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P Ehi Oshio

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THE INDIGENOUS LAND TENURE AND NATIONALIZATION OF LAND IN NIGERIA

P. EHI OSHIO*

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I. INTRODUCTION

A little over a decade has passed since the Nigerian Land Use Act of 1978 nationalized land and introduced a uniform rights of occupancy system in Nigeria.¹ The true implication of a uniform rights of occupancy system for the indigenous land tenure system has not been fully articulated by lawyers, grasped by the courts, or appreciated by laymen. This is evident from the conflicting decisions

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¹ In *Nkwocha v. The Governor of Anambra State*, 1 Supreme Court of Nigeria Law Reports [hereinafter Sup. Ct. Nig. L. Rep.] 634, 652 (1984), Eso, J.S.C., declared that "... the tenor of the [Land Use] Act as a single piece of legislation, is the nationalisation of all lands in the country by the vesting of its ownership in the state leaving the private individual with an interest in land which is a mere right of occupancy . . ." A debate follows. See J.A. Omotola, *Does the Land Use Act Expropriate?* 3 J. PRIVATE & PROP. L. 1 (1985); I.A. Umezulike, *Does the Land Use Act Expropriate? — Another View*, 5 J. PRIVATE & PROP. L. 61 (1986). It seems, however, that nationalization of land in Nigeria is one *sui generis*, and furthers the preservation of existing interests.

of courts,² controversial commentaries of learned writers,³ and the continuous alienation of land by laymen in complete disregard of the rights of occupancy system. On the part of the "legal minds," the lack of sufficient understanding is exacerbated by the adoption of a doctrinal approach instead of attempting to analyze and critically appraise the pre-existing system so to fully appreciate the implication of its interaction with the rights of occupancy system.

This article adopts the latter approach. Commencing with an analysis and appraisal of the pre-existing tenures, the article proceeds to examine the pitfalls in these tenures and the need for a new land policy. The interaction of the new rights of occupancy system with the indigenous tenure system is also discussed. The article concludes with suggestions for reform of the present system.

II. PRE-EXISTING TENURES

Prior to the introduction of a uniform rights of occupancy system, Nigeria operated a plural system of land tenure. There were basically four systems: tenure under the received English law,⁴ tenure under the State Land Laws,⁵ tenure under the Land Tenure Law,⁶ and the indigenous tenure under customary law. Two of these operated nationwide while the others followed the usual north-south dichotomy characterization in Nigeria.⁷

A. Nationwide Tenures

English law, which was received into Nigeria as part of the political process, created certain interests in land and governed

² See, e.g., cases cited in J.A. OMOTOLA, *CASES ON THE LAND USE ACT*, (Lagos Univ. Press, 1983).

³ For contrasting commentaries, see generally *THE LAND USE ACT, REPORT OF A NATIONAL WORKSHOP* (J.A. Omotola ed. Lagos Univ. Press, 1982).

⁴ The introduction of English law into Nigeria dates back to 1863 when Ordinance No. 3 of that year received English law into the Colony of Lagos. See A.O. OBILODE, *THE NIGERIAN LEGAL SYSTEM* 18 (Sweet and Maxwell, London, 1979).

⁵ See, e.g., State Lands Act, ch. 45 (Nig. 1958), and the State Land Laws of each state of the federation, e.g., Western States, ch. 29, Eastern States, ch. 122. These statutes are mentioned in TOBI, *NIGERIAN LAND LAW* (Ahmadu Bello Univ. Press Ltd. 1987).

⁶ Laws of Northern Region of Nigeria, ch. 59, cited in II *THE LAWS OF NORTHERN NIGERIA* 1069 (1963) [hereinafter *Land Tenure Law of 1962*].

⁷ The territory known today as Nigeria resulted from the amalgamation of the Colony and Protectorate of Southern Nigeria with the Protectorate of Northern Nigeria in 1914. Despite this unification and the subsequent attainment of independence and republican status as one indissoluble unit, this dichotomy exists in almost all spheres of Nigerian national life. It is little wonder that today the military governors of the states in the northern part of Nigeria still hold a regular meeting of "Northern Governors!"

tenure in these interests nationwide. Tenure with respect to the parcels of land all over the country which were specifically taken over by the state was governed by the provisions of the various State Land Laws.⁸ State land is land held by the state and includes land which was acquired before Nigerian independence by the British Crown by agreement, cession, or conversion, and land acquired by virtue of the Public Lands Acquisition statutes.⁹ Such land can only be held on a lease from the appropriate state government. Section 2 of the State Lands Act defines state land as all public lands in Nigeria which are, for the time being, vested in the President on behalf of or for the benefit of the nation and government.¹⁰ Equivalent definitions are contained in the state lands legislation of the various states of the federation.

B. *Tenure in Northern Nigeria*

The customary tenure in northern Nigeria suffered early disruptions by the Fulani jihadists, who introduced a kind of feudal tenure under which they claimed overlordship of the land after the Islamic conquest.¹¹ When the country became a colony of Britain, the colonial officials under the leadership of Lord Lugard, to whom land rights were ceded in 1903, introduced statutory regulation of land rights under the Lands and Native Rights Ordinances of 1910, as amended in 1916. The 1916 Ordinance was also amended and substantially reenacted in the Land Tenure Law of 1962. This law declared certain lands in northern Nigeria as "native lands" and vested the management and control of these lands in the Minister (later Commissioner) for Lands and Survey to administer such lands for the use and common benefit of the natives.¹² Section 6 of the 1962 law empowered the minister to grant rights of occupancy to natives. The consent and approval of the minister was also required for the occupation and enjoyment of land rights by non-natives.¹³

⁸ See *supra* note 5.

