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**European and International Law**



**Private Property Rights and Compulsory Acquisition Process in Nigeria: the Past, Present and Future**

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**Abstract: Objectives:** A property right is the exclusive authority to determine how a resource is used, whether that resource is owned by government or by individuals. In the context of land, it is the authority of the land owner to determine its use or otherwise. On the other hand, compulsory acquisition is the process by which government obtain land from private owners for development purposes in the best interest of the community. These diametrically opposed concepts of property rights and compulsory acquisition is reconciled with the payment of compensation for the extinguishment of private property rights. **Implications:** In Nigeria, these two concepts have a history of mutual conflicts, resulting in congruous resolutions most of the time, until the introduction of the Land Use Act 1978. With the coming of the Act, the pendulum has tilted in favors of compulsory acquisition to the detriment of private property rights; as compensation fails to assuage the loss occasioned by expropriation. **Value:** The paper explored the dichotomy between private property rights and compulsory acquisition in Nigeria in the last 50 years and submitted that the process under the Land Use Act changed the equilibrium that existed between these two concepts and produced a skewed and unfavorable result to the detriment of private property rights and National economy. It finally proposed a new equitable arrangement to the quagmire.

**Keywords:** land; property rights; compulsory acquisition; compensation; constitution

## 1. Introduction

Sustainable development requires governments to provide public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, and protection and restoration of the natural environment. A proper step in the process of providing these facilities and infrastructure is the acquisition of appropriate land.<sup>2</sup> However, land is scarce and the land may not be

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<sup>2</sup>Land Tenure Studies 10, *Compulsory acquisitions of land and compensation*. Available at <ftp://ftp.fao.org/docrep/fao/011/i0506e/i0506e00.pdf> accessed 16/04/2012.

available or on sale at the time it is required. Therefore, in order to obtain land when and where it is needed, governments have the power of compulsory acquisition of land: they can compel owners to sell their land in order for it to be used for specific purposes. The exercise of this government power necessarily brings losses to the affected individual(s), which at times go beyond the economic loss of the land and include social, religious and cultural loss (Nkosi, 2012)<sup>1</sup>. It thus requires finding the balance between the public need for land on the one hand and the provision of land tenure security and the protection of private property rights on the other hand. (Land tenure studies, 2010)

To assuage the loss, the government provides compensation to the affected person(s) which compensation is mostly inadequate. However, even when compensation is generous and procedures are generally fair and efficient, the displacement of people from established homes, businesses and communities will still entail significant human costs. It is therefore important to give imprimatur to the steps and procedure for compulsory acquisition and fundamentally to the compensation offered to the affected victims in order to provide a just and equitable governance and social justice to all.

Lately, government use of compulsory acquisition and land use control powers appears to be increasing worldwide as the desire for public facilities and supporting infrastructures and the competition for usable and livable space intensifies. The need for large, relatively undeveloped areas for agriculture and conservation often competes with the government's obligation to provide land zoned for residential purposes, commercial and industrial development, and other largely urban uses (Tsuyoshi & David, 2002, p. 3). Urbanization drives the demand for buildings and highways, rapid transit systems, and airports, but the free market does not always result in a logical and equitable distribution of land use.

In the light of the foregoing this paper sets out to examine the concepts, philosophy and rationale of compulsory acquisition of land and compensation in Nigeria from the historical perspective whilst highlighting the policy changes in the process and advocating the need for policy shift in the current legal and administrative arrangement.

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<sup>1</sup> Available at: <http://www.wcc-coe.org/wcc/what/jpc/echoes-16-05>, accessed 16/04/2012.

## 2. Conceptual Framework

Compulsory acquisition or purchase is the process by which local and national governments obtain land and premises for development purposes when they consider this to be in the best interest of the community. It is the power of government to acquire private rights in land without the willing consent of its owner or occupant in order to benefit society. The term compulsory acquisition has a number of connotations which include compulsory purchase, expropriation, land-take or eminent domain (Kakulu, 2008). In all cases the owners or occupiers are denied their property rights for overriding public interest or public benefit (Kakulu, 2009). At times, the acquisition is for direct government use for public purposes and often times for public- private use, as for example when the land is required for the direct use of a private commercial enterprise for public benefit.<sup>1</sup>

In modern times and particularly in the advanced countries, the ambit of compulsory acquisition process has widened to include regulatory taking; (Melville, 2012)<sup>2</sup> whereby governmental conduct or regulation that impacts negatively on individual property rights is seen as compulsory acquisition of property rights of the citizens (Eagle, 2005). This occurs when government regulation of private property "goes too far"<sup>3</sup> and deprives the landowner of the value of his land through enactment of a statute, promulgation of a regulation, refusal to issue a permit or declaration of land as a wetland, as endangered species habitat or as unsuitable for mining; such a taking also may be compensable. (Burcat, 2004)

When lands are acquired under compulsory powers, the acquiring authority obtains an unchallengeable title unencumbered by any existing securities, burdens or conditions. The rights of any third party in the subjects are converted into a personal right to claim compensation from the acquiring authority for loss of any heritable rights.

Thus, compulsory acquisition will arise where government without the consent of the owner *takes over the ownership*<sup>4</sup> and use of private land directly for

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<sup>1</sup>For example the requirement of land for mining and extractive purposes or where land is required for public/private partnership enterprise.

<sup>2</sup> Available at: <http://www.expropriationlaw.ca/articles/art00300.asp> accessed 25/04/2012.

<sup>3</sup> As Justice Holmes put it in *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922).

