



THE POLICY OF NON-ALIENATION OF NON-URBAN LAND SUBJECT TO DEEMED GRANT UNDER THE LAND USE ACT: A CRITIQUE

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ABSTRACT

Land occupies a central position in economic development in developing countries. This stems from the fact that most of the developmental projects executed by the government, individuals or corporate bodies are done on land. It is based on the foregoing reasons that the Constitution has guaranteed the rights of all Nigerians to lands. The Land Use Act also introduced the right of occupancy system and empowers persons to alienate same subject to Governor's consent. However, by virtue of section 36(5) of the Act, the Act places an absolute restriction on the alienation of land subject to deemed customary grant. In the light of the fact that the current trend on agricultural development and indeed any other kind of development requires the acquisition of land, this work undertakes a critical examination of the non-alienation policy under the Land Use Act with a view to ascertaining whether it serves or can serve its purpose. It was found that the non-alienation policy will, if implemented to the letters, form a clog in the wheel of development in land use and administration. In response, the work recommends that the provisions of the Act relating to the non-alienation policy be expunged so as to bring deemed customary rights of occupancy under the general scheme of the Act.

INTRODUCTION

One of the basic social problem confronting many African countries today is how best to fashion an appropriate land redistribution policy that would be equitable and as well ensure security of term and access to land.²³ Rights relating to land are increasingly becoming contentious issues for a number of reasons. First, land is an indispensable natural resources which goes to the root of mans' existence. The ability to own and control land is not only an important expression of both private and proprietary right but is also a measure of economic wealth and power. Secondly, there have been conflicts between customary and statutory

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²³ OG Amokaye, 'The Land Use Act and Governor's Powers to Revoke Interests in Land: A Critique', in J A Omotola (ed), Essay on the Land Use Act 1978 (Lagos: University of Lagos Press 1982) p. 246.

forms of land law and ownership. These pressures are primarily induced by the desire of government to control land resources in the state. This is necessitated by the fact that the discharge of governmental responsibility necessarily and implicitly involves the use of land for diverse social, economic and political considerations.²⁴

Against the background of private and public quest to own, access and control land for diverse socio-economic development which include agriculture, housing, etc, the question of the restriction placed on transfer and partition of land subject to deemed customary grant under the Land Use Act²⁵ has generated a lot of controversy. Section 35 (5) & (6) of the Land Use Act which embodies the non-alienation policy provides as follows;

(5) No land to which this section applies shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested as aforesaid.

(6) Any instrument purporting to transfer any land to which this section relates shall be void and of no effect whatsoever in law and every party to any such instrument shall be guilty of an offence and liable on conviction to a fine of N5,000 or to imprisonment for one year..

The above provision of the Land Use Act will continue to generate serious debate for a long time to come for variety of reasons, the primary of which is that such restriction placed on alienation of land subject to deemed grant has serious implication on constitutional right to property.²⁶ There is no doubt that the most complete of relations that may exist in land or indeed any other property is that expressed in the notion of ownership. It connotes a complete and total control which a person can exercise over land.²⁷ These rights include, the right to income from it in money, in kind or in services and the power of management including that of alienation.²⁸ The most comprehensive way a person can demonstrate that he is the owner of a thing is if he can alienate it to anyone he likes without any limitation or restriction. The

²⁴ Fundamental Objectives and Directive Principles of State Policy, Cap II, 1999 Constitution of the Federal Republic of Nigeria (as amended 2011), Cap. C23, L.F.N., 2004.

²⁵ S. 36 (5).

²⁶ Ss 43 & 44 Constitution FRN 1999 as amended.