⁹ See, e.g., Public Lands Acquisition Act, ch. 167 (Nigeria and Lagos 1958); Laws of Western Nigeria, ch. 105 (1959); Public Lands Acquisition (Miscellaneous Provisions) Decree No. 33 of 1976. These laws are cited in TOBI, *supra* note 5.

¹⁰ See *supra* note 5.

¹¹ The jihad (1804–1810) was led by Utman Dan Fodio and marked the beginning of the introduction of Islam into northern Nigeria.

¹² Land Tenure Law of 1962, *supra* note 6, § 5.

¹³ *Id.*

Under this law, a non-native was defined as a person whose father was not a member of any tribe indigenous to northern Nigeria.¹⁴

C. Tenure in Southern Nigeria

1. Customary Tenure

Tenure in southern Nigeria as regulated by customary law had its roots in the traditional conception of land. Traditionally, land had economic, social, political, and religious significance. It was conceived of as a sacred institution given by God for the sustenance of all members of the community, and as such it belonged to the dead, the living, and the unborn. Since the view was that the living merely held land as a kind of "ancestral trust" for the benefit of themselves and generations yet unborn, it was inconceivable for any individual to claim ownership of the land or part thereof or to sell it.¹⁵ Indeed, testifying before the West African Lands Commission in 1908, Chief Elesi of Odogbulu, a traditional ruler, expounded the traditional conception of land thus: "I conceive that land belongs to a vast family of which many are dead, few are living and countless members are still unborn."¹⁶ This group ownership of land seems to cut across the whole of the West African sub-region. In Nigeria, as in almost all of the former British colonies in West Africa, ownership of land in the accepted English sense is unknown. Land there is held under community ownership, and not, as a rule, by individuals.¹⁷

In the leading case of *Amodu Tijani v. Secretary of Southern Nigeria*,¹⁸ Viscount Haldane, delivering the opinion of the Privy Council, gave judicial impetus to the corporate ownership of land in southern Nigeria by adopting the following analysis of the indigenous system of land tenure: "The next fact which it is important to bear in mind in order to understand the native land law, is that the notion of individual ownership is quite foreign to native ideas. Land

¹⁴ *Id.* at § 2.

¹⁵ See *Okiji v. Adejobi*, 5 Federal Supreme Court Reports [hereinafter Fed. Sup. Ct. Rep.] 44 (Nig. 1960); *Okoko and Another v. Esedalue and Another*, 3 Supreme Court Reports [hereinafter Sup. Ct. Rep.] 15 (Nig., March 1974).

¹⁶ See West African Lands Commission 183, para. 1048 (1908).

¹⁷ See T.O. ELIAS, *NIGERIAN LAND LAW* 7 (4th ed., Sweet and Maxwell, London, 1971); C.O. OLAWOYE, *TITLE TO LAND IN NIGERIA* 21 (Evans Brothers Ltd., 1974).

¹⁸ 2 Appeal Cases 399 (Nig. 1921) cited in R.W. JAMES, *MODERN LAND LAW OF NIGERIA* 15 (1973).

belongs to the community, the village or the family, never to the individual.”¹⁹

This group ownership under the indigenous system gives rise to some distinctive features. All members of the group, community, village, or family have an equal right to the land, but in every case the chief or headman of the group occupies a unique position in relation to the land. He has charge or control of it and, in a loose mode of speech, is sometimes called the owner. To some extent, he is in the position of a trustee, although not in the English law sense, and as such holds the land for the use of the group. Any member of the group who needs a piece of land for farming or residential purposes would go to the chief or headman for permission to use the land; but the land so given still remains the property of the group.²⁰

Important disposition of land, however, cannot be made by the chief without consulting the elders of the group. For instance, the elders' consent must be given before a valid grant of the land can be made to a stranger. When such a grant is made, the stranger becomes the customary tenant of the group, giving rise to a very peculiar tenure under customary law, known as customary tenancy.

2. Customary Tenancy

This tenancy has no equivalent in English law. It is not a leasehold interest, a tenancy at will, or a yearly tenancy. The principal incident of customary tenure is the payment of annual tributes, not rents, by the customary tenant to its overlord.²¹ In essence, the customary tenant is not a lessee or borrower, he is a grantee of land under customary tenure and holds a determinable interest in the land which may be enjoyed in perpetuity subject to good behavior on the part of the tenant.²² He enjoys something like *emphyteusis*, a perpetual right in the land of another.²³

The principles governing this customary tenure are now well established by various judicial authorities. For instance, the tenant must use the land for the purpose for which it was granted and no

¹⁹ *Id.* at 404 (citing RAYNER, REPORT OF LAND TENURE IN WEST AFRICA (1898)).

²⁰ *See id.* at 399.

²¹ *See* Abudu Lasisi v. Oladapo Tubi, 12 Sup. Ct. Rep. 71 (Nig., Dec. 1974).