<sup>4</sup> It is this ownership take over that distinguishes compulsory acquisition from requisition which is the temporary takeover of the use and occupation of private property by the government in the interest of the general public and or for public use.

government use or for public private partnership and sometimes when government through its regulation, though not physically taking the land, but has so restricted the economic value and use of the land in the hand of private owners. (Schutt, 1996)<sup>1</sup>

### 3. Right to Property and Compulsory Acquisition

Compulsory acquisition is founded on the existence of private property rights.<sup>2</sup> The compulsory acquisition process is a confirmation and recognition of the fundamental right to private property, in that it gives a-priori recognition to private property rights. Going by the ordinary meaning of the concept, it presupposes the existence of ownership rights in other persons outside the government and the public in general. It comes into play when the government now decides to compulsorily acquire the property belonging to another for the common good of the society. This usually arises when the government needs land for government developmental purposes and the need to provide public infrastructures by itself and or through the agency of private commercial enterprise (PPP). Legal and jurisprudential justification of the compulsory acquisition process can be found in the argument that compulsory acquisition is “*balancing the needs of the few with the needs of the many*” (Marcus, 2010, p. 24).

The corollary to compulsory acquisition is compensation paid to the victim of compulsory acquisition in the form of monetary compensation or resettlement. To a large extent the law seeks to compensate the victim based on the quantum and value of his loss. The compensation paid to the affected is probably premised on the philosophy that no individual should be personally and exclusively be burdened by the need to provide for the common good of all in the society. It is thus a process of equitable redistribution of societal burden on all, since the compensation is paid from the common pool of the State.

Given the facts and position in the preceding paragraph, it is pristine to observe and submit that where there is no private ownership rights to land, there cannot be in existence compulsory acquisition process, save for circumstances where the

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<sup>1</sup> Available online at : [http://caselaw.lp.findlaw.com/data/law\\_reviews/017fsu\\_lr/241/schutt.html](http://caselaw.lp.findlaw.com/data/law_reviews/017fsu_lr/241/schutt.html) --> Accessed 24/05/2012.

<sup>2</sup>See: Section 43 Constitution of federal Republic of Nigeria 1999 cap. C23 Laws of Federation of Nigeria 2004.

interest of the holder is less than ownership; but not when it is the State that holds the reversionary interest in the land. The existence of the two concepts is mutually inclusive. The need for this clarification becomes manifest when an analysis of the current regime under the Land Use Act<sup>1</sup> is undertaken. Though a lot of academic and judicial ink has been poured on the issue as to whether the Act nationalized all land in the country or not; (Adekoya, 2003, p. 61). It is trite that private *ownership*<sup>2</sup> of land in Nigeria is now a thing of the past. Deliberately, the Act used the expression ‘revocation of right of occupancy’<sup>3</sup> instead of ‘compulsory acquisition’ because the only right vested in the individual under the Act is a mere ‘user right’ otherwise called the ‘right of occupancy’ granted by the Governor, as opposed to ownership rights hitherto existing in individuals.

The preceding fact presupposes that the ultimate ownership of and the reversionary interest in land reside in the State as encapsulated in the Governor. Not only that, it also confirms the fact that the initial grant<sup>4</sup> was from the State (the Owner) through the Governor and that when such land is subsequently taken over by the State; it is not compulsory acquisition of land *strictu sensu*, but revocation of possessory rights granted by the Governor and the resumption of ownership right by the State (Chan, 2001, pp. 136-152). This position is further reinforced by the fact that no compensation is paid for revocation of right of occupancy over vacant land, except for the rent (if any) paid by the holder of the right of occupancy for the current year.<sup>5</sup> This means that bare land without any private development/improvement thereon is seen in the eye of the law as State owned and therefore calls for no compensation when the State takes it back from the grantee. The death knell on private ownership of land in Nigeria is brought to fore by the fact that the Governor has no obligation to renew any right of occupancy on the effluxion of time of the grant, thus where the period of your grant expires the absolute ownership right of the State over the land becomes obvious (Otubu, 2010). The consequences of this position of the Act on compulsory acquisition process is grave and ominous on individual property right, State control and management of land, land conflicts and

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<sup>1</sup> Cap. 202 LFN 2004.

<sup>2</sup> The right and interest which a man has in land and chattels to the exclusion of others. It is the right to enjoy and to dispose of certain things in the most absolute manner as he pleases, provided he makes no use of them as prohibited by law.

<sup>3</sup> Section 5 Land Use Act.

<sup>4</sup> Express or Deemed Grant as stated under the Land Use Act.

<sup>5</sup> Section 29 LUA.

litigation, national growth and sustainable development in the country, as will be seen soon.

Thus, as cost follows event, compensation follows compulsory acquisition of land from the individuals by the state. Compensation in this respect is seen as recompense for deprivation of individual private property rights. This theoretical postulation probably informed the constitutional provision that guarantees that every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.<sup>1</sup> And the subsequent provision that no moveable property or any interest in an immovable property 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 in the manner and for the purposes prescribed by a law that, among other things.

The kernel of this provision is the recognition of private property right and the need to compensate the individual where such right is lost to State acquisition process. Though the constitution says ‘prompt compensation’<sup>2</sup> without reference to its adequacy or otherwise, it is however a generally accepted norm<sup>3</sup> that compensation payable goes as far as it can to put the injured party into the position he was before the State acquisition of his property right.<sup>4</sup>

#### 4. Compensation

Conceptually when private property is acquired by the State, compensation is paid not only for the actual loss of the land but also for other socio-economic losses occasioned by the act.<sup>5</sup> In fact heads of compensation includes compensation for

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<sup>1</sup> Section 43 Constitution of Federal Republic of Nigeria 1999.

