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Legal Analysis of the Right to Preservation and Protection of Land in Nigeria

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Abstract

Land is a pioneer possession given to man by God upon man's creation. It is constant, immoveable and fix. It houses the sea, trees, sources of food to man and balances ecological stand of the universe. Land remains the nucleus of human existence and represents foundation of every man's possession. Over the years, the right to preservation and protection of land by individuals has been challenged by lot of obstacles in Nigeria. The consequence of the above is that many tribes, communities, villages and individuals have been engulfed in land squabble in constant agitation for a clear legally defined protection and preservation of their rights to land in Nigeria. The motivation of this paper was borne out of the desire to carry out legal analysis of the right to preservation and protection of land in Nigeria. This paper was commenced by a review of relevant laws on the right of ownership and acquisition of land in Nigeria. This was done through doctrinal research method. At the end, it was discovered that the challenge to the right of preservation and protection of land in Nigeria rests on the lacunae in the legal regime for land administration and management in Nigeria. It was based on the above that recommendations were made to wit: amendment of the Land Use Act for the purpose of clearly defining the procedure for revocation of interest and right on land, assessment of compensation and extent of compensation that is adequate in compulsory acquisition of land, among others.

Keywords: ***land, right, legal, preservation, protection, occupancy***

1. Introduction

There is no resource or property as valuable as land as virtually all human activities, exertions and relations are carried out on land. Land is the source of all material wealth; we derive everything of value from it; we live thereon and are buried therein when we die. The availability of land is thus of incalculable value to human existence and its distribution and use are of fundamental importance.[1] The importance of land to humankind can be properly appreciated from the words of Obi when he said that: 'Land is a deity, the source of all life, of food and fertility, the custodian of social norms and morals. Both as a good and as a legal person, some form of respect and tribute is due to mother earth.'[2] Omotola, in succinct elucidation of the importance of land to humankind, enthused thus:

> *Land is the foundation of shelter, food and employment. Man lives on land during his life and upon his demise, his remains are kept in it permanently. Even where the remains are cremated, the ashes eventually settle on land. It is therefore crucial*

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[1]SR Simpson, *Land Law and Registration* (London: Cambridge University Press, 1976) p. 33,

[2]SNC Obi, *The Ibo Law of Property* (London: Butterwsorth African Law Series No. 15, 1965), p. 30, cited in SR Simpson, ibid.

> *to the existence of the individual and the society. It is indispensable from the concept of the society. Man has aptly been described as a land animal.*[3]

Land provides the physical base for all interactions for everybody, thus, even the homeless live somewhere.[4] From all of the above, it is clear that land is invaluable and a prime asset to have.

In Nigeria, the right of every citizen to acquire land anywhere in the country is a constitutional matter.[5] Flowing from the above, whenever one toils and eventually succeeds in acquiring a plot of land, it is totally natural for one to hold it dearly, after all, a man would sooner forget the death of a parent than the loss of property.[6] Nevertheless, the individual's right to acquisition of land under the Nigerian law is not absolute as it is subject to certain interests.[7] For this purpose, it becomes eminent to analysis legal basis for the preservation and protection of land in Nigeria.

The paper is set to discussing the legal basis ofthe right to preservation and protection of land in Nigeria. For this purpose, the paper shall examine the key words in the topic under discourse to *wit*: land, right, protection of interest to land among others. The paper shall draw a conclusion and make recommendations for the purpose of straightening the right to preservation and protection of land in Nigeria.

2. Land

Just like many other legal concept, the legal conception of land has always been a subject of divergent opinions among lawyers and law scholars.[8] Therefore, attempting a definition of land is no mean feat. Nevertheless, there have been some attempts by several scholars to define land.Braynoted that land has is the 'earth surface, sub soil, the air space above it, as well as things that are permanently attached to it'.[9] Olawoye defines land as including 'the surface of the earth, the subsoil and the air space above it as well as all things that are permanently attached to the soil, including streams and ponds….'.[10] Burns describes land to include 'the surface of the earth, together with all the sub-jacent and super-jacent things of a physical nature such as building, trees and minerals'.[11]

Under the Property and Conveyancing Law of Western Nigeria 1959, land was defined to include:

> *Land of any tenure, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way), and other corporeal hereditaments,*

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[3]JA Omotola, 'Law and Land Rights: Whither Nigeria?' being the text of an Inaugural Lecture delivered at the University of Lagos, June 29, 1988. See also P Z Datong, 'The Role of the State Government in the Implementation of the Land Use Act', In O Adigun (ed), *The Land Use Act Administration and Policy Implication* (Lagos: UNILAG Press, 1991), P. 64.

[4] E Essien, 'Land Use Act and Security in Real Estate in Nigeria', in I O Smith (ed), *The Land Use Act – Twenty Five Years After* (Lagos: Forlan Printers, 2003).

[5] Constitution of the Federal Republic of Nigeria (1999), Cap. C.23, Laws of the Federation of Nigeria (2010), Section 43 hereinafter called "the Constitution". See also Universal Declaration of Human Rights, Article 17 and African Charter on Human Rights, Article 14.

[6] N Machiavelli, *The Prince* (London: Penguin Books, 1963) p. 53

[7] One of the interests is the government interest under the theory of eminent domain, an inherent right of the State to acquire individuals' property for the benefit of the populace

[8] J Bray, *Unlocking Land Law* (London: Hodder& Stoughton, 2004), p.1

[9] AAUtuama, *Nigerian Law of Real Property* (Ibadan: Shaneson C.I. Ltd, 1989), p.4.