²⁷ *Abraham v Olorunfunmi* [1991] INWLR (Pt. 165) 53. See also A J Smith, *Property Law* (4th edn, England: Pearson Education Ltd, 2003) p. 6; R W M Dias, *Dias on jurisprudence* (5th edn, London: Butterworth, 1985) chapter 14, p. 292; J F Garner, 'Ownership and the Common Law' (1976) *JPEL* p. 403;

²⁸ L M Qin, 'Reform of Land System in China' (1994) *Singapore Journal of Legal Studies* 495-520; C O Olawoye, *Title to land in Nigeria* (Lagos: Evans Brothers Ltd, 1974) p. 1; L K Agbosu, 'The Land Use Act and the State of Nigerian Land Law' (1988) *Journal of African Law*, Vol. 32, No.1, 5. See generally, J Waldron, *The right to private property* (Oxford: Clarendon Press, 1988).

real essence of ownership lies therefore in the power of alienation without interference. Apart from alienation, the power of management connotes the right to control and defend the enjoyment of the property, aimed particularly against unauthorized interference. Ownership therefore comprises the fullest amplitude of right of enjoyment, management and disposal over a property. Thus Prof. I. O. Smith has submitted that when the right of a person to possess, use and dispose of land is not subject to or restricted by the superior right of another person, the right of ownership is said to be vested in him.²⁹ It is against the foregoing that the provision of this section of the Act has received generous share of attention from jurists. While it has been described by one as “a legislature fiction or at best a legislature misadventure”³⁰ another has described it as “unfortunate and exhibits a striking example of bad drafting”.³¹

In the light of the fact that the Land Use Act has entered into its 45th year of existence, it is therefore important to assess and appraise the impact of the restriction of alienation of land subject to deemed customary grant. This chapter therefore examines the theoretical framework for that provision under the Act and practical implication *viz-a-viz* current trends in land acquisition and usage.

HISTORICAL ANTECEDENTS TO THE NON-ALIENATION POLICY

Customary land tenure is frequently considered to be an impediment to agricultural development for plethora of reasons. In the first instance, the lack of secure and clearly defined rights is often held to lead to a disincentive or an inability to invest in agriculture. Secondly, the inflexibility of the traditional system is said to prevent the transfer of rights between groups and individuals and this inhibits the mobility of factors of production.³² In discussing the situation of land tenure prior to the Land Use Act, a number of different phases may be distinguished. In the debate about land, these phases are marked by clergy relationships between Africans, administrators and commercial interests. At the early stage, i.e. communal level of land holding, there was little or no problem. This is because of the principle of inalienability of land. At the earliest times, land was held sacred and thus

²⁹ I O Smith, *op cit*, p. 14.

³⁰ OR Akujobi, in J A Omotola (ed), *Essay on the Land Use Act 1978* (Lagos: University of Lagos Press 1982) p. 214.

³¹ IO Smith, *Practical Approach to Law of Real Property in Nigeria* (2nd edn, Lagos: Ecowatch Publications Ltd, 2007) p. 324.

³² Paul Francis, “Land Naturalization and Rural Land Tenure in South-West Nigeria”, Retrieved from <http://www.ilri.org/infoserv/webpub/fulldocs/bulletin24/land.htm>. last accessed on 27/05/2023 by 11:46am.



inalienable. The reason proffered for this was that land belonged to the whole community i.e., the dead, the living and the unborn.³³ Consequently, the living does not possess the capacity to alienate it. Indeed, community and family land was held inalienable due a desire to pressure it for the requirements of the owning group (i.e. past, present and future).³⁴ Thus, the principle of inalienability is a device to protect the interest of the present and future generations.³⁵ However with the advent of colonization and English system of land tenure, the state and commercialists began to seek and obtain interest in land. This led to fragmentation and individualization of land with the attendant conflicts. During this period, the issue of land tenure became a major concern of both the government and jurists. This subject appeared repeatedly in colonial correspondence, memoranda, reports and enquiries.³⁶ The main concern of the colonialists was the political stability of their colonial territory rather than agricultural development, their fear being that the extensive alienation of interests in land to national or expatriate commercial interests would lead to landlessness and discontent.³⁷

With political independence and opening of global debate on economic development, economist arguments came to dominate the debate about land tenure in Nigeria. The arguments were mainly as to the defective nature of customary land tenure with regards to fostering developments from the late 1960s and that customary forms of land tenure suffered from defects and inconsistencies that militated against the most rational economic use of land. In the words of Oluwasanmi;

Social institutions may be so rigid as to constitute formidable barriers to agricultural production.... The traditional system of tenure may sometimes constitute a formidable obstacle to the enterprising farmer desirous of increasing the size of his farm business.³⁸

The problems generally cited by jurists on the shortcomings of customary forms of tenure relates to communal tenure, fragmentation, customary tenancy and the use of land as collateral. Adegboye while identifying defects in land tenure, farm tenancy and the provision of agricultural credit as obstacle to agriculture, argued, with regards to land tenure that the

³³ *Tijani v Secretary of Southern Nigeria* (1921) AC 39

³⁴ TO Elias, *The Nature of African customary Law* (England: Manchester University Press, 1956) p. 147.