<sup>2</sup> This is unlike the provision of S.31 of the 1963 Republican Constitution of Nigeria that provided for the payment of adequate compensation to the victims of compulsory acquisition.

<sup>3</sup> See: The famous English court case *Horn v Sunderland Corporation* (1941), in which Scott LJ held that a dispossessed person is entitled to compensation and to be put, “as far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a monetary payment not less than the loss imposed on him in the public interest, but, on the other [hand], no greater.”

<sup>4</sup> Notable exception is to be found in the provision of the land Use Act on compensation.

<sup>5</sup> In UK compulsory acquisition is seen as the State seeking to retain its right to recover that which it considers its own, when and wherever it is required for public purposes. In so doing, it offers compensation to the current holders by way of payment for whatever interests held in the lands taken, and some consideration for inconveniences caused, income lost or injury suffered (disturbance), and the reimbursement of expenses incurred in recovering such compensation.

the land taken, for development on the land, severance, injurious affection, (Cosburn, 2002)<sup>1</sup> disturbance, special value and damages (Umeh, 1973, pp. 39-48). The valuation of payable compensation is usually a function of the provisions of the Acts, Decrees and other relevant statutory enactments guiding the process. This framework usually specifies the basis and methods of assessment, as well as the procedures, heads of claim and roles of respective parties. It is influenced by the level of socio-economic development of particular nations; their development needs, cultural norms and land-use patterns. Also influential is the level of development of the appropriate national professional body (Viitanen & Kakulu, 2008)<sup>2</sup>. It should be noted however that valuation for compensation is not only expected to satisfy professional standards of valuation but in addition, constitutional provisions and international requirements for just, fair, adequate and equitable value must be met. (Knight, 2007)<sup>3</sup>

In the United States, the market value of the subject property is generally held as just compensation for the dispossessed landowners (Eaton, 1995, p. 42). In contrast, in the United Kingdom, compensation is based on the principle of value to the owner or the principle of equivalence. The principle of equivalence in the words of Scott LJ in *Horn v Sunderland Corporation (1941)* is “*the right of the owner to be, so far as money can do it, in the same position as if his land had not been taken from him. In other words, he gains the right to receive a money payment not less than the loss imposed on him in the public interest, but, on the other hand, no greater.*” The value to the owner compensation principle is made up of market value together with other losses suffered by the claimant. (Denyer-Green 1994) This principle is broadly followed in most Commonwealth countries and regions such as Australia (Rost & Collins, 1993) and Hong Kong. (Cruden, 1986) The heads of compensation include:

- (a) the value of the land and any buildings erected thereon at the date of acquisition;

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<sup>1</sup> Available at: [http://www.expropriationlaw.ca/articles/art02000\\_files/art02002.asp](http://www.expropriationlaw.ca/articles/art02000_files/art02002.asp) accessed 24/05/2012.

<sup>2</sup> Available at: [http://www.fig.net/pub/monthly\\_articles/february\\_2009/february\\_2009\\_viitanen\\_kakulu.html](http://www.fig.net/pub/monthly_articles/february_2009/february_2009_viitanen_kakulu.html) --> accessed 24/05/2012.

<sup>3</sup> Available at: <http://www.tkk.fi/Yksikot/Kiinteisto/FIG/pdf-files/07092007Knight> accessed 24/05/2012.

- (b) the value of any easement or other right in the land resumed, owned, held or enjoyed by a claimant at the date of acquisition;
- (c) the amount of loss or damage suffered by any claimant due to the severance of the land acquired or any building erected thereon from any other land of the claimant, or building erected thereon, contiguous or adjacent thereto;
- (d) the amount of loss or damage to a business conducted by a claimant at the date of acquisition on the land acquired or in any building erected thereon, due to the removal of the business from that land or building as a result of the acquisition;
- (e) (i) the amount of any expenses reasonably incurred by him in moving from any premises owned or occupied by him on the land acquired to, or in connection with the acquisition of, alternative land or land and buildings,<sup>1</sup> but excluding any amount to which paragraph (d) applies; (ii) the amount of any costs or remuneration reasonably incurred or paid in employing persons to act in a professional capacity in connection with such offer or claim.<sup>2</sup>

It is also customary that where there is dispute as to the quantum and or adequacy of compensation paid the law allows an aggrieved party to approach the court for the determination of the issue.<sup>3</sup> In Hong Kong, in the event that an agreement as to the amount of statutory compensation (if any) cannot be reached between the claimant and the Government, either party may submit the claim to the Lands Tribunal for a determination of the amount of the compensation. The figure awarded will then be binding on both the claimant and the Government. In the interim Government will offer to the claimant 100% of the statutory valuation assessed by the Government as a provisional payment together with interest pending the outcome of the determination by the Land Tribunal.<sup>4</sup>

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<sup>1</sup> Glasgow Corporation v. Anderson (1976) SLT 225.

<sup>2</sup> Pang L.H.C: Resumption & Valuation In Hong Kong available at: <http://www.hkis.org.hk/hkis/general/events/cpd-2012089a.pdf>, accessed 24/07/2012.

<sup>3</sup> See: section 44 of the constitution of federal republic of Nigeria 1999 (As amended); KEOGH. J.: The 'Special Value' Of Land In Compulsory Acquisition Cases. Paper Delivered At Pacific Rim Real Estate Society Seventh Annual Conference 21st – 24th January 2001 Adelaide, Australia.

<sup>4</sup> Guidelines on land resumption and compensation in Urban Area in Hong kong available at : [http://www.landsd.gov.hk/en/images/doc/ulm\\_resumption.pdf](http://www.landsd.gov.hk/en/images/doc/ulm_resumption.pdf) accessed 24/07/2012.



