



## SACHA JOURNAL OF POLICY AND STRATEGIC STUDIES

Volume 5 Number 1 (2016) 1 - 14

ISSN 2045-8495 (Print) ISSN 2045-8509 (Online)

Publishers: Sacha & Diamond, England, United Kingdom

www.sachajournals.com

Cumulative Impact Factor: 11.4



### AN EXPOSITION ON THE CONCEPT AND LEGALITY OF COMPULSORY ACQUISITION WITHOUT COMPENSATION UNDER NIGERIAN LAW

ONUOHA, R.A (PhD)

Department of Private and Property Law,  
Imo State University, Owerri Imo State, Nigeria.

#### ABSTRACT

Property right in land is the authority of the land owner to determine the use of the land or otherwise. However, this can be cut short by compulsory acquisition whereby government is vested with the power to acquire private rights in land for a public purpose without the willing consent of the land owner or occupant in order to benefit society in exchange for compensation. However, there are situations where compensation for compulsory acquisition is not paid. The purpose of government to compulsorily acquire private properties is mainly to ensure that land is available when needed for essential infrastructure. However, despite being a necessary governmental power, this act of the government has always attracted controversy, both in theory and practice. This paper aims at discussing the concept of compulsory acquisition without compensation and the reason thereof.

*Keywords:* Land Law, Land Use, Land Acquisition, Nigeria.

#### 1. INTRODUCTION

Compulsory acquisition is the process by which state obtains land and premises for development purposes when they consider this to be in the best interest of the community. It is the power of government to acquire private rights in land for public purpose without the willing consent of the land owner when it considers this to be in the best interest of the community. Thus it is the right and action of the government to take property not owned by it for public use. This power to acquire private rights in land is also known as expropriation, takings, revocation or compulsory purchase depending on a country's legal traditions. In all cases the owners or occupiers are denied their property rights for overriding public interest or public benefit.<sup>1</sup> At times, acquisition is for direct government use for public purposes and often times for public-private use, as for example when the land is required for the direct use of a private commercial enterprise for public benefit.<sup>2</sup>

<sup>1</sup> Kakulu, I.I. Phenomenological Research in Compulsory Land Acquisition and Compensation. Paper at Compulsory Purchase and Compensation and Valuation in Real Estate Development FIG Working Week 2009 Surveys Key Role in Accelerated Development Eilat, Isreal, 3-8 May 2009.

<sup>2</sup> For example, the requirement of land for mining and extractive purposes or where land is required for public/private partnership enterprise.

The purpose of the government to compulsorily acquire lands is mainly to ensure that land is readily available when needed for essential infrastructure. However, despite being a necessary governmental power, this act of the government has always attracted controversy, both in theory and practice. This is because whenever people are being displaced, the human costs in terms of disruption to community cohesion, livelihood patterns and way of life may go beyond what can be fully mitigated through standard compensation packages, however generous those may be.<sup>3</sup>

Land uses which fall within the definition of public purposes include; Transportation uses, including roads, highways, canals, bridges, and airports; Public parks, playgrounds, sports facilities, and cemeteries; Public utilities for water, sewage, drainage and reservoir; Public buildings including schools, libraries, hospitals, religious institutions, public housing and factories.

There is need to have an exclusive list of purposes in order to help provide a degree of certainty and works to prevent the expansion of government powers into areas that are arguably beyond the proper theoretical limits of eminent domain. This is to prevent some of the governance abuses often associated with compulsory acquisition. On the other hand, exclusive list may suffer from excessive inflexibility and may fail to provide for the full range of public needs; as the government may eventually need to acquire land for a public purpose that was not anticipated when the law was written.<sup>4</sup>

Despite the variations, an overarching principle in most cases is that a government's taking power is extraordinary powers that are intended to meet public needs that are not well addressed through the operation of the market. Thus, it is not typical for laws to allow government to use the compulsory acquisition as the normal means of assembling land for purposes that are clearly for commercial, industrial, or other profitable private uses alone. In order to avert the above situation, legislations have devised tool which are used to ensure that the public purpose limitation has some 'teeth' whether the ultimate user is a public, private, or public-private-partnership (PPP) entity. For instance, in Kenya, the proponent of a compulsory acquisition is required to provide credible evidence that the benefit to the public of the acquisition will outweigh the hardships to those affected. A number of countries try to restrict subsequent transfers and land use changes of land taken for a specific public purpose, in order to ensure that the public purpose justification was genuine, and not simply a disguise for facilitating future commercial transfers. Thus, some laws or proposals require the government to offer the land back to the original owner if it is not used for the purpose for which it was initially acquired,<sup>5</sup> or allow the original owners to share in the profit if acquired land is transferred to an unanticipated private use.<sup>6</sup>

## 2. THE NEED FOR COMPENSATION

Compensation is the system of consideration which exists to enable the land owner derive economic benefits from his land in the event of a takeover otherwise known as compulsory acquisition. Compulsory acquisition of private property by the government is a right authorized by legislation, and in all cases, the owners or occupiers of the properties are denied their property rights for overriding public interest or public benefit and are usually entitled to adequate compensation. This is also provided for under section 43 of the constitution, which provides that no right or interest in movable or immovable property shall

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<sup>3</sup> Jonathan Mills Lindsay, *Compulsory Acquisition of Land and Compensation in Infrastructure projects*. PPP Insights, Vol1, Issue 3, August 2012.