³⁵ Ibid.

³⁶ Paul Francis, *op cit*.

³⁷ Ibid.

³⁸ HA Oluwasanmi, *Agriculture in Nigerian Economic Development*, (Ibadan, Oxford University Press), 1966, pp. 22 – 25.

then structure of land tenure made it impossible for enterprising young farmers to mobilize their labour and capital as freely as they would like to.³⁹ The reason for the foregoing may be found in the fact that sales of land were rare, and thus the cultivator and his descendants were confined to family land, and the division of land upon inheritance leads to the holding becoming uneconomic in size and productivity.

On the issue of use of land as a collateral, the principal problem with regards to agricultural credit was also held to stem from customary land tenure practices in that a piece of land which is communally owned cannot be used for collateral and thus the commercial bank do not lend to farmers who only have access to such lands as a means of guaranteeing bank facilities.⁴⁰ The implication of the above is that prior to the promulgation of the Land Use Act, laws relating to land rights was criticized on three main grounds. First, they did not guarantee security of title. Secondly, they made it difficult and cumbersome to acquire land for private and public uses and thirdly, the cost of obtaining land for public purpose was high and prohibitive.⁴¹

These assumptions became part of the conventional wisdom of development planning. Thus, the Second National Development Plan states as follows;

The prevailing land tenure system in the country sometimes hinders agricultural development.... If Nigeria's agriculture is then to develop very rapidly and have the desired impact on the standard of living, there must be reform in the system of land tenure.⁴²

According to the Third Plan:

The under-utilization of agricultural land is itself a function of some institutional constraints, in particular, the land tenure system and seasonal labour shortages. The land tenure system is mainly responsible for fragmentation of holdings and difficulties in mechanization and modernization of Agricultural production⁴³

³⁹ RO Adegboye, 'The Need for Land Reform in Nigeria' (1967) *Nigerian Journal of Economic and Social Studies*, vol. 9, No. 4, p. 340.

⁴⁰ Ibid.

⁴¹ T Otubu, 'Land Use Act and Housing in Nigeria: Problems and Prospects', in IO Smith (ed.), *op cit*, p. 353.

⁴² Ministry of Economic Development, Second National Development Plan, Ministry of Economic Development, Lagos, Nigeria, 1970.

⁴³ Federal Ministry of Economic Development, Third National Development Plan, Federal Ministry of Economic Development, Lagos, Nigeria, 1975 – 1980, Vol. 1.

However, it must be noted that neither plan made any concrete proposal for reform. But the government of Nigeria, consequent upon the hardship that was being experienced, was desirous of upturning the problem of land tenure as an inhibition to national integration and development. It was against this background that the Anti-inflation Task Force in its interim or first report made a radical recommendation for the promulgation of a Decree that will have the effect of vesting all lands in principle on the state governments. The 12-member Land Use Panel set up in 1977 by the Federal Government, based on the recommendation of the Rent Panel earlier set up in 1976 was enjoined under its terms of reference to *inter alia*, examine steps necessary for controlling future land use and also, opening and developing new land for the needs of government and Nigeria's growing population in both urban and rural areas and make appropriate re-recommendations;⁴⁴ hence the coming into force of the Land Use Act on 29th March 1978.

OBJECTIVES OF THE NON-ALIENATION POLICY

To fully understand the objectives for the non-alienation policy, it is pertinent to first understand the general objective of the Act and from there, distill the objectives which the non-alienation policy, as provided in the Act, was meant to serve. General Olusegun Obasanjo, the Nigeria Head of State at the time the Act was promulgated, in a broadcast which introduced the Act, stated the purpose of the Act as follows:

The main purpose of this Decree is to make land for development available for all including individuals, corporate bodies, institution and governments... fast economic and social development at all levels and in all parts of the country is our main consideration.⁴⁵

Also the preamble of the Act, pointing out the objectives of the Act states as follows:

Whereas it is in public interest that the rights of all Nigerians be asserted and preserved by law, and whereas it is in the public interest that all the rights of all Nigerian 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....⁴⁶

⁴⁴ See the Terms of Reference of the Land Use Panel, cited in T Otubu, *op cit*, p. 353.

