordance with the provisions of section 9(2) of this constitution.

The reasoning of the court was that if the provisions of the Land Use Act should have equal force as the provisions of the Constitution and be repealed in the same way as the provisions of the Constitution, then it should be part of the Constitution. Similarly, in *Aina & Co. Ltd v Commissioner for Land and Housing, Oyo State*,⁶ the court held that the Act was an existing legislation by virtue of *section 274 subsection 4 paragraph b* of the 1979 Constitution,

⁴ A S Acheneje, 'The Nigeria Land Use Act, 1978: Some Emerging Controversies' (2009) *Journal of Contemporary Legal Issues*, a publication of a Nigerian Bar Association Idah Branch, 60.

⁵ Unreported Suit No BOM/82/81 delivered 4th March 1982.

⁶ [1989] NMLR (Pt 97) 305.



therefore, an Act of the National Assembly. It should be stressed that the Constitutional controversy of the Act became essential when it was doubtful whether the phrase “Military Governor” survived during the civilian administration where there was no military without the Act and the Constitution being amended to remove the “Military” since by virtue of section 274 of the 1979 Constitution, the Act was part of the Constitution. Furthermore, in *Nkwocha v Governor of Anambra State (supra)*, the apex court shed light on the issues and laid the matter to rest. This case was a referral from the Court of Appeal to the Supreme Court by virtue of section 259 subsection 3 of the 1979 Constitution.

The main issue or question for resolution was whether the Governor of Anambra State was the person or authority to exercise the power or functions vested in the Military Governor under the provisions of the Land Use Act. The question arose from the Civilian Governor of Anambra State exercising the power of revocation vested in the Military Governor under section 28 of the Act with respect to a leasehold interest on two properties, plot No.17 and plot No.9 independence layout, Enugu. The plots were leasehold interests assigned to the claimants by a deed of assignment registered as No. 40 at page 40 volume 1043 of the Land Registry, Enugu. The apex court held in *Nkwocha v Governor of Anambra State (supra)* that the State Governor was clothed with the powers of the Military Governor under the Act and has power to revoke a right of occupancy for overriding public interest and such other statutory powers which apparently without any further assurance were vested by the Land Use Act in the Military Governor.

The Supreme Court further held in the above case that in view of the provisions of section 274 of the 1979 Constitution, the Land Use Act was not an integral part of the Constitution. The Act is an ordinary statute which became extra-ordinary by virtue of its enactment in the Constitution.⁷ The court further stated that if the Act has been made a part of the Constitution, it would have been necessary to include or insert in subsections of section 274 the words – “nothing in this Constitution shall invalidate” as the draftsman of the Constitution cannot make the Constitution to invalidate part of itself, nor will it be necessary to have in subsection 6 of section 274 that the Act shall continue to have effect as a federal enactment. The court went further to hold that the tenor of the Act as a single piece of legislation is the nationalization of

⁷ s 275(4) 1979 Constitution of the Federal Republic of Nigeria.



all lands in the country by the vesting of its ownership in the State leaving the private individual with an interest in land which is a mere right of occupancy and which is the only right protected in his favour by law after the enactment of the Act. Once the import of *section 274* and *section 276* of the Constitution are separated, it would be clear that there is no conflict in the Act and the Constitution nor in the provisions of the Constitution in relation to the Act. It is the same organic law of the land that has provided for the status of the Act and made it a federal enactment which the President can modify that has also made provision for the executive administration of the Act.

The above holding of the apex court is far-reaching and binding throughout the federation and settled if not all, most of the contentions on the status of the Act and its relationship with the Constitution. Olong asserts that even though the decisions conform to the literary interpretation of *section 274 subsection 6* of the Constitution,⁸ it has an inherent implication.⁹ It implies that the President or the National Assembly can by enactment confer duties on the Governor, a situation unacceptable in a Federal setting which incidentally was decried by Kayode Esho JSC (as he then was) in *Ogun State v AG of the Federation*,¹⁰ that the bedrock of Federalism lies in each tier of government being a master in its own domain.

This it appears makes the Constitutional controversy argument of the Land Use Act tenable. The State Governors in a democracy would accept duties assigned to them by the Constitution rather than accepting duties issued out by the President or the National Assembly. Support to this argument was given in *Attorney General Attorney of the Federation v Attorney General of Bendel State* where Bello JSC (as he was then) held that:

I will amplify the view that the dicta... that the National Assembly cannot unilaterally confer power or impose duty on a State functionary is a correct statement of the principles of Constitutional law in a Federation. This principle found expression in our sections 4 and 5 thereof.