[10] CO Olawoye, *Title to Land in Nigeria* (Lagos: Evans Brothers Ltd, 1974), p. 9

[11] EH Burns, Cheshire's *Modern Law of Real Property* (12thedn, London: Butterworths, 1976) p .136.

> *also a rent and other incorporeal hereditaments and an easement, right, privilege or benefit in, over or derived from land.*[12]

A close Look at the above definitions will fairly easy to glean the fact that land is not just the physical soil or subsoil that one can see with one's eyes. It rather includes the air above it, waters such as ponds, lakes or streams on it as well as invisible rights such as easements, rents, etc. Nwabueze alluded to this reasoning when he stated as follows, 'it seems to be a consensus even among laymen that land includes not just the ground but also all structures and objects located on it'.[13]

The common law maxim, *Quid quid plantatur solo solo cedit'*[14] applies in Nigeria. It follows then that the surface, subsoil and things growing on it as well as buildings and other permanent fixtures on the land belong to the owner of the land.[15] The maxim has also been given judicial approval in our courts. Thus, in *Otogbolu v Okeluwa*,[16] the Supreme Court, relying on the above maxim, held that the structure constructed on the plaintiff's land by a trespasser belonged to the plaintiff, the plaintiff being the true owner of the land.[17]The maxim was also applied in *The Administrators/Executors of the Estate of Abacha v Eke-Spiff*.[18] In that case, the respondent's land was purportedly revoked for public interest, only for it to be re-granted to General Sani Abacha, the then Head of State. The suit challenging the wrong revocation of his land and claiming ownership of same was successful and the court held that the land as well as the property built thereon by the deceased Head of State was the plaintiff's own.

Nwabueze has however cautioned that the application of the maxim is not inflexible. According to him, the application depends on the circumstances of the case as well as any statutory enactments modifying the operation of the maxim. In his view, concrete structures such as building pass with ownership but difficulty could arise with regard to chattels or fixtures.[19] The position appears to be that the chattels become part of the land if they are actually fastened or attached to the land or a building thereon with the aim of enabling same to be used more conveniently and not merely to facilitate the more convenient use of the chattels as chattels.

A judicial guide to this issue was provided in *Holland v Hodgson*.[20] In that case, Blackburn J. espoused as follows:

> *Perhaps the true rule is that articles not attached to the land otherwise than by their own weight are not considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they have ceased to be chattels; and that, on the contrary, an article*

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[12] Section 2 thereof. This is *inparimateria* with Section 205 (i)(x) of the English Law of Property Act. (1925). Corporeal hereditaments are visible unlike incorporeal hereditaments. See Blackstone Commentaries, Vol. II, p. 17; B O Nwabueze, *Nigeria Land Law* (Enugu: Nwamife Publishers Limited, 1982), p. 11.

[13] BO Nwabueze, no. 12, p. 3

[14] Meaning, 'whatever is affixed to the land belongs to the land'. Therefore, whoever owns the land, owns everything affixed thereto.

[15] N Tobi, *Cases and Materials on Nigerian Land Law* (Lagos: Mabrochi Books, 1997) p.9.

[16] (1981) 6-7 S.C, 99

[17] *Oso v Olayioye* [1966] NMLR, 329 and *U.A.C Ltd v Apaw* [1936] 3 WACA 114 where the maxim had earlier been applied.

[18] [2009] 7 NWLR (Pt.1139) 97

[19] BO Nwabueze, no. 12, p.5

[20] (1872) L.R 7 C. P 328 at 334.

> *which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend it as a chattel.*

It is submitted that the above passage has thrown light on this dark area. Whenever things are permanently attached to the soil, they form part of it but light things affixed to the soil usually do not form part of it. In concluding this sub-chapter, it is pertinent to note that in Nigeria, the ownership of mineral deposits in or over land in Nigeria is vested in the Federal Government.[21] This has received judicial approval in *Unilife Dev. Co. Ltd v Adeshigbin.*[22]

3. Right

The conceptual underpin of the word 'right' is not easy achievable. This afore-said difficulty was captured by Holman, J. who remarked that, 'the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion.'[23]In spite of the perceived difficulty stated above, several scholars have undertaken an attempt to define the illusory concept. Thus right has been defined as 'a legally enforceable claim that another will do or not do a given act; a recognized and protected interest the violation of which is a wrong.'[24]Adaramola noted that right is 'the lawful expectation that the duty correlative to it be discharged by the person upon whom the duty rests, and in the event that it is not discharged, the power to get the right enforced through the intervention of the state or organized community.'[25] Whenever one refers to anything as an individual's right, one means that such an individual has a lawful claim on the society to protect such a right whether by force of law, education or opinion.[26] In the view of yet another scholar, rights are entitlements to do or refrain from doing certain acts or to be or refrain from being in certain conditions or entitlements that others do or refrain from doing.

A right is a composite concept which is a collection of sub-concepts, as it were. The above given definitions all state that rights are contingent upon others doing something or not doing something with regards to the holder of the right save the last definition which state that a right can exist without some form of duty on others. However, most scholars hold the view that for one to hold a right, another must owe a duty to him. In fact, it has been opined that right is a correlative of duty and therefore in the absence of duty, there can be no right.[27]

In our humble view, a right can exist without a duty and it is not necessary that there be somebody to enforce it. It can exist on its own. Thus, one has a right to dream, aspire and hope but no one has a duty to realize the dreams, aspirations or hope of the person nor is there any authority which has the duty of ensuring the realization of same.