⁴⁵ Address by the then Head of State, Gen. Olusegun Obasanjo in the Daily Times Newspaper of 30th March 1978.

⁴⁶ Preamble to the Land Use Act, Cap. 202, L.F.N., 1990 now re-enacted as Cap. L12, L.F.N. 2004.

There is no doubt that the Act, going by the statements of its founding father, its preamble and some of its provision is designed to achieve a radical re-engineering designed to make land accessible for both economic and social development and to solve the problem of housing, agriculture, social amenities, etc. The general intendment of the Act has been summarized as follows: firstly the provision of a uniform land tenure system in the country; secondly, to make land easily and cheaply available to all Nigerians and government for developmental purposes and finally to check the practices of land speculators whereby some wealthy individuals indulged in a lucrative trade in land.⁴⁷ With the above fact in mind the question now is to what the provision of section 36(5) of the Land Use Act was geared towards achieving. The non-alienation policy is geared towards making land available for developmental purposes particularly, agriculture. The justification for the proposition could be seen by taking a quick look at the provisions of S.36(2) of the Act which provides for persons entitled to deemed customary right of occupancy. The section provides thus:

Any occupier or holder of such Land, whether under customary law or otherwise howsoever, shall, if that land was on the commencement of this Act being used for Agricultural purposes, continue to be entitled to possession of the land for use for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder thereof by the appropriate Local Government....

A community examination of sub-sections (2) and (3) of section 36 will bring to light the intention of the lawmakers which is that the land to which the prohibition relates was intended to be land used for agricultural purpose. The restriction contained in section 36(5) of the Act was made to address the issue of unavailability of land for agricultural purpose and also the issue of fragmentation which usually leads to land being so small that it becomes of no economic or developmental value.

There were little or no problem with regards to transactions in land due to the principle of inalienability of land but the advent of the English system brought changes which introduced sale of land and consequently, agricultural lands were being sold by Nigerians. This posed a threat to the agricultural development of the country which needed to be addressed. On the other hand was the issue of individualization of land. On land attaining commercial value,

⁴⁷ AOO Ekpu, 'The Role of Local Government in the Implementation of the Land Use Act: The Bendel State Experience' in Olayide Adigun (ed.), *The Land Use Act Administration and Policy Implementation*, being Proceedings of the Third National Workshop on the Land Use Act, University of Lagos Press, Lagos, 1991, p. 42 – 44.

individuals who were part owners of family land wanted to get their own share of the land and make money. Or in the instance of not selling it retain it as their personal property. This development militated against the agricultural development of the country since it led to shortage of land for agricultural purpose and where there was still land, the issue of individualization led to fragmentation which reduces such lands to becoming uneconomic in size and productivity. This necessitated the promulgation of the Land Use Act which came to restore the *status quo* i.e. to protect agricultural land and stop fragmentation. It was against this background that the provision of S.36(5) of the Land Use Act was inserted into the Act.

It has been judicially observed that the absolute prohibition of transfer and partition of land to which section 36 applies is in consonance with the policy of the government of the Federation to ensure availability of agricultural land and adequate supply of food to the nation.⁴⁸ This assertion is in support of the provision of the preamble to the Act.⁴⁹ But it has been argued to the contrary that this provision makes it difficult, if not impossible for prospective farmers who do not belong to the land owning families to obtain land for Agricultural purposes.⁵⁰

Having established that the objective of the non-alienation policy as provided in section 36(5) is to protect agricultural land by preventing indiscriminate transfer which may lead to unavailability of land for agricultural purposes and also to check the problem of individualization or fragmentation which may lead to reducing agricultural lands to uneconomic scales in terms of size and productivity, the issue that arises therefore, is to see whether the Act has fulfilled or is fulfilling its objectives of assuring, protecting and preserving the use and enjoyment of land by all Nigerians, especially with the result to providing a platform towards agricultural development in Nigeria.