²² Chief Etim v. Chief Eke, 16 Nigeria Law Reports [hereinafter Nig. L. Rep.] 43 (1941); Mohammed Ojumu v. Salawu Ajao, 9 Sup. Ct. Rep. 22 (Nig., Sept. 1983); Basse and Others v. Chief Eteta, 4 West African Court of Appeal [hereinafter W. Afr. Ct. of App.] 153 (1938).

²³ Josiah Aghenghen and Others v. Maduku Waghoreghor and Others, 1 Sup. Ct. Rep. 1, 8 (Nig., Jan. 1974).

other,²⁴ he must pay yearly tributes to the grantor as an acknowledgment of the latter's overlordship,²⁵ and neither party can alienate the land without the consent of the other.²⁶ The interest thus secured by the tenant in the land is one of inheritance,²⁷ and the land will revert to the overlord only upon proven misbehavior on the part of the customary tenant or in the rare case of the extinction of the tenant's family.²⁸

The only weapon in the hands of the overlord for effectively dealing with the tenant after the grant is the power to forfeit the tenancy. Grounds for forfeiture include abandonment,²⁹ alienation or attempted alienation of the land without the consent of the overlord,³⁰ denial of the overlord's title,³¹ using the land for purposes for which it was not granted,³² and withholding tributes persistently.³³ Forfeiture, however, is not automatic.³⁴ Nigerian courts have often been willing to grant relief against forfeiture, such as a fine, except in cases where refusal to grant forfeiture would tend to defeat the ends of justice.³⁵

III. PITFALLS IN PRE-EXISTING TENURES

The various pre-existing tenures discussed above had some pitfalls, both inherent and operational, which caused concern and

²⁴ *Ukwa and Others v. Akwa Local Council and Others*, Nig. Monthly L. Rep. 41, 42 (1966); *Ochonma v. Unosi*, 4 E. Nig. L. Rep. 107 (1960).

²⁵ *Chief Uwani v. Akom and Others*, 8 Nig. L. Rep. 19 (1928); *Chief Braide v. Chief Kalio*, 7 Nig. L. Rep. 34 (1927).

²⁶ *Onisiwo v. Gbangboye*, 7 W. Afr. Ct. of App. 69 (1941); *Ashiyambi v. Adeniji*, Nig. Monthly L. Rep. 106, 107 (1966); *Chief Esi v. Itsekiri Communal Land Trustees and Others*, W. Reg. Nig. L. Rep. 15, 21 (1961).

²⁷ *Oshodi v. Dakolo*, Appeal Cases 667 (Nig. 1930); *Ovie v. Onoviobokirhe*, W. Reg. Nig. L. Rep. 169 (1957).

²⁸ *Sunmonu v. Disu Raphael*, Appeal Cases 881 (Nig. 1927); *Ramotu Otun and Others v. Osenatu Ejide and Others*, 11 Nig. L. Rep. 124 (1932).

²⁹ *Baillie v. Offiong*, 5 Nig. L. Rep. 29 (1923).

³⁰ *Onisiwo v. Gbangboye*, 7 W. Afr. Ct. of App. 69 (1941); *Onisiwo v. Fagbenro*, 21 Nig. L. Rep. 3 (1954); *Inasa v. Oshodi*, Appeal Cases 99 (Nig. 1934).

³¹ *Asani Taiwo and Others v. Adamo Akinwunmi and Others*, 5 Univ. Ife L. Rep. pt. 1, 67, 4 Sup. Ct. Rep. 143 (1975); *Olotu v. Dawuda and Others*, 1 Nig. L. Rep. 58 (1904); *Chief S.U. Ojeme and Others v. Alhaji Momdu II and Others*, 1 Sup. Ct. Nig. L. Rep. 188 (1983).

³² *Ochonma v. Unosi*, 4 E. Nig. L. Rep. 107 (1960); *Eyamba v. Holmes*, 5 Nig. L. Rep. 85 (1924).

³³ *Asani Taiwo and Others v. Adamo Akinwunmi and Others*, 5 Univ. Ife L. Rep. pt. 1, 67, 4 Sup. Ct. Rep. 143 (1975); *Olotu v. Dawuda and Others*, 1 Nig. L. Rep. 58 (1904); *Chief S.U. Ojeme and Others v. Alhaji Momdu II and Others*, 1 Sup. Ct. Nig. L. Rep. 188 (1983).

³⁴ *Lawani v. Tadeyo*, 10 W. Afr. Ct. of App. 37 (1944); *Coker v. Jinadu*, Lagos L. Rep. 77 (1958). This rule has been criticized by many authors. See, e.g., OLAWOYE, *supra* note 17, at 107; B.O. NWABUEZE, *NIGERIAN LAND LAW* 154 (1972).

³⁵ *Josiah Aghenghen and Others v. Maduku Waghoreghor and Others*, 1 Sup. Ct. Rep. 1, 4 (1974); *Abudu Lasisi v. Oladapo Tubi*, 12 Sup. Ct. Rep. 71, 74 (1974).

dissatisfaction in Nigeria. The intrusion of English law into the indigenous system also gave rise to difficulties. Conversion of title from either of these systems to the other created numerous problems for conveyancers, and it took many years for conveyancers, in conjunction with the courts, to fashion proper rules for conveyancing.³⁶ Moreover, attempts to use the English law of trust devices to create corporate holdings under the indigenous system led to serious conflict in the exercise of the power of management and control of the property between the head of the group and the trustee.³⁷