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[21]Petroleum Act, Cap. P10, Section 1,Laws of the Federation of Nigeria (LFN), 2004;CFRN, S. 44(3)
[22][2001] 4 NWLR (Pt. 704) 609 at 625.
[23]*American Bank & Trust Co. v Federal Reserve Bank of Atlanta* 256 US 350, 358, 41 S. Ct. 499,500 (1921)
[24]B A Garner, *Black's Law Dictionary* (7thedn, Minnesota: West Group, 1999) p. 1322.
[25]F Adaramola, *Jurisprudence* (4thedn, London: Lexis NexisButterworths 2008) p. 143.
[26]TI Adedayo & KO Mohammed-Lawal, *art cit*, p. 171.
[27]JC Gray, *The Nature and Sources of the Law* (2ndedn, USA: Quid Pro LLC, 1921) pp. 8-9; cited in BA Garner, no. 24.

In order to illustrate the meaning and nature of a right comprehensively, we proceed hereunder to consider two areas: (a) A description of the internal composition of rights (Form of Rights), and (b) A description of the role of rights (Function of Rights).

A. Form of Rights

There are four fundamental elements of rights, referred to as the 'Hohfeldian incidents' named after the great American Legal thinker who advanced the theories on the said elements, Wesley Hohfeld.[28] They are: privilege, claim, power and immunity.[29]

i. Privilege

Privilege is the component of right which manifests when the right holder has the liberty to do or not do a particular thing. Thus, while the right holder is entitled to do that thing, he has the discretion to do or refrain from doing it so that in the event he decides not to do it, he would not be contravening any duty. An example is, you have a right to pick up a coin you find on the sand. This is a privilege. You have no duty to pick it up but you are entitled to pick it up. If you decide not to pick it up, you have not failed to keep any duty. However, in the above example, no one has a duty to make sure you pick up the coin. It is entirely at your disposal and there are no repercussions whether you pick it up or not.[30]

ii. Claim

Claim is the component of a right which manifests when a right holder is owed a duty by some other person (called a duty bearer), who is under obligation to render that duty. It correlates to duty because in order for it to exist, some other person must owe the right holder a duty. This is the component of right that is sometimes called 'True Right'. It is also the aspect of right that was considered in the definitions earlier considered.

Gray would have been right if he had circumscribed his view that right does not exist without duty, to this particular aspect of right. An example is that a contract between a solicitor and his client confers on the solicitor a right to be paid his legal fees. This is a claim. For the solicitor to have a claim with regard to the client paying him legal fees, the client must have a duty to the solicitor to pay those fees. Thus, if the duty bearer fails to carry out his duty, there would be consequences.[31]

iii. Power

Power is the component of right which enables the right holder impose a duty on a person who hitherto did not have that duty and simultaneously, curtail a privilege which that other person hitherto had. As an example, a General has the power to order his troops to fire at the enemy. This is a power. The General's exercise of the power imposes a new duty on the troops (the duty to fire) and curtails a privilege (the privilege not to fire).

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[28]For a detailed examination of his work, see, W. N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* , 1917 Faculty Scholarship Series, Paper 4378, available at http://digitalcommons.law.yale.edu/fss_papers/4378; accessed on 19th August 2018

[29] Ibid, Seealso L Wener, *artcit* and F Adaramola, no 25.

[30] L Wenar, *op cit* and W.N Hohfeld, no. 28

[31]Ibid

From the above, it can be seen that power correlates to duty and privilege. It has the effect of altering another person's incidents. In the event of that person failing to do the imposed duty or going ahead to observe the curtailed privilege, there would be consequences.[32]

iv. **Immunity**

Immunity is the component of right which prevents another person from imposing a duty on the right holder or from curtailing the right holder's privilege. Whereas power enables one to alter another's incident, immunity prevents people from altering one's incidents. An example is that a son generally lacks the power to order his father. The afore-said right of his father is immunity. Here, the son lacks the power to alter his father's incidents.[33]

The four incidents examined above have been elucidated in captions of opposites and correlatives in order to explain them better.[34] Certain terms have been added to further this aim.

a. **Opposites**

i) If A has a claim, then A lacks a No-claim.

ii) If A has a privilege, then A lacks a Duty.

iii) If A has a Power, then A lacks a Disability.

iv) If A has Immunity, then A lacks a Liability.

b. Correlatives

i) If A has a claim, then some person has a Duty.

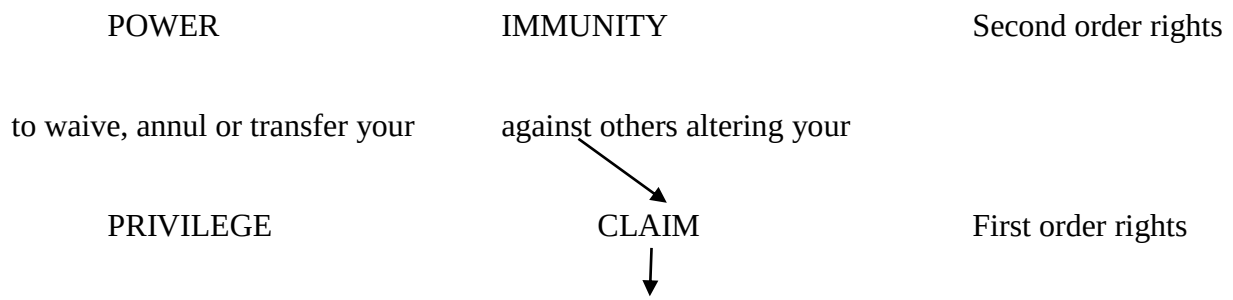
ii) If A has a privilege, then some person has a No-claim.