In view of the foregoing, Olong contends that the inclusion of the Act into the Constitution should not have created controversies as the intention was simply to preserve its provisions

⁸ 1979 Constitution of the Federal Republic of Nigeria.

⁹ M A Olong, *Land Law in Nigeria* (Lagos: University of Lagos Press and Bookshop Ltd, 2022) 182.

¹⁰ [1982] 3 NCLR 202.



from being amended as an ordinary law by State Governors given the importance of land to the citizens of Nigeria.¹¹ The implication of the inclusion has been that the Act cannot be amended without the Constitution being amended. It should be noted that it is in line with this that the Act has not been amended since its commencement in 1978 thus leaving so many sections obsolete.

EXPROPRIATION CONTROVERSY

Compulsory deprivation of an individual's rights over a property belonging to him in return for a compensation is what is referred to as expropriation.¹² The phrase expropriation could also mean the act of a State in enforcing the compulsory surrender of private property for the purpose of the State or the overriding interest of the State without the payment of compensation.¹³ There has been contentions as to whether or not the Land Use Act nationalized property interest in real property in Nigeria. A State could expropriate an individual's property by exercising its power of compulsory acquisition which is the sovereign power of a State that authorizes fair compensation to the individual. It should be stressed that the words nationalization and expropriation connote deprivation of interest in real property which constitutes proprietary rights under the Land Use Act.

A cursory look at *section 1* and other relevant sections of the Act shows how such sections have established controversies amongst Jurists and Legal Scholars. *Section 1* provides as follows:

Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of the State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

Ogudare J in *Akinloye v Oyejide*,¹⁴ commenting on *section 1* of the Act, the Learned Justice maintained that the phrase “vested” in *section 1* of the Act has the effect of transferring to the Governor of the State the ownership of all land in the State. Literally, the Learned Justice was of the view that citizens are deprived of their ownership in land and vest the ownership in the

¹¹ Olong (n9) 183.

¹² J F Fekumo, *Principles of Nigerian Customary Land Law* (Port Harcourt: F & F Publishers, 2002) 417.

¹³ Olong (n9).

¹⁴ (Unreported) Suit No HCJ/9A/81 delivered on 17th July 1981 in the High Court of Ijero, Ondo State.



respective State Governors. There is a presumption that the lawmakers do not desire to confiscate the land or to encroach upon the rights of persons, as the provisions of the Act were clear and unambiguous.¹⁵ This interpretation is in accord with the decision of the Supreme Court in *Nkwocha v Governor of Anambra State*,¹⁶ as representing the correct interpretation of the Act.

In contention with the view expressed by the Learned Justice, Omotola contended that this view was incorrect, maintaining that *section 1* of the Act is ambiguous and its meaning could be correctly deduced by reference to other sections of the Act.¹⁷ The Learned Scholar was of the view that an evaluation of some provisions of the Act shows that there is no expropriation of the real property as *section 1* cannot be read in isolation save as is provided in *section 34 subsections 5 and 6* regarding the quantum of interest in undeveloped land that can be held by any person within the urban area of a State. It was the contention that *section 28*, which gives the Governor power of revocation, will be unnecessary if it is true that the Governor is already an owner in the sense under *section 1* as there will be nothing to revoke.¹⁸

This article is in agreement with the opinion expressed by the Learned Scholar that the essence of *section 28* is not to diminish the proprietary rights over land vested in the Governor under *section 1* but to facilitate the recovery of land granted under the relevant provisions of the Act by the Governor as owner of the land. Contributing to the controversy, Egute maintains that even though *section 1* has vested all land in the State Governor, Nigerians are left with the equitable interest in the land and have become beneficial owners of the land subject to other provisions of the Act.¹⁹ The phrase “trust” as used in *section 1* simply means that the Governor holds the land as a trustee for the beneficiaries, who are Nigerians and not in his private capacity as the owner and the word trustee as used in *section 1* is not as high as it is under English law where the trustee is sometimes vested with the legal title of the property.²⁰ It should be noted that *section 1* has created a bare trust and no more.

¹⁵ (n14).

¹⁶ (n1).

¹⁷ J A Omotola, ‘Does the Land Use Act Expropriate?’ (1985) 3 *Journal of Private/Property Law*, 1.

¹⁸ Omotola (n17).

¹⁹ M A Egute, *Essentials of Nigerian Land Law* (Makurdi: Onaivi Publishing Company, 2002) 76.

²⁰ Ibid.