It must be noted that due to political and socio-economic factors land later became alienable under the indigenous system, although corporate ownership remained more prevalent than individual ownership.³⁸ Unfortunately, this development soon fell prey to unscrupulous hands. Traditional chiefs, as well as individuals, soon saw land as a means of enriching themselves at all costs. Chiefs would appropriate income from corporate holdings for their personal benefit rather than hold it in trust for the benefit of the members of the group. Greed and unprecedented racketeering thus characterized administration of group-owned lands.³⁹ Many individuals also became land speculators, which resulted in the rise of land prices. The consequence was insecurity of title to land, as the same piece of land could be sold to different persons at different times. These questionable sales invariably led to disputes, resulting in increased litigation which spanned many years.⁴⁰ In extreme cases, many people resorted to violence to secure their interests in land. In some cases, even the courts looked helpless and embarrassed as evident from the following observation of Judge Verity in *Ogunbambi v. Abowab*:⁴¹

[T]he case is indeed in this respect like many which come before the court: one in which the Oloto family either by inadvertence

³⁶ P.A. OLUYEDE, *NIGERIAN LAW OF CONVEYANCING* 26–27 (1978). See also *Oshodi v. Balogun*, 4 W. Afr. Ct. of App. 1 (1936); *Balogun v. Balogun*, 9 W. Afr. Ct. of App. 78 (1943).

³⁷ This was commonly found in wills creating family property using the machinery of a trust. See, e.g., *Young v. Abina*, 6 W. Afr. Ct. of App. 180 (1940); *Balogun v. Balogun*, 2 W. Afr. Ct. of App. 290 (1934).

³⁸ See *Amodu Tijani's Case*, 2 Appeal Cases 399.

³⁹ See S.N.C. OBI, *THE IBO LAW OF PROPERTY* 45–46 (1963); P.C. LLOYD, *YORUBA LAND LAW* 360–61 (1962). Indeed, the Government of the Western Region of Nigeria had enacted the *Communal Land Rights (Vesting in Trustees) Law*, ch. 24 of 1958, as amended in 1959, in order to control the excesses of these chiefs. See JAMES, *supra* note 18, at 36.

⁴⁰ Some litigation lasted well over ten years. See *Ariori and Others v. Muraimo Elemo and Others*, 1 Sup. Ct. Nig. L. Rep. 1 (1983) (action commenced in October 1960, appeal heard and retrial ordered by the Supreme Court in 1983).

⁴¹ 13 W. Afr. Ct. of App. 222 (1951).

or design, sell or purport to sell the same piece of land at different times to different persons. It passes my comprehension how in these days, when such disputes have come before this court over and over again, any person will purchase land from this family without the most careful investigation, for more often than not they purchase a law suit and very often that is all they get.⁴²

These abuses were not limited to privately owned lands or communal lands under customary law. The allocation of state lands was also affected in no small measure. The distribution was either to government functionaries, to persons who were closely connected with them, or to others who invariably had more wealth than most. In a sharp reaction to this unwholesome practice, the Nigerian Constitution Drafting Committee had observed that

[i]t is revolting to one's sense of justice and equity that one person alone should own three or six or even more plots of state land in one state, when others of comparable status have none. The inequality is more condemnable when it is remembered that a plot of state land, allocated to a person at a nominal price, represents thousands of naira [the Nigerian currency] of public funds sunk into its improvement and development

The committee therefore warned that it "would be laying a foundation for a major explosion in this country if the present system of abuse and profiteering [were] allowed to continue unchecked and unredressed."⁴³

The operation of the rights of occupancy system in northern Nigeria could not be spared of these abuses. Thus Professor Jegede laments that "[e]ven in the Northern States where the Land Tenure Law and its predecessors have been in operation for about a century, there is the [] cry against rich and influential members of the society using their position to seize the land of the less privileged members of the society"⁴⁴

Ironically, not only individuals suffered from the abuses just analyzed; governments were also affected. On the occasion of the inauguration of the Nigerian Land Use Panel in 1977, the Chief of Staff, Supreme Headquarters, declared:

The Federal Military Government is fully aware of the land racketeering [and] the pernicious role of middlemen in land speculation and in the sometime[s] bitter and unending litiga-

⁴² *Id.* at 223.

⁴³ See 2 REP. OF THE CONSTITUTION DRAFTING COMM. xii (1976).

⁴⁴ M.I. JEGEDE, LAND LAW AND DEVELOPMENT 37 (1981).

tions in land transaction[s] in the country. At present, it is not only the individual who wants to build his or her house that is facing difficulties in finding suitable land, the Local, State and Federal Governments are also inhibited by problems placed in their way in acquiring land for development.⁴⁵

From the foregoing, it is obvious that the systems of land tenure in Nigeria before the Land Use Act introduced a uniform rights of occupancy system were unsatisfactory and in need of reform.

IV. TOWARDS A NEW LAND POLICY

In 1975 the Nigerian federal government appointed an Anti-Inflation Task Force to examine inflation in the economy, identify its causes and recommend short and long-term solutions. The Task Force identified the land tenure systems as one of the causes of inflation and recommended that, with respect to control of dealings in land, a decree be promulgated which would have the effect of vesting all land in principle in the state governments.⁴⁶ The government rejected this recommendation.