PRACTICAL IMPLICATION ON THE NON-ALIENATION POLICY VIZ-A-VIZ CURRENT TREND IN LAND ACQUISITION AND USAGE

In the light of the foregoing discussions, the question that one is bound to ask is whether the theoretical and practical interpretation given to section 36(5) of the Land Use Act has helped to achieve the objectives of the Act. As has been stated earlier, part of the underlying

⁴⁸ per Obaseki FSC in *Abioye v Yakubu* Supra at 224

⁴⁹ The preamble provides "...Whereas it is in the public interest that all the right of all Nigerian to use and enjoy land in Nigeria and the natural fruit thereof... should be assured, protected and preserved".

⁵⁰ LOC Chukwu, 'Practical Implications of Deemed Grants under the Land Use Act', in IO Smith (ed.), *op. cit.*, p.158.



objective of the Land Use Act is to ensure that land is made available to all those who are willing, ready and able to use it for all purposes in the interest of the economy.⁵¹ The objective is also reinforced by the provisions of the preamble to the Act.⁵²

It is evident that land occupies a central position in economic development in developing countries. As we have earlier observed, this stems from the fact that most of the developmental projects executed by the government, individuals or corporate bodies are done on land. It is based on the foregoing reasons that section 1 of the Land Use Act has proceeded to vest all land in the territory of each state on the Governor to hold same in trust for all Nigerians. The said 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 that 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.

From the provision, it would be seen that the provisions of the Land Use Act was meant to protect the right of Nigerians to the use and enjoyment of lands comprised in the country. Consequently, the function or practical implications of the Land Use Act would be more readily appreciated if viewed from the point of view of the requirement of the ordinary land owner. The need for ensuring a proper and adequate economic use of land is of special importance in agricultural economics. Indeed the study of land law should concern itself more with the aspects of this function than with the analysis of rules defining the rights of the owner.⁵³ Consequently, this work will proceed to deal with the impact of the restrictions placed on non-urban land by the Act to agricultural development.

Section 36(5) of the Land Use Act provides that no land to which the section applies shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the persons in whom the land was vested. The restriction placed by the provision of that section is that such land shall not be partitioned or transferred. Furthermore, section 36(6) makes any purported transfer of such land void as well as making any person who is party to the instrument of transfer criminally liable. According to Obaseki J.S.C. in *Abioye v Yakubu*, the absolute prohibition of transfer and partition of land to which section 36 applies, is in

⁵¹ The was stated main address by the Head of State Gen. Olusegun Obasanjo published in the Daily Times of 30th March 1978.

⁵² Preamble to the Land Use Act.

⁵³ BO Nwabueze, *Nigerian Land Law*, (Enugu: Nwamife Publishers Ltd, 1974) .p. 601.

consonance with the policy of the government of the Federation to ensure the availability of agricultural land and adequate supply of food to feed the Nation.⁵⁴

On the contrary, the forgoing view of Obaseki JSC has been criticized by L.O.C. Chukwu who argues thus:

It is not easily understandable how such policy objective could be accomplished by an absolute prohibition of transfer and partition of agricultural land. On the contrary the prohibition (if it is construed to be absolute) makes it rather difficult, if not impossible, for prospective farmers who do not belong to the land owing families to obtain land for agricultural purposes....⁵⁵

With due respect to the erudite Justice of the Supreme Court, the researcher adopts the conflicting view expressed by Chukwu because it is more in consonance with the current realities. The fact is that not all holders of deemed customary right of occupancy would want to use it for agricultural purposes. Even where they do, it is predominantly for subsistent agriculture as they rarely practice it on a commercial scale. In some cases also such holders of deemed customary rights may have no use for the land. Consequently if they are prohibited from transferring such lands it may lead to a situation whereby those who may need the land for agricultural purposes or other developmental purposes e.g. building would not be able to gain access to it.