iii) If A has a Power, then some person has a Liability.

iv) If A has immunity, then some person has a Disability.

c. Molecular Structure of a Property Right

Each of the four afore-explained incidents all form a complex relationship referred to as a molecular structure of rights. Consider the following diagram regarding the rights over a computer.[35]



[32]Ibid.
[33]Ibid.
[34]Adapted from L Wenar, no. 29.
[35]Adapted from L Wenar, *art cit*.

to use/not use the computer against others over the computer

The first rights are directly over the computer while the second order rights relate to the ability to alter/change the first order rights.

From the diagram, the following are evident:

The computer owner can exercise his claims in respect of the computer against others.

i) He can exercise power with respect to the claim by waiving, annulling or transferring the claim.
ii) His immunity prevents others from altering his claim over his computer.
iii) His privilege entitles him to use or decide not to use the computer at anytime.

There are however some restrictions. Since most rights are qualified,[36] this is hardly surprising. Thus, despite the abundance of rights above described, the owner cannot legally use his computer to commit a crime nor can his immunity prevent the authorities from expropriating or laying a higher claim over the computer in the appropriate circumstances.[37]

B. The Function of Rights

This relates to the benefits of rights to those who hold them. There are two major theories of the function of rights. They are:

i) The Will theory
ii) The Interest Theory.[38]

Will theorists hold the view that a right gives its holder control over others and imposes duty over others. Thus, a right here makes the holder a 'sovereign' over others. In the afore-said example of the computer, this empowers the right holder to control the actions of others with regards to the computer.

Interest theories, on the other hand, are of the view that the function of a right is to further the interests of the right holder. Thus, a right here does not necessarily entail exerting control over others, but in the main, has the function of benefiting the right holder. In our view, there is no reason why the theories cannot be married. Nevertheless, we submit that, the interest theory is to be preferred over the will theory for the following reasons:

i) Having a right over a property is always aimed at benefiting the right holder. One does not generally acquire what one has no need of.
ii) While in many cases one's right over a property circumscribes the rights of others over that property, this is not always the case.
iii) Even where one controls the actions of others, the fact that one possesses that power of control, is ultimately beneficial to that person.

[36]Holmes, J. in *American Bank and Trust Co. v Federal Reserve Bank of Atlanta, (Supra).*
[37]This shows that the right is not absolute.
[38]Wenar, *art cit.*

From the above, one can discern the nature of a right. A right is a composite concept which comprises the following different aspects:

i) Claim over others with respect to the subject of the right.
ii) Privilege over the subject of the right.
iii) Immunity from others with respect to the subject of the right.
iv) Power over others with respect to the subject of the right.

4. Right to Land

First and foremost, all the points made in the preceding subhead apply here *mutatis mutandis*. This is because right to land is inextricably linked to the concept of right as a whole as it is just specie of right. Therefore, right to land is encapsulated in the Nature of right. Be that as it may, land rights is defined by Nadi as the inalienable capacity of persons to freely obtain, possess and make use of land at their discretion provided their activities on the land do not infringe the rights of others.[39] The above definition is a good one. It brings out the following essential points:

i) Right to land gives the right holder an entitlement that is backed by law.
ii) It includes ownership as well as possession.
iii) The right holder exercises his/her privileges over the land at his/her discretion.
iv) Others have the duty not to infringe on the right holder's right over his land.
v) The right holder also may not infringe on the rights of others.

The only point not covered in the definition relates to the right of eminent domain by the state or authorities over the land. The various categories of rights and interests over land as well as the meaning and nature of land were also captured in the Hohfeldian incidents. For instance, the afore-given example relating to rights over computer is the same with rights over land. Thus, a land owner can exercise power with respect to his claim by waiving, annulling or transferring the claim. His immunity with respect thereto prevents others from altering his claim thereto. His privilege with respect to the land entitles him to use his land in whatever manner he wants provided it is not illegal or against public policy. Finally, his right is not absolute because it is circumscribed by the rights of others, e.g. those of owners of adjourning lands as well as the right of the State or authorities to expropriate same in deserving cases.

It is therefore the submission of this paper that the right to land is a composite right which contains the Hohfeldian incidents of power, claim, privilege and immunity. The relationship among these incidents and the manner in which the land holder utilizes same illustrate vividly the nature of right to land.