In January 1976, the federal government appointed a rent panel to review the level and structure of rents in relation to the housing situation in the country with particular reference to urban centers. The panel was also to examine the adequacy of the housing program in the country and to suggest appropriate remedial measures and make recommendations. This panel also identified the land tenure system as a major hindrance to rapid economic development in the country. The panel recommended that in the long-term interest of future economic development in the country, the government should look into the question of vesting all lands in the state.⁴⁷ This time the government accepted the recommendation in principle and called for further study of its practical implications.

In 1977, the federal government appointed the Land Use Panel to study the land tenure situation. Its terms of reference were:

- i. to undertake an in-depth study of the various land tenure, land use and conservation practices in the country and recommend steps to be taken to streamline them;

⁴⁵ See REP. OF THE LAND USE PANEL 5 (1977).

⁴⁶ See FIRST REPORT OF THE ANTI-INFLATION TASK FORCE (Oct. 1979).

⁴⁷ See REPORT OF THE LAND USE PANEL, *supra* note 45, at 2-4. For a brief commentary on the outcome of the Rent Panel's recommendations, see OLUYEDE, *supra* note 36, at 274-79.

- ii. to study and analyze the implications of a uniform land policy for the country;
- iii. to examine the feasibility of a uniform land policy for the entire country, make recommendations and propose guidelines for their implementation; and
- iv. to examine steps necessary for controlling future land use and also opening and developing new lands for the needs of the government and Nigeria's growing population in both urban and rural areas and make appropriate recommendations.⁴⁸

Although the panel's majority did not recommend nationalization of land, the federal government acted on the minority report in the promulgation of the Land Use Act, 1978 (the "Act").⁴⁹

V. THE LAND USE ACT: BASIC PRINCIPLES

Section 1 of the Act vests all land in the territory of each state of the federation in the state's governor to be held in trust and administered for the use and common benefits of all Nigerians in accordance with the provisions of the Act.⁵⁰ Management and control of land in urban areas is vested in the governor, while the local governments assume this responsibility over land in non-urban areas.⁵¹ Section 5 empowers the governor to grant statutory rights of occupancy to all persons with respect to any land, whether in urban or non-urban areas, while section 6 empowers the appropriate local government to grant customary rights of occupancy over land in non-urban areas within its jurisdiction. These authorities are assisted in the allocation of land by the Land Use Allocation Committee and the Land Allocation Advisory Committee, respectively.⁵² By sections 34 and 36 of the Act, pre-existing interests in land are preserved subject to their transformation into rights of occupancy.⁵³

⁴⁸ See REPORT OF THE LAND USE PANEL, *supra* note 45.

⁴⁹ Formerly the Land Use Decree No. 6, 1978, this was redesignated an "Act" by the Adaptation of Laws (Redesignation of Decrees etc.) Order, 1980.

⁵⁰ By section 49, land vested in the federal government or its agencies is exempted from the vesting declaration of section 1.

⁵¹ Land Use Act ¶ 2 (1978).

⁵² Land Use Act ¶¶ 2(3)-(5).

⁵³ In *Nkwocha v. The Governor of Anambra State*, 1 Sup. Ct. Nig. L. Rep. 634, 652 (1984), Eso, J.S.C., declared that the vesting of ownership of land in the state leaves the individual with an interest in land which is a *mere right of occupancy*; but in *Salami v. Oke*, 4 Nig. Weekly L. Rep. pt. 63, 1 (1987), Obaseki, J.S.C., identified a right of occupancy as a *possessory interest in land*.

Under sections 21–23 and 34 of the Act, no alienation of rights of occupancy can be valid without the consent of the governor or the approval of the local government where appropriate. Power to revoke any right of occupancy for overriding public interest with or without payment of compensation is vested in the governor,⁵⁴ while the local government has limited power to revoke a customary right of occupancy only. By these provisions, the Act introduced a uniform state ownership system otherwise known as Nigeria's Rights of Occupancy System. The effective implementation of this system, it has been asserted, would accomplish the following objectives:

(a) To remove the bitter controversies, resulting at times in loss of lives and limbs, which land is known to be generating.

(b) To streamline and simplify the management and ownership of land in the country.

(c) To assist the citizenry, irrespective of his social status to realise his ambition and aspiration of owning the place where he and his family will live a secure and peaceful life.

(d) To enable the government to bring under control the use to which land can be put in all parts of the country and thus facilitate planning and zoning programmes for particular uses.⁵⁵

These objectives find support in the preamble to the Act.⁵⁶

VI. INTERACTION OF THE LAND USE ACT WITH THE INDIGENOUS LAND TENURE SYSTEM

A. *General Observations*

Although there is no direct reference to the indigenous land tenure in the Act, the recognition and preservation of customary land law within the language of the Act may imply the survival of the indigenous land tenure. Section 24 preserves the customary law rules governing devolution of property, while section 25, which prohibits partitioning of land, expressly exempts cases which are regulated by customary law. Under section 29, where the holder or

⁵⁴ Land Use Act ¶¶ 28, 6.

⁵⁵ These objectives, as stated by Commander G.N. Kano, Military Governor, Lagos State, are quoted in J.A. OMOTOLA, *ESSAYS ON THE LAND USE ACT 1978* (Lagos Univ. Press, vii, 1980).