The Supreme Court in *Salami v Oke*,²¹ held that the Land Use Act vests all land in each State in the Governor of that State, the land is held by the Governor in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act. Consequently, the Act has not taken away the right of customary owners to the enjoyment of tributes. Rather it left them untouched. The power that is vested in each Governor is the administrative power to control and proprietary interest. In line with the foregoing contention, it is argued that the Act, specifically *section 1* did not expropriate the land in Nigeria. It has simply vested the land in the Governor of each State for administrative purposes only.

Accordingly, *section 34 subsection 2* and *section 36* and *subsection 4* state that where a piece of land is developed in an urban area and non-urban area, such land shall continue to be held by the person in whom it was vested immediately before the commencement of the Act as if the holder of the land was the holder of a statutory or customary right of occupancy. Comparing and contrasting the above provisions with *section 1* of the Act, it would be save to say that *section 1* nationalized all land which would amount to taking away such land from the holder *ab initio*. Consequently, it can be contended that whatever the merit of the decision of the apex court in *Nkwocha v Governor of Anambra State*,²² that decided that all land were nationalized, did not sufficiently reflect the true spirit of the Act as it appears to be too sweeping to say so. Therefore, it follows that if “X” grants “Y” a lease for 30 years before the coming of the Land Use Act, “Y” would be deemed to have obtained his 30 years lease with the consent of the Governor under *section 22* of the Act. Such a lease would be any encumbrances or interest valid in law under *section 34 subsection 4* of the Act.

By virtue of *sections 1, 21, 22* and *section 34 subsection 4*, “X” and “Y” would be tenant and subtenant respectively to the Governor. “X” will be the ‘holder’ while “Y” would be the ‘occupier’. It is probably in this revolutionary sense that the Act can be viewed to have nationalized all land within a State and turned all landowners into tenants. It should be emphasized that when interpreting the provisions of the Land Use Act, great caution should be exercised in looking back into the history and state of land law in Nigeria, unless the provision in question is of doubtful import, or the words used have acquired technical meanings different from their natural meanings which could be resolved by reference to the previous state of the

²¹ (1987) 4 NWLR (Pt 63) 1.

²² (n1).



law. Thus, in *Bank of England v Vagliano Brothers*,²³ the court held that when such difficulty arises, one has to “... examine the language of the statute and ask what its natural meaning is, uninfluenced by any consideration derived from the previous state of the law”. Regarding the quantum of interest in undeveloped land held by any person within an urban area of a State, the correct position of the law is that the Act converts such a holder as a tenant of the Governor in respect of the half a hectare of the land and such a holder is entitled to statutory right of occupancy with respect to such land.²⁴

Equally essential is the provision of *section 11* which provides that the Governor or any public officer duly authorized by the Governor on that behalf, have the power to enter upon and inspect the land comprised in any statutory right of occupancy or any improvements effected thereupon at any reasonable hour in the daytime and the occupier shall permit and give free access to the Governor or any such officer so to enter and inspect. Furthermore, under *section 14* the occupier of land shall have exclusive possession against all persons except the Governor. In other words, the Governor has concurrent possessory right with all proceedings pertaining to the title to land or interest therein, pending before the courts at the coming of the Act, the court shall not recognize any higher interest or title than the right of occupancy. *Sections 21 to 23* firmly establish the Governor’s supervision and surveillance over all land in the state. It should be pointed out that some of the sections of the Act, for instance, *section 36* may be irksome, rightly or wrongly to a number of customary landlords. However, the apex court held in Abioye’s case that the function of the Judge is to construe the provisions of the statute and not to so construe it by making nonsensical of it but to do so as not to defeat the manifest intention of the lawmakers.

OUSTER CLAUSES CONTROVERSY

The controversy surrounding the provisions of *section 47 subsection 2* deals with the duty of compensation by the Governor. The provision of this section is quite clear, plain and unambiguous in ousting the jurisdiction of the courts to inquire into any question concerning the amount or adequacy of any compensation paid or to be paid under the Act. It should be

²³ [1891] A C 107, 144.

²⁴ LUA, s34(5)(6).



reiterated that before the promulgation of the Land Use Decree, the 1963 Constitution had provided in *section 31* as follows:

No property moveable or immovable shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria, except by or under the provisions of the law that:

- a) Requires the payment of adequate compensation thereof;
- b) gives to any person claiming such compensation or right of access, for the determination of his interest in the property and the amount of compensation to the High Court having jurisdiction in that part of Nigeria.