## **5. Compulsory Acquisition Process and Procedure**

Compulsory acquisition is a power of government, but it is also the process by which that power is exercised. Attention to the procedures of compulsory acquisition is critical if a government's exercise of this power is to be efficient, fair and legitimate. In line with the FAO studies in Land tenure, a well designed compulsory acquisition process should include the following steps: Planning, that is determining the different land options available for meeting the public need in a participatory fashion. The exact location and size of the land to be acquired is identified. Relevant data are collected. The impact of the project is assessed with the participation of the affected people. Notice of intending acquisition is published to inform owners and occupants in the designated area that the government intends to acquire their land. People are requested to submit claims for compensation for land to be acquired. The notice must describe the purpose and process, including important deadlines and the procedural rights of people. Public meetings are called to provide people with an opportunity to learn more about the project, and to express their opinions and needs for compensation.

The process should also include valuation and submission of claims by the affected parties while also permitting negotiation between the parties. Compensation for the land to be acquired is determined at the stated date of valuation. The land is valued by the acquiring agency or another government body. The acquiring agency considers the submitted claim, and offers what it believes to be appropriate compensation. Following that, the government pays people for their land or resettles them on alternate land, after which the government takes ownership and physical possession of the land for the intended purpose. Also owners and occupants are given the chance to contest the compulsory acquisition, including the decision to acquire the land, the process by which the land was acquired, and the amount of compensation offered. Lastly the process should offer opportunity for restitution of land if the purpose for which the land was used is no longer relevant. Any process or procedure falling short of the above process is likely to yield injustice and breed friction between the acquiring authority and individual property owners.

The remaining part of the paper is devoted to the examination and the review of the Nigerian scenario from pre-colonial times to the present with a view at rationalizing the process within the conceptually accepted international standard.

## 6. History of Compulsory Acquisition and Compensation in Nigeria

(a) **Pre-colonial era.** In pre-colonial Nigeria compulsory acquisition process was carried out in different communities and tribal kingdoms based on existing socio-cultural patterns and political hegemony existing in the various communities.<sup>1</sup> The right of the State to extinguish private ownership rights in land was well recognized and well documented in traditional cultures and native language expressions. The power was essentially used for establishment of public institutions like village shrines, markets and grooves. The process was also used as a punitive expropriation scheme as part of the traditional machinery for public justice.<sup>2</sup> In acquiring the property the individual affected was usually carried along and was usually convinced of the need to relinquish his land for communal use. Thus the process was devoid of disputes and or disagreement between the acquiring authority and the land owners.

During this period compensation was mostly by way of resettlement and allocation of alternative land to victims of compulsory acquisition, except when the acquisition was done in furtherance of administration of communal justice. In the later circumstance the acquisition in penal in nature and therefore devoid of any compensation. The alternative land so offered needed neither to be comparable with the land taken nor to be an adequate *quid pro quo* for it. (Umeh, 1973)

(b) **Colonial.** The inception of the colonial rule in Nigeria did not immediately terminate the customary mode of compulsory acquisition and compensation scheme; it continued for a considerable period until the full establishment of colonial rule by the British imperialist in what later became known as Nigeria. The coming British administration initially acquired land for its administration in Nigeria through a variety of ways including conquests, purchases, gifts and treaties. (Umeh, 1973)

Statutory compulsory acquisition was introduced in Nigeria in 1863, in connection with the town improvement scheme in Lagos. 1876 saw the introduction of the Public Lands Ordinance with the first general powers of acquisition in Lagos, which extended to southern Nigeria in 1906 and was made to cover the other parts

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<sup>1</sup> These includes the Town, Village, community and groups which performed functions similar to those of a modern state.

<sup>2</sup> For example where oath deities acquired lands and other assets of culprits.

in 1917. The Ordinance permitted government to compulsorily acquired land needed for public purposes and pay compensation.

In the Northern region of Nigeria the situation was much different. The incoming British administration met and inherited a monolithic tenurial system, which recognized the suzerainty of the caliphate in land administration (Atilola, 2010). It was therefore not difficult for the incoming administration to step into the shoes of the conquered Fulani's. In the words of Lugard "*the government will in future hold the rights in land which the Fulani took by conquest from the people and if the government requires land it will take it for any purpose*". (Mcdowell, 1964)

The British declared all lands in the North to be native land and put the management and control of all land under the chief executive of the region for the benefit of all the people, thus exercising the powers of trusteeship of the land in accordance with native laws and customs.<sup>1</sup> Based on the Northern Nigerian land committee report<sup>2</sup> the colonial administration promulgated the Land and Native Rights Proclamation of 1910<sup>3</sup> which was repealed and replaced with the Land and Native Rights Ordinance of 1916.<sup>4</sup> The Land Tenure Law of 1962 later replaced this Ordinance.<sup>5</sup> All these succeeding legislation were *impari* material in concept, content, scope and application.

Under the Land Tenure Law, the absolute ownership rights of the natives over land was subjugated and circumscribed to a mere right of occupancy, which is a limited right of use over land for a determinable period. This management power was so expansive to the extent, that even the limited right of use of the land is revocable by the chief executive without compensation in some cases. And where compensation was payable it was only for the improvement or development on the land and not the land itself or any other ancillary rights.

Meanwhile the Public Land Ordinance of 1917 provided for the procedure for compulsory acquisition and the payment of compensation for such land acquisition in the southern part of the country. The Act provided for the taking of preliminary

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<sup>1</sup> Section 4 of the Land Tenure Law provided that "all native lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the minister charged with responsibility for land matter and shall be held and administered for the use and common benefits of all natives" indigenous to Northern Nigeria.