⁵⁶ "Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law: and Whereas it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families should be assured, protected and preserved."

occupier entitled to compensation is a community, the governor is empowered to direct payment of the compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Under section 50, a “[c]ustomary right of occupancy” is defined as “the right of a person or community lawfully using or occupying land in accordance with customary law . . .” and an “occupier” is similarly defined as “any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law” This is in addition to section 48, which preserves all existing laws relating to the registration of title to, or interest in, land subject to such modifications as will bring those laws into conformity with the Act or its general intentment. It is submitted that customary land law is an existing law within the meaning of section 48 of the Act.

Indeed, it can be asserted that section 1 of the Act merely borrows and enacts the notion of corporate ownership and trusteeship under the indigenous land tenure system. The position of the governor under the Act appears to be comparable to that of the head of the community or family in relation to communal land under customary law. But this would seem to be half-truth only: when the powers of the governor are closely analyzed, the area of conflict with the head of the community can easily be identified, especially in relation to the power of management and control of the land.

B. *Management and Control of Land: The Conflict*

It is true that certain sections of the Act import the right of a community to hold a right of occupancy.⁵⁷ Indeed, such right was conceded by the Supreme Court of Nigeria in the recent case of *Chief S.U. Ojeme and Others v. Alhaji Momdu II and Others*.⁵⁸ One critical issue, however, is whether the head of the community in exercising his power of management and control of land under customary law can deal with the land to which the community holds a right of occupancy without reference to the governor or the local government. The latter are the authorities to whom the power of

⁵⁷ See, e.g., Land Use Act ¶ 29(3) (“If the holder or the occupier entitled to compensation under this section is a community the Military Governor may direct that any compensation payable to it shall be paid (a) to the community”).

⁵⁸ See *supra* note 31.

management and control of land is specifically vested in the Act. Two situations can be distinguished for consideration.

1. Allocation to Members of the Community

One critical legal question is whether allocation of land by the head of the community to a member of the community would involve alienation of the right of occupancy for which the consent of the governor or the local government would be required under the Act.⁵⁹ Under customary law, allocation of part of communal land to a member of the community neither divests the community of title nor vests title to the land in the member. It seems, therefore, that such allocation will not amount to alienation of a right of occupancy under the Act and can still be done solely by the head of the community. Although not expressly defined under the Act, sections 21 and 22 show that alienation involves assignment, mortgage, sublease, or transfer of possession. The latter, transfer of possession, would, on a cursory look, seem to imply that allocation to a member of the community amounts to alienation for which consent is required under the Act. In actual fact, however, the community does not transfer possession as such when it allocates land to its member. Rather, under customary law, the community maintains possession of the land through its member.

Where the member needs a certificate of occupancy, however, in respect to the portion of land occupied by him, it seems that the best way for the community to retain its interest in the land is to grant a sublease of the right of occupancy to the member and thus retain the reversion. As alienation includes a sublease under the Act, this would require the consent of the governor or the local government. Thus, where a certificate of occupancy is issued to the member, it will be necessary to insert in the certificate the interest of the community subject to which he takes the right of occupancy.⁶⁰ This would forestall the situation where the member would want to alienate the right of occupancy to a stranger without reference to the community.

2. Partition and Sale of Land

Under customary law, members of the community, with the consent of the head of the community, are entitled to partition

⁵⁹ Land Use Act ¶ 21-3.

⁶⁰ A provision is made under paragraph 34(4) of the Land Use Act for this kind of situation.

communal land among themselves or even to sell the land. The effect of partition is to divest the community of title to the land and vest the title in the individuals.⁶¹ This being the case, it is submitted that partition of formerly group-owned land will require the consent of the governor or the local government, since it amounts to alienation of a right of occupancy to individuals under the Act. Sale of land by the community in exercise of its ownership rights, however, cannot now be done, as ownership now vests in the state by virtue of section 1 of the Act.

C. *Practical Problems*

The various chiefs or heads of communities still regard themselves as trustees of community land for the management and control of the land in total disregard of the rights of occupancy system. The various Communal Lands Allocation Wards are still functioning effectively although they were meant to be supplanted by the Land Use Allocation Committee and the Land Allocation Advisory Committee established under the Act.⁶² These wards are still allocating, partitioning, and selling land without reference to the appropriate authorities designated under the Act. Where written documents are used for this purpose, they are back-dated to any period before the Land Use Act came into force.⁶³ By this device, the documents effectively transfer land behind the Act. The disadvantage of this device is that these documents purporting to transfer fee simple interest in land are no longer registrable,⁶⁴ but they nevertheless remain valid documents conveying at least equitable interest in land. Where the transferees have been led into effective possession and they erect buildings on the land, for example, the interest is as good as a legal interest.⁶⁵ Moreover, as these documents pre-date the Act, they are accepted as evidence of title before the Act and thus qualify the transferees as deemed holders of rights of occupancy under the transitional provisions of the Act. Accordingly, these documents are easily accepted in processing applications for certificates of occupancy under the Act.⁶⁶

⁶¹ See *Balogun v. Balogun*, 9 W. Afr. Ct. of App. 78 (1943).

⁶² See *supra* note 52.

⁶³ The Act came into force on March 29, 1978.

⁶⁴ Only certificates of occupancy are now registrable. See *State Lands (Amendment No. 2) Edict No. 12, ¶ 16* (1978). A right of occupancy is now limited to 99 years. See section 3.

⁶⁵ See *infra* note 76.