5. Protection and Preservation of Rights and Interests in Land in Nigeria

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 or

[39]D Nadi, 'Critical Mass Representation in Uganda' (2009), 1-38; available at <https://www.google.com/url?sa=t&source=web&cd=17&ved=0ahUKEwj7puHp_IPVAhUHmbQKHRxvBw0QFgh9MBA&url=http%3A%2F%2Fdigitalcollections.sit.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1674%26context%3Disp_collection&usg=AFQjCNH6yvAX-xdk7L2Tig_1uPqt_WUdNQ> last accessed on 12/07/2017.

right of the land owner to determine its use or otherwise.[40] This right is expressed through use, control and transfer in many ways among which are right to use land, right to exclude unauthorized people from using the land, right to control how land will be used, right to derive income from the land, right to protection from illegal expropriation of the land, right to transmit the rights to the land to one's successor, right to alienate all rights to the entire holding, right of indirect economic gain.[41]

The Constitution of the Federal Republic of Nigeria[42] in Sections 43 and 44 respectively, makes adequate provisions for the right to acquire and own immovable properties and protection of property rights. Accordingly, Section 43provides that 'Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria. Section 44(1) provides thus:

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

In view of the foregoing provisions, it is safe to assert that the Constitution makes adequate provision for the protection and preservation of land rights in respective of whether the holder of the right is deemed and statutorily granted by the government. Thus Chigbo argued that it is trite that the security of interest acquired by a purchaser or an owner of land is no doubt a corollary of ownership of real property just as possession is said to be an incident of ownership.[43] The implication being that such rights cannot be compulsorily acquired without prompt and adequate compensation.

The power of the government to acquire and hold land for the purpose of their respective functions is predicated upon firstly, the doctrine that the power is incidental to the existence of the government and to the discharge of their duties;[44] and secondly, on the postulations of the sociological school of thought to the effect that the government exists to 'make the good of existence and means of satisfying claims go round, as far as possible, with the least friction and waste.'[45] The power of compulsory acquisition is thus an inherent and unquestionable power of

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[40]A Otubu, 'Private Property Rights and Compulsory Acquisition Process in Nigeria: the Past, Present and Future' (2012) *Act aUniversitatis Danubius Vol. 8, No. 3*, p 102

[41]A Kenneth, OG Amasiatu& OU Onuoha, Land Rights Characteristics and access to Land: Implications on Food Security in Nigeria (2010) *Journal of Environmental Issues and Agriculture in Developing Countries, Volume 2 Nos. 2 & 3*, p. 150; S Onwuchekwa, *Land Ownership and Conflict in Nigeria* (Umuahia: Kab Publicity, 1999).

[42]Cap C23 LFN 2004.

[43]CC Chigbo, The Nature of Land Ownership and the Protection of the Purchaser (2013) *AfeBabalola University: Journal of Sustainable Development Law and Policy Vol. 1 Iss, 1* pp. 1-20; Clement E A Taiwo, *The Nigerian Land Law*,(Ibadan: Ababa Press, 2011) p.16. See also *Agheghen v Wighareghor* [1974] 1 S C 1; *Orhu v GogoAbite* [2010] 8 NWLR (Pt. 1196) 307 at 324; *Da Costa v Ikomi* [1968] 1 All N L R 394.

[44]B O Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (London: Sweet & Maxwell, 1983) p.153.

[45] D L Lloyds & M D A Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 1994) p.

governments all over the world.[46] Though expropriation is not illegal *per se*, as it is beyond doubt that the State has a right and the power to expropriate the property of nationals and even of foreigners; in principle, the process by which it is done may be illegal.[47] An expropriation, in order to be legal, must be in the public interest, no-discriminatory, must take place under the due process of law and against prompt adequate and effective compensation.[48]

It is not in doubt that the general effect of the Land Use Act on title to land is to vest abstract title and control title over land within the territory of each state upon the Governor of the state whilst preserving the title of the Federal Government and its agencies[49] over limited areas of land belonging to the Federal Government.[50] The absolute forms of ownership that existed before the introduction of the Act became extinguished and became vested in the Governor of the state.[51] In a loose sense, the Governor became the 'land owner' or 'landlord' with power to grant rights of occupancy to citizens. In the exercise of the Governor's power over land, due process must not be bypassed and the compensation of the person in possession is sacrosanct.

6. Revocation of Right of Occupancy

Revocation entails the process by which an authority puts an end to an individual's interest. The Land Use Act provides that a right of occupancy may be revoked by the Governor for overriding public interest.[52] Umezulike acknowledges that revocation under the Land Use Act may either be for incidence of tenure or incidence of sovereign power.[53] According to him revocation for incidence of tenure may occur where any of the conditions stipulated in the Certificate of Occupancy is breached or where alienation is made without the Governor's consent. Revocation for incidence of sovereign power arises where the reason for revocation is for public purpose under Section 28 of the Act.[54] Accordingly, where revocation occurs in the former, no compensation is payable but in the latter, compensation is payable.[55]

524; H Morris 'Dean Pound's Jurisprudence' in R S Summers (ed), *More Essays in legal philosophy* (California: University of California Press, 1971); R Pound, *Jurisprudence* (St Paul Minnesota: West Publishing Company, 1959) pp. 133-135; J Marcus, *Law of Compulsory Acquisition* (UK: Law Book Co; 2010) p. 24.

[46]For example the Public Lands Acquisition Ordinance 1876 of the Gold Coast; Indian Lands Acquisition Act of 1894. See also M Ndulo, *Law in Zambia;* (Zambia: East African Publishing house, 1984) 247.

[47]United Nations Conference on Trade And Development Series (2000) <https://www.google.com/url?q=http://unctad.org/en/docs/psiteiitd15.en.pdf&sa=U&ved=0ahUKEwjgNCK4cjLAhUiCZoKHZEyBp0QFgPMAE&sig2=LjsrYw9vXWH-MjxSKpQrjg&usg=AFQjCNFsgY1tR51fiJMNPWmdPiDUTV-Mkw> accessed on 16/03/2016.

[48]Ibid.

[49] Land Use Act, Section 48.