<sup>2</sup> CMD 5102 of 1910. See Rindam D.D. op.cit for a detailed examination of the purpose for which the committee was established.

<sup>3</sup> No. 9 of 1910 cap 96 Laws of Northern Nigeria 1958.

<sup>4</sup> No 1 of 1916.

<sup>5</sup> Cap 59 Laws of Northern Nigeria 1963.

investigation by the acquiring authority and the consent of the land owner before any entry could be made into the land.<sup>1</sup> It also required the acquiring authority to serve a notice of intention to acquire the land on the land owner prior to the acquisition,<sup>2</sup> including a mandatory obligation to serve a notice specifying a period of not less than 6 weeks within which the land owner must yield possession of the land.<sup>3</sup> The Act also stipulated the methods and media for effective transmission of notices issued under it and required that the notices must, after being served, be published in the official gazette of the State.<sup>4</sup> To crown it all the constitution granted the land owner the right of access to court for the determination of his interest in the property and amount of compensation payable to him for the loss of his property right. Conversely, similar procedural provisions were made to guard against the acquiring authorities being deliberately or unreasonably held to ransom by the land owners.<sup>5</sup>

For all acquired land under the Act there were provisions for compensation. The heads of compensation included compensation for damages caused on entry the land for preliminary investigation,<sup>6</sup> cost and damages for consequences of the authority's withdrawal of notice of intended acquisition.<sup>7</sup> Compensation was also payable for land, estates, interest or profits taken and for land not taken in the nature of severance and injurious affection and other losses flowing from the acquisition process.<sup>8</sup> The measure of compensation payable was constitutionally stated to be 'adequate compensation'<sup>9</sup> which has been statutorily<sup>10</sup> and judicially<sup>11</sup> interpreted to be the fair market value of the land.

The compulsory acquisition and compensation process under the Act was not immutable as it was defective conceptually and administratively. There existed a

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<sup>1</sup> Section 4 (1) Public Land Ordinance of 1917. The authority must give at least a 7 days' notice to the land owner before entering the land.

<sup>2</sup> Ibid. s. 5. The notice of intention to acquire must inform the land owner of his right to make presentation of his right and/ or interest in the property to the acquiring authority within 6 weeks of receipt of the notice otherwise such land would be treated as *bona vacanti*.

<sup>3</sup> Ibid. s. 8 (1).

<sup>4</sup> s. 9 (1) & (2).

<sup>5</sup> s. 4 (1), 10, 11.

<sup>6</sup> s. 4.

<sup>7</sup> s. 18 (1).

<sup>8</sup> s. 15 (d).

<sup>9</sup> s. 31 (1)a Constitution of Federal Republic of Nigeria 1963.

<sup>10</sup> s. 15 (b) Public Land Ordinance of 1917.

<sup>11</sup> *Commissioner for Lands V Adeleye* 14 NLR 109, *Chairman L.E.D.B. V Joye* 15 NLR 50

lacuna in the series of statutory notices expected to be issued and served under the Act; whilst the Act provided for the issuance of two separate notices, only one is provided for in the schedule to the Act. In fact, the administrative officers charged with the responsibility for issuance of these notices usually used one and the same notice to serve the two separate purposes stated in the Act (Umeh, 1973). The Act did not apply to all parts of the country as its jurisdiction was confined to Southern Nigeria. Northern Nigeria was catered for by the Land and Native Rights Ordinance of 1916 and later by the 1962 Land Tenure Law whose modus operandi was diametrically different from the policy and intendment of the Public Land Ordinance of 1917.

The land Tenure Law declared all land in the North as Native Land and vested the same in the government of the region for the benefit of all Northerners.<sup>1</sup> Individuals only have a user right of a limited duration over the land in his possession. Thus when land is taken over by the government in the North it is not compulsory acquisition but State resumption of ownership and reversionary rights in the property. Compensation was thus paid only for any unexhausted improvement on the land and for inconveniences caused by their disturbance but not for the land itself.<sup>2</sup> Where the right of occupancy is revoked for penal reasons the holder gets no compensation under the law. The processes and procedure set out under the Public Land Ordinance for compulsory acquisition were not applicable under the Land Tenure law. Under the latter law, the procedure for revoking a right of occupancy was set out in subsections 5 and 6 of section 34 of the law. It merely required that the revocation shall be signified under the hand of a public officer duly authorized by the Minister and that a notice thereof shall be given to the holder of the right of occupancy upon which his title and interest in the land shall be extinguished forthwith. Service of the notice shall be effected as stated in section 45 of the law. No statutory requirement that the notice shall be published in the State gazette or that it shall contain explicit information on good cause or public purpose need of the acquired land.

(c) **Post Colonial period.** The extant legislations on the subject during the colonial period continued after independence and until the military takeover of 1966. Given the prevailing socio-economic realities of the time and the need to fast track economic development of the country while also tackling the ills of the

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<sup>1</sup> Except non Native lands governed by the provisions of the Public Land Acquisition Act.