⁶⁶ The author owes this information to one of the Deputy Chief Lands Officers in one of the Departments of Lands which he visited in the course of this research. Needless to say,

It is to be noted, however, that under the Act's transitional provisions, entitlement to the deemed right of occupancy depends on successful proof of title. Presentation of valid documents of title is a prerequisite to obtaining the certificate of occupancy. For example, section 34(3) of the Act provides that

[i]n respect of land to which subsection (2) of this section applies there shall be issued by the Military Governor on application to him in the prescribed form a certificate of occupancy if the Military Governor is satisfied that the land was, immediately before the commencement of this Act, vested in that person.

Section 36(3) even requires the production of a sketch or diagram or other sufficient description of the land with the application for a certificate of occupancy to the appropriate authority. These requirements cause problems for some people with customary titles, which are not documented, but obtained by oral agreements which are valid under customary law. The appropriate ministry or department of lands is often at a loss as to how to process such applications without these documents, and in some cases the applicants are advised to go and get deeds of conveyance back-dated to any date before the commencement of the Act to enable them to process the applications.⁶⁷ The Act ought to be amended to provide for the processing of applications for certificates of occupancy by persons who, before the Act, had obtained titles to land orally under customary tenure.⁶⁸

Customary tenancy, however, appears to present the most difficult problems in this respect. Since the commencement of the Act, the customary tenants have refused to pay tributes to their overlords, insisting that section 1 of the Act, which vests ownership of land in the governor of each state, has divested the overlords of their interest in the land and therefore severed the relationship of landlord and tenant. This, they contend, has relieved them of the obligations to pay annual tributes. Indeed, in some cases there have been local skirmishes between the two parties, and cases on customary tenancy have flooded the courts.⁶⁹ In some cases, where the courts have declared the tenants' interest in the land forfeited for

the author pointed out the absurdity in flouting the Act by backdating the documents in order to obtain the certificate of occupancy.

⁶⁷ *Id.*

⁶⁸ Alternatively, the applicant will first go to court for a declaration of title and use the judgment for the processing. This will be dilatory, however.

⁶⁹ See generally CASES ON THE LAND USE ACT, *supra* note 2, at 133-63.

breaches of the terms of the tenancy, the tenants have refused to quit the land. The consequence is increased tension, and the future of this exclusively indigenous tenancy looks bleak.

D. *Legal Tension*

At the center of the legal controversy is the true construction of section 36 with respect to customary tenancy. Subsections (1) and (2) of that section provide:

(1) The following provisions of this section shall have effect in respect of land not in an urban area which was immediately before the commencement of this Act held or occupied by any person.

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

The Nigerian Court of Appeal has consistently held that under this provision the customary tenant who is in physical possession of the land and using it for agricultural purposes at the commencement of the Act is the person entitled to the deemed right of occupancy. In *Yesufu Kasali and Others v. Alhaji Liadi Lawal*,⁷⁰ the court made it clear that the notion and incidents of customary tenancy in relation to agricultural lands not in an urban area have been swept away by the combined effect of sections 1, 36, and 37 of the Act. Moreover, in *Chief Davies Momodu Ilo and Others v. Chief G.A. Davies and Others*,⁷¹ Nnemeka Agu, J.C.A., in the lead judgment pointed out that

[b]earing the definition of an occupier in section [50] and the provisions of section [40] in mind, it appears clear to me that a right of occupancy is not limited to a fee simple owner. A person may have a right of occupancy under the Act even though the quantum of his interest before the promulgation of the Act would have been less than fee simple.

The learned justice of appeal then concluded that “[a]ll that needs now be proved for entitlement to a right of occupancy is that the

⁷⁰ 3 Nig. Weekly L. Rep. pt. 28, 305 (1986).

⁷¹ IBADAN U.L. REV. 34-35 et seq. (1986) (This unreported case, suit no. CA/L/42/84, is noted in the above article).

person possesses or occupies a definite piece of land lawfully.”⁷² These statements of the law with respect to section 36 as interpreted are clearly correct: a customary tenant is the one entitled to the customary right of occupancy under this provision, provided that at the commencement of the Act, (a) he was in actual possession of the land, and (b) he was using the land for agricultural purposes.⁷³ Such a customary tenant qualifies as “occupier” under section 36(2), lawfully occupying and using the land under customary law.

The interpretation of section 36(4) of the Act, however, has not yet been rid of controversy. This section provides:

Where the land is developed, the land shall continue to be held by the person in whom it was *vested immediately before the commencement of this Act* as if the holder of the land was the holder of a customary right of occupancy issued by the Local Government, and if the holder or occupier . . . at his discretion, produces a sketch or diagram showing the area of the land . . . the Local Government shall if satisfied that that person immediately before the commencement of this Act has the land vested in him register the holder or occupier as one in respect of whom a customary right of occupancy has been granted

Some assert that “vested” in this provision means “vested in ownership” so as to entitle the overlord to the deemed right of occupancy. Others hold the contrary view that it means “vested in possession” so as to entitle the customary tenant to the right of occupancy.⁷⁴ It is submitted that the latter view is the correct interpretation for a number of reasons. First, “vested” in this subsection refers to the law as it stood before the Act. There are weighty authorities to the effect that under customary law as it stood before the Act the interest of the customary tenant is greater than that of the overlord. Asserting the superior interest of the tenant in this regard, Elias, C.J.N., delivering the judgment of the Supreme Court of Nigeria in *Chief Maduku Waghoreghor and Others v. Josiah Agheghen and Others*, said “the result is that, in many ways, as with the customary tenant in this type of legal situation where the grantors do not live on the land or farm thereon ‘possession is nine-tenths of the

⁷² *Id.* See also Peter Pav. Dzungwe v. Oram Gbishe and Another, 2 Nig. Weekly L. Rep. pt. 8, 528 (1985); Akpasubi Omonfoman v. C.K. Okoeguale, 5 Nig. Weekly L. Rep. pt. 40, 179 (1986).