[50]IO Smith 'Title to Land in the Former Federal Capital Territory of Lagos upon Creation of Lagos State: Matters Arising' (2004) vol. *25 JPPL*, 21.

[51]*Nkwocha v Governor of Anambra State* [1984] 6 SC 362. *Savannah Bank v Ajilo* [1989] 1 NWLR (Pt. 97) p.305.

[52]Land Use Act s. 28(1); *C.S.S Bookshops v Registered Trustees of Muslim Community in Rivers State*[2006] 11 NWLR (Pt. 991) 561

[53]IA Umezulike, *ABC of Contemporary Land Law in Nigeria, op cit,* p. 205. See also R W James, *op it,* p. 140

[54]Ibid.

[55]Ibid

Nelson opined that there are two mode of revocation under the Land Use Act to *wit*: the express mode in Section 28 and the implied mode in Section 5(2).[56] According to learned author, the former manifests when the Governor out rightly revokes a person's right of occupancy while the latter arises when the Governor grants a right of occupancy to another person who is not the occupant. The author noted that Section 5(2) provides that upon the grant of a statutory right of occupancy to a person, all existing rights to the use and occupation of the land which is the subject thereof shall be extinguished. If the proposition of Nelson is taken into account, it means that by the provision of Section 5 of the Act that every holder of a right of occupancy has no security since the Governor need not go through the elaborate procedure spelt out under the Act for the purpose of the revocation but may merely grant or re-grant a right of occupancy in respect of same land to someone else. The above provision, with respect, is misconceived and unsupportable. Revocation cannot be implied; it must be express and must follow the stipulated procedure under the Act.[57]

Chianu noted that since the weak are perpetually at the frontline of suffering, they must be protected by the courts against the improper exercise of power by the government.[58] in*Ononuju v A G Anambra State*, the Supreme Court held that compulsory acquisition of land must follow due process particularly where such acquisition involves the erosion of people's rights.[59]*Adole v Gwar*, the Supreme Court held that Notice of Revocation and service of such notice are fundamental requirements for a valid revocation[60] and any mode used for the service of revocation notice must comply with the provisions of the Act or else the Notice would be void.[61] The purpose for which the land is required must be stated.[62] Oludayo argued that where a land acquired for a certain purpose (public purpose) is not eventually utilized for that purpose, it must revert to the original owner.[63] This is because the law prescribes that before a person's right can be taken away, he must be given fair hearing[64]

In *Ibrahim v Mohammed*,[65] Umaru Atu Kalgo, JSC stated *inter alia*, as follows

> *It is not the intendment or the intention of the Act that the Governor shall use his powers to grant the land arbitrarily without regard to the existing ownership or holdings granted before the operation of the Act. Furthermore, the Act itself provides some checks and balances which must be observed before making any grant, the conditions under which such grants can be revoked and what follows after such revocation. It provides under Section 28 that the Governor can only revoke a right of occupancy for overriding public interest, which has been defined both in respect of statutory and customary rights of occupancy. If such powers of revocation are to be exercised, the holder of the right of occupancy must be notified*

[56] D Nelson, 'An Examination of the Right to Compensation for Compulsory Acquisition of Land in Nigeria' (2015) vol. 6 No. 3 *GRBPL*, p. 39

[57]*Nigerian Engineering Works Ltd v Denap Ltd* [2001] 18 NWLR (Pt. 746) 726

[58] E Chianu, 'Land Use Act and Individual Land Rights', in IO Smith (ed), *The Land Use Act-Twenty Five Years After*, (Lagos: Forlan Printers, 2003) p. 139

[59][1998] 11 NWLR (Pt. 573) 304*; Seleh v Monguno*[2006] 15 NWLR (Pt. 1001) 26

[60] [2008] 11 NWLR (Pt. 1099) 562

[61]*Osho v Foreign Finance Corporation (Supra)*

[62]*Osho v Foreign Finance Corporation (Supra)*

[63]AG Oludayo, *op cit*, p. 262, See also *Ajibulu v Lawson*[1997] 6 NWLR (Pt. 507) 19; *Olatunji v Military Governor Oyo State* [1995] 5 NWLR (Pt. 397) 385

[64]Section 36(5) of the Constitution. This would include revoking a right of occupancy.

[65](2003) 17 WRN I;*Olohunde v Adeyoju* [2000] All FWLR (Pt. 24) 1355.

> *in advance. Revocation of a right of occupancy for public purpose or in the public does not include the revocation of the right of a grantee for the purpose of vesting it in another. Therefore, since revocation of the grant involves the deprivation of the proprietary right and obligations of a grantee, all the terms and conditions laid down by the Act must be strictly adhered to and complied with….*

The bottom line is that where in the exercise of the Governor's power to revocation a right of occupancy vested in any individual, the Governor must following the laid procedure and purpose of the revocation must be in accordance with the law otherwise, such revocation will be unlawful.

7. Challenges to the Preservation and Protection of Land Rights under the Nigerian law

The right to preservation and protection of land in Nigeria are challenged by certain lacunae under the Nigerian law. For instance, Section 315 (5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) makes the Land Use Act 1978 an existing law. The implication of the above provision is that Land Use Act cannot be amended without fulfilling the Constitution requirement as enshrined in Section 9(2) of the Constitution. For this purpose, for the Land Use Act to be amended, it will require the two-third support of the Houses of Assembly in the 36 States of the Federation.