<sup>2</sup> s. 35 (1) Land Tenure Law 1962.

society in land management, the military government, in quick succession, promulgated 3 Decrees to tackle land acquisition and compensation issues in the country; namely, the Requisition and other powers Decree<sup>1</sup>, the State lands (compensation) Decree<sup>2</sup> and the Public Land Acquisition (Miscellaneous Provisions) Decree.<sup>3</sup>

The Requisition and other powers Decree was promulgated during the emergency period of the civil war and it authorized a requisitioning authority to requisition land and other things for a definite or indefinite period of time in pursuit of public purpose within the meaning of Public Land Acquisition Act.<sup>4</sup> The law authorized the payment of compensation for the action of the State and where same is refused it directed its payment into the court.<sup>5</sup> The State lands (compensation) Decree<sup>6</sup> and the Public Land Acquisition (Miscellaneous Provisions) Decree<sup>7</sup> addressed the issue of compensation for compulsory acquisition process. The Public Land Acquisition (Miscellaneous Provisions) Decree not only addressed the lacuna and incongruous provisions in the previous law but fundamentally changed the rules governing compensation in the country. It zoned the whole country and stipulated the maximum compensation payable in each zone as stated in the schedule to the law. It established land tribunals with an exclusive jurisdiction and changed the method of compensation valuation for building and structures from open market or investment method to replacement cost valuation principle less depreciation. The Decree also introduced resettlement of displaced persons in lieu of compensation for the first time in the country.

These Decrees revolutionized the compulsory acquisition process particularly the compensation process in the country. The fundamental and iconic processes and procedure required for compulsory acquisition and compensation were distorted and consigned to the dustbin of history. In its wake a regime of draconian legislation devoid of equity and fairness was launched on the Nation by the ruling military junta, all in the quest to acquire land for the state without payment of adequate compensation and recognition of property rights and interest in land.

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<sup>1</sup> No. 39 of 1967.

<sup>2</sup> No. 38 of 1968.

<sup>3</sup> No. 4 of 1976.

<sup>4</sup> s. 10 (1) of Decree 39 of 1967.

<sup>5</sup> s. 10 & 13 of Decree 39 of 1967.

<sup>6</sup> No. 38 of 1968.

<sup>7</sup> No. 4 of 1976.

Under the Decrees both the acquisition and compensation processes were faulty. There was no provision for the service of adequate notices and no room for objection or public participation in the process. On the compensation side, many otherwise recognizable proprietary interest were ignored and not compensated, while the quantum of compensation paid were grossly inadequate. The letters and spirit of the provisions of the constitution on the subject were totally disregarded and ignored. Such was the scenario when the Land Use Act was promulgated as uniform land legislation in the country in 1978.

(d) **Land Use Act.** The promulgation of the land use act was foreshadowed by the existing scenario in land use management in the country as evident in land speculation, huge land compensation bill, land hoarding and vagaries in land tenure and management approaches in different parts of the country. The Nigerian land-use Act, promulgated on 29<sup>th</sup> March 1978, has many social, economic and political objectives. There are four main objectives derivable from the Act<sup>1</sup> and these are:

- (1) to effect structural change in the system of land tenure;
- (2) to achieve fast economic and social transformation;
- (3) to negate economic inequality caused by the appropriation of rising land values by land speculators; and
- (4) to make land available easily and cheaply, to both the government and private individual developers.

With respect to the fourth objective, the Act provided for a unique land acquisition and compensation process hitherto unknown to native land tenure system. Firstly the Act vested all lands in the state in the Governor in trust for the benefits of all Nigerians<sup>2</sup> and thereafter created a property interest in land less than ownership known as a right of occupancy<sup>3</sup>; which interest is not only of limited duration but also de-feasible under certain conditions. From the inception of Act the reversionary interest in all lands in the country became vested in the State. This policy informed the compulsory acquisition process adopted by the Act, to the extent that what the State compulsorily acquires is not the land *simpliciter*, but the unexhausted development on the land at the point of acquisition. Thus, what

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<sup>1</sup> SERAC: Implications of the Land Use Act in Lagos State available at: <http://www.serac.org/SERAC-LANDUSEACT.doc>, accessed 24/07/2012.

<sup>2</sup> s. 1 Land Use Act.

<sup>3</sup> Though the Act did not define the expression „right of occupancy” but its precursor the Land Tenure Law of Northern Nigeria defines it in section 1 as „title to the use and occupation of land....”

operates under the Act is the revocation of the right of occupancy earlier expressly or deemed granted by the State.<sup>1</sup>

The provisions of the Act on compulsory acquisition process are found in sections 28 and 29, to wit:

(1) It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest.

(2) Overriding public interest in the case of a statutory right of occupancy means (a) the alienation by the occupier by assignment, mortgage, transfer of possession, sublease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made there under; (b) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation; (c) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.

(3) Overriding public interest in the case of a customary right of occupancy means (a) the requirement of the land by the Government of the State or by a Local Government in the State in either case for public purpose within the State, or the requirement of the land by the government of the Federation for public purposes of the Federation; (b) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith; (c) the requirement of the land for the extraction of building materials; (d) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval.

(4) The Governor shall revoke a right of occupancy in the event of the issue of a notice by or on behalf of the (Head of the Federal Military Government) if such notice declares such land to be required by the Government for public purposes.

(5) The Military Government may revoke a statutory right of occupancy on the ground of (a) a breach of any of the provisions which a certificate of occupancy is by section 10 deemed to contain; (b) a breach of any term contained in the certificate of occupancy or in any special contract made under section 8; (c) a refusal or neglect to accept and pay for a certificate which was issued in evidence

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<sup>1</sup> s. 28 & 38 Land Use Act.



of a right of occupancy but has been cancelled by the Military Governor under subsection (3) of section 10.

(6) The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorised in that behalf by the Governor and notice thereof shall be given to the holder.

(7) The title of the holder of a right of occupancy shall be extinguished on receipt by him or a notice given under subsection (5) or on such later date as may be stated in the notice.

Section 29. (1) If a right of occupancy is revoked for the cause set out in paragraph (b) of subsection (2) of section 28 or (c) of subsection (3) of the same section, the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their un-exhausted improvements.