Another justification that may be advanced for the non-transferability of such lands is that it conforms with the customary tenure principle of inalienability of family or communal land. But this cannot be said to be more important than the developmental purpose which the Act was made to serve. It must be noted that a society seeking land reform must make a choice between economic efficiency and retention of traditional ties and institutions. This problem of unavailability of land that may be caused by the non-alienation policy if implemented is further worsened by the fact that prior to the Land Use Act, there was scarcely any land in non-urban areas without an owner and as no land is vested in the Local Government under the Act, the power of the Local Government to make actual grants is seriously impaired. The only lands over which they can make grants are those acquired by revocation.⁵⁶

⁵⁴ *Abioye v Yakubu (supra)*, @ p. 224.

⁵⁵ LOC Chukwu, *op cit*, p. 158.

⁵⁶ That is if the power of revocation is exercised pursuant to S.6(3) of the Act.



Another problem that would be generated by the implementation of non-alienation policy is as regards the employment of land as security for agricultural loans. The prohibition of transfer and partition under S. 36(5) if implemented will constitute a serious impediment to the effective implementation of the Agricultural Credit Guarantee Scheme Fund Act.⁵⁷ The prohibition of transfer of agricultural land would make it imprudent for a lender to accept same as security for agricultural loan, for though the prohibition of transfer is, strictly speaking, not a bar to the creation of an agricultural charge, yet it constitutes a permanent barrier to enforcing the charge by usual means of a sale or the appointment of a receiver.⁵⁸ In the words of Tunde Otubu, ‘the total ban on alienation of undeveloped land in non-urban areas excludes the use of these lands as subject of security for advances for the purpose of its development’.⁵⁹

The policy if implemented, especially with regards to inability to partition such land, would create hardship in devolution of title to land at the death of a holder of such deemed grant. This provision of the Act that no land to which section 34 or 36 applies “shall be subdivided or laid out in plots” has far reaching negative implications. The prohibition, if observed to the letters, will accentuate feuds and scramble for possession of land especially among members of a land owning family or community.⁶⁰ For example, if the owner of the land has 3 children, he cannot subdivide the land among them so that each of them gets an individual plot, or in case of a family or communal land it cannot be partitioned (no matter how large it may be) among their members. This could lead to conflicts which could have been simply avoided by partitioning the land in accordance with customary law.⁶¹ This policy will also lead to the available land being unreasonably costly and hard to purchase since the prohibition of alienation of land would lead to alienable land being so scarce that those who have alienable lands to sell would offer it at very high prices.

CONCLUSION

In the light of the foregoing, it is submitted that the policy of non-alienation which was originally made to preserve land for agricultural purposes and deal with the issue of fragmentation, will

⁵⁷ LOC Chukwu, *op cit*, p. 159.

⁵⁸ Ibid.

⁵⁹ Tunde Otubu, *op cit*, p.358.

⁶⁰ LOC Chukwu, *op cit*, p. 161.

⁶¹ *Olorunfemi v Asho* (2000) NWLR (pt. 643) 143, *Balogun v Balogun* (1961) LLR 149.



if implemented to the letters, form a clog in the wheel of agricultural development for plethora of reasons. The non-alienation policy if implemented, may lead to a situation where those who may need the land for agricultural purposes or other developmental purposes would not be able to gain access to it. It will also constitute a serious impediment to the effective application of non-urban land as a security for loans. The policy if implemented, especially with regards to inability to partition such land, would create hardship in devolution of title to land at the death of a holder of such deemed grant. Hence, it will be wrong to assert that the no-alienation policy has been or will be instrumental to agricultural development.

RECOMMENDATION

In view of the foregoing, it is recommended that the absolute prohibition of transfer and partition in section 36(5) of the Act should be expunged so as to bring deemed customary rights of occupancy under the general scheme of the Act. The reason for this is that the prohibition on alienation of land subject to deemed grant makes it impossible for prospective farmers to acquire land for agricultural purposes, even for building and industrial purposes. The majority of available lands are situate in non-urban areas and if they are not alienable, agricultural development may be slowed down since farmers who want to go into commercial agriculture would not have access to land. If the prohibition is removed, the holder of a deemed grant will be able to alienate it with the consent of the governor or Local Government, as appropriate, and he can partition the land since he is lawfully using or occupying land in accordance with customary law.