Outside the Constitutional provision above, there certain sections of the Land Use Act 1978 that have militated against the protection and preservation of rights to land in Nigeria. Examples are: Section 1 of the Land Use Act which vests ownership of all in the State in the State Governor. The section needs to be re-crafted to making the wordings clearer by making the Governor of a State a legal trustee of all the lands in the State and to administer same in good faith and for the benefit of Nigerians, the beneficiaries. Section 5(2) of the Land Use Act provides that upon the grant of a statutory right of occupancy under Section 5(1) of the Act, all existing rights to the use and occupation of the land which is the subject of the statutory right of occupancy shall be extinguished. By the provision of the subsection is clear that once the Governor grants statutory rights of occupancy over a land to a person, all rights, whether legal or equitable, titular or possessory, legitimate or otherwise, are extinguished and revoked. In our view, the above provision is misconceived, unsupportable and unfortunate. Where a person has a rightful interest over a land, for instance, via inheritance, would the grant of statutory right of occupancy over his land not infringe his rights? Clearly, it would. We submit that revocation under the Act must be express and follow the stipulated procedure under the Act. Happily, the Supreme Court has subsequently retraced its step in a latter decision and echoed our above view.[66] Moreover, it has also held that where another person other than the grantee has a better title, the Court would void the latter grant.[67] The Governor's power to grant right of occupancy to people is not absolute. Where a person is already in ownership of a land, the Governor cannot grant right of occupancy over same to another. After all, *quiprior est tempore, portiorest jure*! Notwithstanding the position now taken by the Supreme Court, the Judiciary is not the arm of government primarily tasked with lawmaking so it is imperative that the National Assembly repeal this section. As it presently stands, that section seriously works injustice on the land rights of people in this country and must be rooted out completely from the Act.

[66] *Nigerian Engineering Works Ltd v Denap Ltd* (2001) 18 NWLR (Pt. 746) 726
[67] *Oniyale v Macaulay* [2009] 7 NWLR (Pt. 1141) 597

Section 6(5) of the Land Use Act provides that people whose interests are revoked under Section 6(3) of the Act shall be entitled to compensation for their unexhausted improvements. We appreciate the fact that one of the aims of the Act is to discourage land speculation which makes for a situation where some people acquire lands and not develop them in a bid for the prices to escalate while others in genuine need of land have no land. However, it is also pertinent to note that many people actually use their life savings to purchase land in order to build a house. We therefore recommend that compensation should be paid both for the land itself as well as for the unexhausted improvements[68]. Naturally, a person who has not developed his/her land should be paid less than one who has developed his/hers. We recommend amendment of this subsection to this effect that compensation of the land itself be paid and calculated on the basis of the value of the land at the time of revocation. In a similar vein, Section 9(3) of the Land Use Act provides that where the person in whose name a certificate of occupancy is issued, without lawful excuse, refuses or neglects to accept and pay for the certificate, the Governor may cancel the certificate or if the statutory right of occupancy is granted under Section 9(1)(a), revoke the statutory right of occupancy. This section is clearly unnecessary. Where a person refuses or neglects to accept and pay for the certificate, he/she should be penalized or fined. Cancelling the certificate or revoking the statutory right of occupancy is going too far. The expression, "lawful excuse" is not defined in the Act and may well be abused. In any case, we reiterate our point earlier made that revocation can only be done under the Act following the stipulated procedure. The subsection should be amended to read as follows, 'if the person in whose name a certificate of occupancy is issued, refuses or neglects to accept and pay for same within 3 months after the issuance, he/she shall pay the penalty of N200 per day until he/she accepts and pays for it.'

This is an era of substantial justice and there may be legitimate reasons for the lateness in acceptance and payment. In any case, certificate of occupancy is evidence of grant so non-issuance of it does not derogate from the grant. We submit that the Act be amended as recommended above in order to protect the interests of the populace.

Other challenges include Section 19(5) of the Land Use Act which provides for imposition of penal rent for breach of a covenant in the certificate of occupancy and the Governor may still go ahead to revoke the statutory right of occupancy. We submit that revocation as a punishment here is too much. Payment of penal rent is enough. Section 27 of the Land Use Act which empowers the Governor to accept, on such terms as he deems fit, the surrender of any statutory right of occupancy granted under the Act. This section is misconceived. Why exactly should a holder surrender his right of occupancy? Is surrender here a variant of revocation? On what terms can the Governor request it? It is not enough for the Governor to contrive any term and act on it. We submit that this section is unjustified and would lead to arbitrariness by the Governor and does not augur well for the right holder. Thus, the Governor can just ask a holder to surrender his right of occupancy. With respect, the Governor, after granting one a right of occupancy cannot withdraw it. He can only revoke it in compliance with the Act. We see no merit in this provision and recommend that it be repealed. Section 28(1) of the Land Use Act which empowers the Governor to revoke a right of occupancy for overriding public interest should be amended to add the following phrase, 'provided that where the land is not used for the purpose, it should revert to the holder.' This would reduce

[68]Article 1, Section 16 Constitution of the State of Washington (2014)

arbitrary use of this power. If a person's right is revoked for a public purpose, it must be used for that purpose; otherwise, it should revert to the owner.