(2) If a right of occupancy is revoked for the cause set out in paragraph (c) of subsection (2) of section 28 or in paragraph (b) of subsection (3) of the same section the holder and the occupier shall be entitled to compensation under the appropriate provisions of the Mineral Act or the Mineral Oils Act or any legislation replacing the same.

(3) If the holder or the occupier entitled to compensation under this section is a community the Governor may direct that any compensation payable to it shall be paid (a) to the community; (b) to 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; (c) into some fund specified by the Governor for the purpose of being utilised or applied for the benefit of the community.

(4) Compensation under subsection (1) of this section shall be, as respects (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 improvements 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 a prescribed and determined by the appropriate officer.

(5) Where the land in respect of which a right of occupancy has been revoked forms part of a larger area the compensation payable shall be computed as in subsection (4) (a) above less a proportionate amount calculated in relation to that part of the area not affected by the revocation but of which the portion revoked forms a part and any interest payable shall be assessed and computed in like manner.

(6) Where there is any building, installation or improvement or crops on the land to which subsection (5) applies, then compensation shall be computed as specified hereunder, that is a respects (a) such land, on the basis specified in that subsection; (b) any building, installation or improvement or crops thereon (or any combination or two or all of those things) on the basis specified in that subsection and subsection (4) above, or so much of those provisions as are applicable, and any interest payable under those provisions shall be computed in like manner.

For the purposes of this section, "installation" means any mechanical apparatus set up or put in position for use or materials set up in or on land or other equipment, but excludes any fixture in or on any building.

The provision of section 28 provides for 2 variants of the power of the governor to revoke a right of occupancy; non penal revocation for overriding public interest<sup>1</sup> and penal revocation for failure of the holder to fulfill the terms of the grant one way or the other.<sup>2</sup> Revocation under the first leg will entitled the holder to compensation as provided under section 29 of the Act, while revocation under the latter regime confers no compensation on the holder under the Act. Revocation under section 28(1)-(3) must be premised on overriding public interest for its validity, while revocation under subsection (5) need not be premised on any overriding public interest but on the breach of the terms of the grant and or the provision of the Act. Revocation under subsection (4) is only expected to meet the requirement of defined 'public purposes'. Outside the provisions of section 28 of the Act, the Land Use Act also provides for revocation and/or forfeiture and expropriation of land from individuals and or communities to the State. This

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<sup>1</sup> s. 28 (2) b & c, (3) a, b & c and (4).

<sup>2</sup> s. 28 (2) a,(3) d and (5).

scenario can be found in the 1/2hectare rule<sup>1</sup> and the provision relating to non urban land not covered by the 500/5000 hectares rule. All these vagaries have consequences on land tenure, land rights and compulsory acquisition process in the country.

The Act also provides for novel procedural steps to be taken by the state to affect the revocation of right of occupancy under it. By the provision of section 28(6) of the Act, the revocation of the right of occupancy shall be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice thereof shall be given to the holder. Thereafter the title of the holder of the right of occupancy shall be extinguished on receipt of the notice and or on the effective date stated therein.<sup>2</sup> The expected notice under this provision is expected to be served personally or by prepaid postage and or pasting on the affected premises in deserving cases.<sup>3</sup>

Sequel to the preceding procedure the Governor is expected to pay compensation in line with the provisions of section 29 of the Act. Principally, compensation is premised on payment for any unexhausted improvement on the land, return of the current rent paid for the year, and in the case of building or installation, the replacement cost less depreciation and collateral advantages. The valuation is done exclusively by the appointed state official and or government appointee. As an alternative to monetary compensation the Act provides for resettlement of displaced holders of right of occupancy in alternative accommodation.

The provisions of the Act on land acquisition and its implementation conceptually breeds inequity, discord and vagaries in land administration in Nigeria. The law did not provide for uniformity in the justification for public takeover of private land and interest therein, resulting in divergent approaches to the appreciation of the subject. While some revocation merits compensation, others do not. The Act does not provide for pre- acquisition notices to be issued and or served on the affected citizens, thus engendering ambushing tactics, executive tyranny and surprise conducts on the part of the acquiring authority to the detriment of the populace. The current regime does not encourage public participation in the acquisition process; the exercise is shrouded in secrecy and devoid of any iota of transparency and public accountability; and prohibits recourse to courts for the determination of

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<sup>1</sup> s. 34 (5)(6). This section provides that no person shall have more than ½ hectare of any undeveloped land in urban area and that any land in excess of that is automatically forfeited to the state.

<sup>2</sup> s. 28 (7) Land Use Act.

<sup>3</sup> *Ibidem*.

adequacy or otherwise of the compensation payable or paid. The Act gives much discretionary powers in the Governor and state officials involved in the acquisition process particularly in relation to power of revocation and compensation payable to victims of revocation.

On the compensation plane, the valuation procedure and policy exhibits grave injustice against the victim of state revocation. Not only is there no compensation for bare undeveloped land irrespective of whatever cost incurred at acquiring the land either from the state or the community; but the valuation is done by the state without any input by the victim in terms of representation and or raising objections against the whole process. Compensation recoverable for unexhausted improvement on the land is pegged at replacement cost less depreciation, meaning that the compensation payable will be insufficient to replace the installation anew. To worsen the matter the Act did not recognize the need to pay compensation for severance, though it recognizes that there may be severance;<sup>1</sup> no compensation for injurious affection and any other incidental and collateral losses suffered by the victim of state revocation. In fact the whole process is skewed against the citizen and in favour of the state. For instance, revocation does not extinguish any accrued debt to the State in respect of the land, but where the victim opts for resettlement in lieu of compensation it extinguishes all rights and claims of the victim against the State irrespective of the value of the resettlement *vis a vis* the value of compensation otherwise payable. Unfortunately the reverse is not the case as the victim must pay the differential where the value of the resettlement is greater than the compensation otherwise payable.