⁷³ Chief S.O. Ogunola and Others v. Hoda Eiyokole and Others, *reprinted* in OMOTOLA, *supra* note 2, at 151, 153.

⁷⁴ See Umezulike, *The Customary Tenant and the Land Use Act, 1978*, 1 PEOPLE'S L. J. 20 (1987).

law.”⁷⁵ In *Asani Taiwo and Others v. Adamo Akinwunmi and Others*,⁷⁶ the supreme court also took the same view of the interest of the customary tenant when it declared: “this interest has in practice now been regarded by the courts as practically indefeasible, once permanent buildings or other forms of improvements like extensive commercial farming and/or occupation have been established thereon by the grantees”⁷⁷

Indeed, Professor James appears to agree with the above authorities when he submits that under section 36(4) “development gives the rightsholder an automatic right to the land as if he had a grant from the local government.”⁷⁸ Moreover, regarding the definitions of “occupier” and “customary right of occupancy,”⁷⁹ it is submitted that the customary tenant is the occupier occupying and using the land under customary law and is, therefore, entitled to the customary right of occupancy under section 36(4). For a customary overlord to qualify for the customary right of occupancy under this subsection, he must be in actual possession of the land.⁸⁰

It is submitted that it is absurd to interpret section 36(2) in contradistinction to section 36(4) with respect to customary tenancy. For instance, where a customary tenant is using part of the land in farming and the rest for his residence, as is usual in farming communities, it makes no sense to say that he is entitled to the customary right of occupancy with respect to the former part but not for the latter. Instead, the true effect of section 36, read as a whole, is clearly to abolish customary tenancy with respect to land in non-urban areas and vest the customary right of occupancy in the former tenant.

VII. A VICIOUS CYCLE: THE NEED FOR REFORM

Experience has shown that the letters of a statute are not inherently sacred and that their ability to accomplish the desired goals

⁷⁵ 1 Sup. Ct. Rep. 1, 9 (Nig. 1974).

⁷⁶ 1 All Nig. L. Rep. pt. 1, 202, 4 Sup. Ct. Rep. 143 (1975).

⁷⁷ *Id.* at 227 (Fatayi Williams adopting *Waghoreghor's Case*).

⁷⁸ R.W. JAMES, NIGERIAN LAND USE ACT: POLICY AND PRINCIPLES 105 (1987).

⁷⁹ “‘Occupier’ means any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law ‘Customary right of occupancy’ means the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by a Local Government under this Act.” Land Use Act ¶ 50.

⁸⁰ Gilbert Onwuka and Others v. Michael Ediala and Others, 1 Nig. Weekly L. Rep. pt. 96, at 182 (1989).

depends largely on the operators. The Land Use Act is no less subject to this idea. Ironically, within just a decade of its promulgation, its operation has encountered the same pitfalls as the pre-existing tenures analyzed above. Speculative dealings in land and profiteering are now rife. The result is an increase in the "prices" of land. Government functionaries and their close associates have also returned to the business of distributing land among themselves, thus resurrecting the ills of the state land system.

Indeed, government now sees land as a means of raising revenue, as rents for rights of occupancy are being revised and increased constantly. In one state the cost of an application form alone has been increased from ten naira to one hundred naira.⁸¹ The situation is worse for a pre-existing interest holder who applies for a certificate of occupancy, as the provision in the Act for waiver of rent⁸² is hardly ever applied. Instead, reliance is often placed on section 10(b) of the Act by which a certificate of occupancy is deemed to include a provision that the holder binds himself to pay rent to the governor.

The conflict between the operation of the Act and the indigenous land tenure, and the consequent confusion created by the divergence of opinion among judges, lawyers, and laymen on the true effect of the Act on the indigenous land tenure has also been highlighted in this article. One reason for this is that, although the Act seems to recognize the indigenous land tenure, it nonetheless fails to make clear and adequate provisions for it. For instance, section 48 saves existing laws subject to modifications, but until now the extent of these modifications has not been made clear. Another problem is that the transitional provisions of the Act do not set deadlines for the conversion of formerly indigenous titles into rights of occupancy. Consequently, the indigenous title holders feel that they are free to deal with their land or alienate it in accordance with customary law even in disregard of the rights of occupancy system. Accordingly, there is no doubt that there is need for reform.

Two alternative reforms are suggested. The first is an amendment of the Land Use Act to make clearer provisions for the indigenous land tenure system so as not to leave everything to mere implication, as is presently the case under the transitional provisions of sections 34 and 36. This should include setting a deadline for

⁸¹ See State Lands (Amendment) Edict, 1988 of Bendel State.

⁸² See Land Use Act ¶ 17.

the conversion of pre-existing indigenous titles into rights of occupancy with the holders obtaining certificates of occupancy. The alternative suggestion is an amendment of the Act to exclude the indigenous land tenure system from the operation of the Act. This would enable the latter to co-exist with the rights of occupancy system without the present problems of interpretation.