Section 28(4) of the Land Use Act which empowers the Governor to revoke a right of occupancy if the president declares the subject of same to be required for public purposes without providing for a caveat of what should happen if such a land was no longer used for the purpose of which it was revoked. Revoking a right of occupancy for a breach of a condition or term in the certificate of occupancy or for refusal/neglect to accept and pay for a certificate issued in evidence of a right of occupancy as provided in Section 28(5) of the Land Use Act is too severe a punishment. The above defaults can be better punished through payment of penalties. Revocation should not be made for defaults. We therefore recommend the repealing of this provision. Under Section 28(6) of the Land Use Act, it is suggested that a proviso should be added to the effect that prior to the notice containing the revocation, a notice shall be issued to the holder informing him of the intention of the Governor to revoke his right of occupancy and inviting him to make representations before the Land Use and Allocation Committee either personally or through a legal practitioner chosen by him and that the Committee shall afford him fair hearing and any decision thereby reached would be subject to appeal.[69] This entrenches fair hearing as provided by the Constitution[70] and prevents the notice foisting on the holder, a *fait accompli*. Section 28(7) of the Land Use Act should be re-jigged to provide that where the holder accepts the decision of the Committee or at the determination of the appeal if he appeals against the decision of the appeal and his appeal is unsuccessful, a Notice communicating such decision of the Committee or court, as the case may be, shall, on receipt by him, extinguish his right of occupancy.

Section 29(1) of the Land Use Act provides for compensation for unexhausted improvements of the land provided that in lieu of compensation for the land, the holder may be given alternative land. We submit that compensation should not be for only improvements. What if a person buys land today and the Governor seeks to revoke it tomorrow, should the person not have a remedy? It is equitable that the holder be compensated for the land even if it is undeveloped. If it is developed, he should be paid for the improvements as well as the land. Section 30 of the Land Use Act provides that if any dispute arises in connection with the amount of compensation under Section 29, it should be referred to the appropriate Land Use and Allocation Committee. We suggest an addition to the effect that after the Committee gives its verdict, if the person is still dissatisfied, he/she may appeal to a court of law.[71] Section 46(1) of the Land Use Act empowers the National Council of States to make regulations for the purpose of actualizing the purpose of the Act. In our view, the National Council of States is not the best body to carry out this function. Since they are not elected, they cannot be said to be the representatives of the people and may not have their interests at heart. Again, they sit irregularly.

Section 47(1) of the Land Use Act provides that the Act shall be operative even if it assails against any rule of law, including the Constitution. This section further deprives Courts of the jurisdiction to inquire into the issue of the vesting of lands in the Governor, the right of the Governor to grant a statutory right of occupancy and the right of a Local Government to grant a customary right of

[69]Revised Code of Washington (2014) Title 8, Chapter 4, Section 20

[70] Section 36(1) thereof

[71]Compulsory Purchase and Compensation: Compensation to Business Owners and Occupiers Booklet 2' Being A Booklet done under the Auspices of the office of the Deputy Prime Minister, London in October 2004, Reprinted June 2008, p. 16

occupancy. There is no arguing the fact that this provision is unfortunate, misconceived and unjustifiable. Section 47(2) of the Land Use Act also watered down the courts of jurisdiction from inquiring into the issue of adequacy of compensation. This is an infringement upon the rights of land holders to ventilate their grievances before the court of law.

8. Conclusion and Recommendations

We set out in this work to make a critical analysis of the law on the protection and preservation of right to land in Nigeria. Our findings show that the *lacunae* in the Land Use Act as the principal legislation on land management and administration have militated against the right of ownership of land in Nigeria. The Act, in order to fulfill its mission and cater for the needs and aspirations of the people, must be dynamic. It must be amended from time to time to reflect the changes in the society. In spite of the real and perceived anomalies in the Act and in the current legal framework for the protection of land rights, it is not too late to start. The time is now! An overhauling and re-jigging of the Act will lead to a better land administration and entrench lucidity in the land jurisprudence of Nigeria, making it a system fit for the modern era.

Flowing from the above, it is recommended thatsince the Land Use Act has never been amended since its enactment in 1978, it is therefore necessary to, as a matter of urgency, overhaul the Act. Enactments need to be revisited periodically to ensure that they are still requisite to serve the populace who are the beneficiaries of the enactments. Just like decisions of courts, which if found to be outdated, are overruled, certain provisions of the Act which serve no good purpose ought to be amended or repealed. The following Section of the Land Use Act as earlier pointed out in this work require amendments. They are Sections 1, 5(2), 6(5), 9(3), 19(5), 27, 28, 29(1), 30, 46(1) and 47(1)(2). It is hoped that if these sections are amended, the right to preservation and protection of land in Nigeria will be adequately protected.

Outside the above provisions of Land Use Act, it is also recommended that Section 9 (2) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which requires two-third majority votes in favour of all the 36 Houses of Assembly in the 36 States of the Federation before the Land Use Act can be amended should be amended by virtue of same being existing law under Section 315(5) of the Constitution be amended to delete Land Use Act under the list of existing laws. It is clear that no progress in the Nigerian land jurisprudence can be made if Section 315(5) of the Constitution is not repealed. This is because the provisions of the Constitution cannot invalidate those of the Act however erroneous the latter may be. Again, the provisions of the Act apply just like the provisions of the Constitution and are thus, of a higher cadre than other Acts except the other three Acts listed in Section 315(5) of the Constitution. Furthermore, Section 315(5) of the Constitution provides that the Act can only be amended in accordance with Section 9(2) of the Constitution.

It is the conclusion of this paper that if the above amendment can be effect on the Constitution and the Land Use Act, the right to preservation and protection of land in Nigeria will be a reality.