In the same vein, the 1979 Constitution, which was the first to incorporate the Land Use Act into its provision and the 1999 Constitution has provision which guarantees access to the courts by aggrieved persons. For example, section 44 of the 1999 Constitution as amended provides as follows:

- 1) No moveable property or any interest in an immoveable property shall be taken possession of compulsorily and right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that among other things:
 - a) Require the prompt payment of compensation, and
 - b) Gives any person claiming such compensation, a right of access for the determination of his interest in property and amount of compensation, to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

It is noteworthy to assert that while the 1963 Constitution provided for “adequate compensation” no such language was used in the 1979 and the 1999 Constitution as amended, which simply provided for “prompt payment of compensation” and this seems to be controversial. It is also worthy of mention that the Public Land Acquisition Ordinance²⁵ and the Land Tenure Law, 1962, although they are all repealed, provided for payment of compensation and access to the courts by aggrieved persons to challenge the amount of compensation that was payable where their rights were revoked for overriding public interest.

²⁵ No 17 of 1917, later referred to as the Public Land Act, Cap 167 LFN 1958.



In these repealed legislation, there were no provision similar to *section 47 subsection 2* ousting the jurisdiction of the courts to inquire into any issues concerning the adequacy of compensation.

In view of the foregoing, the vexed question could be asked differently. What is the constitutional validity of the provisions of *section 47 subsection 2* and similar conflicting provision of the Act? First of all, the maxim – *generalia specialibus non-derogant*, which is interpreted to mean, where a general intention is shown in the same statute, which is incompatible with a particular intention, then the particular intention must be construed as an exception to the general intention. This maxim has the effect of validating the conflicting provisions of the Act in *section 36 subsection 1* and *section 44 subsection 1* of the 1999 Constitution as amended, which deal with fair hearing and access to the courts respectively. These are general provisions which are applicable subject to the exceptions created by the Constitution itself. This argument is justifiable by the use of the word “subject to the provision of this Constitution” at the beginning of *section 272 subsection 1* of the 1999 Constitution as amended, showing that it is a general provision that does not foreclose exceptions.

It should be stated that the same rule applies to the provisions of *section 315 subsection 5 paragraph d* of the Constitution, which delimits the jurisdiction of the High Courts and thereby confers validity on *section 47 subsection 2* of the Act, thereby unfortunately, vesting the Land Use and Allocation Committee with powers to resolve disputes on issues of adequacy of compensation instead of resorting to the courts whose independence is more guaranteed than that of the Land Use and Allocation Committee.

Consequently, it is the view of most learned scholars, however, that the courts have not been articulate, firm and fair in their dealing with the issue of the ouster clause created by *section 47 subsection 2* in relation with the provisions of the Constitution. Egute for example, contends that it is unfortunate that the courts as the last hope of the ordinary man have often failed in this regard to either increase or reduce the amount of compensation payable whenever there is a dispute”.²⁶ This was also the view of Acheneje, in his examination of the decision,²⁷ of the Chief Judge of Kaduna State in *Dada v Governor of Kaduna State*,²⁸ where the court in deciding the matter avoided the determination of the amount of compensation but simply said,

²⁶ Egute (n19).

²⁷ Acheneje (n4).

²⁸ [1986] LLJR-SC.



in accordance with *section 40* of the Constitution that the appellant was entitled to compensation. The court shied away from the real issue for determination, leaving the amount of compensation to the appropriate Land Officer to determine. But on further appeal to the Court of Appeal and the Supreme Court, consolation seemed to have come as both courts were in agreement that the lower court, which is the High Court has the power to assess the amount and adequacy of compensation.

Before the Dada's case the Court of Appeal and Supreme Court have had a contrary decision in *Commissioner of Lands v Ideye*²⁹ where the lower court had relied on the Land Officer's award and avoided deciding on the amount or adequacy of compensation as sought by the claimant. In *L E D B v William*³⁰ the Supreme Court equally avoided the real controversy and held that the agreed value in similar cases afforded a reasonable good guide for the assessment of compensation.

CONCLUSION/RECOMMENDATION

Even though *section 47(2)* of the Land Use Act remains unsatisfactory, it is valid and effective. It is the opinion of the authors that the issue be laid to rest anytime an opportunity presents itself. It is only when this happens that the needed succour of landowners whose properties are compulsorily acquired for public purpose will get the needed respite from the courts. The alternative is an amendment to expunge *section 47(2)* of the Act. The incorporation of the Act into the Constitution should be revisited. There is, therefore, the need to amend the 1999 Constitution of the Federal Republic of Nigeria so that the Land Use Act can also be amended if it must play its leading role as a unifying document that regulates land use in the country. If not, several legal commentators will still be referring to the constitutional incorporation of the Land Use Act as controversial amongst others.

²⁹ [1938] 14 NLR 109.

³⁰ [1963] 1 All NLR 267.