The land Use Act makes separate provisions for payment of compensation in respect of compulsory and revocation of land for oil (Oil Pipelines Act, 1990) and minerals<sup>2</sup> licenses. Parties affected under these legislations are to be compensated under the relevant expropriating law affecting their proprietary rights. The compensation regime under these other legislation is better than what is offered under the provisions of the Land Use Act on the subject. Unlike the provisions of the Land Use Act, these latter legislations recognizes severance, injurious affection and other collateral losses suffered by the party as heads of compensation for the purpose assessing the amount of compensation payable to the affected person(s) and or community.

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<sup>1</sup>Ibid. s. 29 (5).

<sup>2</sup> Nigerian Minerals and Mining Act 2007.

It is gratifying to note that some of the rigours in the Act are been addressed through judicial activism and positive interpretation of the law and the constitution in this regard. For instance the issue of non issuance and service of pre acquisition notice and service of acquisition notice generally has been addressed by the courts. In *Osho V Foreign Finance and Another*<sup>1</sup>, the Supreme Court held that the notice of revocation must contain the grounds for revocation, must first be served on the holder of a right of occupancy and must give the holder an opportunity to challenge the rightfulness or otherwise of the revocation in accord with fair hearing provisions in section 33 of the 1979 constitution of federal republic of Nigeria.<sup>2</sup> Anything short of this would render the revocation invalid, *Nitel v Ogunbiyi* (1992) and it is immaterial that the purpose is obvious and the right holder is deemed to know of it.<sup>3</sup> The purport of this decision is to the effect that the revocation notice is not immutable except it affords the right holder a prior right of hearing and an opportunity to query the revocation order. This essentially is a judge made law based on precedents, though not expressly provided for in the Land Use Act.

The courts have also successfully challenged the ouster clause provision in section 47(2) of the Act. In *Kanada V Governor of Kaduna State and Another*,<sup>4</sup> the court of Appeal declared section 47(2) void for being inconsistent with the provision of section 40(1) of the 1979 constitution of the federal republic of Nigeria,<sup>5</sup> in so far as it purports to deny persons claiming compensation for compulsory acquisition of his property access to court of law or tribunal or body having jurisdiction in that part of Nigeria. The consensus of legal opinion is to the effect that the provision of section 47(2) of the Act should be expunged from the Act. (Obaseki, 1991)

Though, the courts have tried to tackle headlong the lingering issues in the compulsory acquisition process under Nigerian law, unresolved issues are still fundamentally enormous; and for now beyond the purview of courts.<sup>6</sup> There is a need for statutory intervention in form of legislative reform to address the problems.

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<sup>1</sup> (1991) 4NWLR (Pt 184) 157.

<sup>2</sup> Now section 36 of the 1999 constitution.

<sup>3</sup> *Nigeria Engineering Works Ltd V Denap Ltd* (1997) 10 NWLR (525) 481.

<sup>4</sup> (1986) 4 NWLR (Pt 35) 361.

<sup>5</sup> Now section 44 of the 1999 constitution.

<sup>6</sup> By nature court only reacts based on disputes placed before it, thus where there is no dispute place before the court and pronouncement from the court is either obiter and or an academic exercise devoid of any sanctifying authority.

There is the need for uniform and comprehensive expropriation legislation in the country that addresses all segments of compulsory acquisition issues and provides uniform compensation regime to the affected. The new law should address uniform revocation process by adopting and adapting the decision of courts in a legislative context and providing for pre-revocation notice, pre-revocation inspection, provision for claims and objection to proposed revocation,<sup>1</sup> notice of revocation and payment of compensation. It should also abolish penal revocation as it is derogation from the constitutional provision on property right since the right to compensation is a constitutional right.<sup>2</sup> The law should also provide for payment of compensation not only for unexhausted improvement on the land, but also for all other incidental and collateral injuries and losses suffered by the victim of revocation. Such heads of compensation as severance, injurious affection, cost of acquisition of the undeveloped land,<sup>3</sup> and the cost of disturbance arising from the revocation. There is also the need for the law to address the issue of assessment of compensation. The new law should move away from the assessment principle of replacement cost less depreciation to assessment based on investment principle. The latter principle is more attuned to equitable and fair compensation scheme than the former which tended to deprive the land holder the current replacement value of the improvement.

## 7. Conclusion

The paper examined compulsory acquisition process in Nigeria through historical lens and discovered that the law and practice of compulsory acquisition in the country was influenced by various factors including culture, history, economics and social exigency in which the country found itself at various stages in her evolution; not excluding the nature and type of government in power at the relevant time. It was found that the process was dictated by the extant land use policy and the prevailing tenurial system. These factors engendered divergent approaches to the issue, resulting in confusing and distorted outcomes; which gave birth to

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<sup>1</sup> This will allow for public participation in the process and provide an avenue for both the holder and the acquiring authority the opportunity to air their views on the proposed project and probably reach an amicably consensus on the issue. The process will engender and foster peaceful resolution of disputes and the evolution of participatory governance.

<sup>2</sup> S 44(1) of the Constitution of Federal Republic of Nigeria 1999.

<sup>3</sup> In Lagos State allocation of State of land is currently based on per square metre rate determined by the *lex situs*.

multiple policies and legislations on the subject, dichotomy in the revocation process and incongruous compensation arrangement, thereby abridging the property rights of the citizenry. The paper thus recommends legislative reform particularly in the area of a unified law and policy on the subject.

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