<sup>4</sup> S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer. *Compulsory Acquisition of land and Compensation* (FAO Land Tenure Series, 2008)

<sup>5</sup> See for example, Cambodian's law on Expropriation, 2010, article 9, which gives the original owner priority to repurchase expropriated property that is not used for the intended purpose.

<sup>6</sup> India, Draft National Land Acquisition and Rehabilitation and Resettlement Bill, 2011, Section 70.

be compulsorily acquired anywhere in Nigeria without the payment of adequate compensation.<sup>7</sup> Thus the constitution recognizes the eminent domain status of the state to take private property upon the payment of adequate compensation to the victim. The exercise of the power of the government to compulsorily acquire private rights in land without a doubt brings losses to the private individual whom the land was compulsorily acquired and these losses range from economic loss of the land to social, religious or cultural losses. The government has therefore provided a system whereby these losses suffered by these affected individuals are remedied by providing compensation to the affected persons. Under the English law, where land is compulsorily acquired, with certain provisos, the land owner expects to receive compensation for the land taken as well as for disturbance, severance, and injurious affection and other losses if any.

Compensation is the key issues in any analysis of revocation of property right as it provides fairness to the person who is harmed or affected by the revocation. The classic rationale for compensation is that of fairness and justice and that one individual should not be forced to bear the burden that properly ought to be borne by a nation as a whole. Sadly, the compensation provided by the government has on most occasions been termed inadequate and even where the compensation seems fair, the displacement of people from established homes, offices, churches, or schools would still entail unimagined and unexpected human costs.

The court, however made emphasis on the need for compensation to be adequate in the case of *A.G. Bendel State V. Aideyon*<sup>8</sup> where it held that the right to property in Nigeria is sacrosanct and that such right or any right attendant thereto can only be taken compulsorily, under a law which provides for payment of adequate compensation to the owner. The court held further that the law gives the owner of such right access to court for the determination of his interest and amount of compensation due to him. Adequate compensation is a fair payment by government for property it has taken under the power of eminent domain so that the owner is not worse-off and is not better off after acquisition. The compensation requirement under the law demands that the acquisition authorities reimburses the expropriated for the property interest taken and place the latter in as good a pecuniary position as if the property had not been taken<sup>9</sup>. The underlying theme in the compensation provisions of the land acquisition statutes is to ensure that a dispossessed landowner is no worse off and no better off as a result of his eviction<sup>10</sup>. The reason compensation should be paid is justified on socio-political, as well as economic theories as it is a means to keep the balance of social justice. It protects the rights of the politically under-represented groups, requiring the government to bear the inconveniences resulting from land acquisition<sup>11</sup>. Hence it is argued that no single individual should bear the cost of government projects that are intended to be for the common good<sup>12</sup>.

### 2.1 Legal Framework For Compensation

Government's power of compulsory acquisition for public use is usually backed by legislation, and the power of government to compulsorily acquire private property is restricted to acquisition for public purposes and payment of compensation. Therefore, the pre-condition for compulsory acquisition is that the land is required for public use and every government is obligated to pay compensation to the holders or occupiers of acquired land. Thus compensation

<sup>7</sup> See section 43 & 44 (1) (a) of Constitution of the Federal Republic of Nigeria 1999 LFN, 2004.

<sup>8</sup> (1989) 4 NWLR, pt. 118. P. 646

<sup>9</sup> Ambaye, D.W (2009). Land valuation for expropriation in Ethiopia: valuation methods and adequacy of compensation. Spatial data serving people. 7<sup>th</sup> FIG regional conference, Hanoi, Vietnam, 19-22 October.

<sup>10</sup> Brown D. (1991). Land Acquisition, 3<sup>rd</sup> edition, Butterworth's: Sydney.

<sup>11</sup> Ndjovu, C.E. (2003). Compulsory Purchase in Tanzania. Doctoral Thesis, Royal Institute of Technology, Stockholm, New Jersey. ISBN 0691-04273X.

<sup>12</sup> Epstein R.A. (1993). Bargaining with the state. Princeton University Press, Princeton.

is one of the twin pillars of acquisition. In *Bello v. Diocesan Synod of Lagos*<sup>13</sup> a notice of acquisition of some plots of land by the Lagos State Development and Property Corporation for further development and expansion of a church was declared invalid by the Supreme court on the ground that the purported acquisition did not come under “overriding public interest” as required by section 28 of the Land Use Act. It follows that any acquisition which is not done for public purpose will be declared invalid by the court upon being challenged.

Some of the relevant laws governing compensation in Nigeria are:

- The Constitution of the Federal Republic of Nigeria, 1999<sup>14</sup>
- The Land Use Act<sup>15</sup>
- The oil Pipeline Act<sup>16</sup>
- The Electric Power Sector Reform Act<sup>17</sup>
- Nigerian Mineral and Mining Act<sup>18</sup>

### 2.1.1 Compensation under the current Nigerian Constitution

This specified the condition for a valid acquisition. Section 44 (1) provides that:

“No movable or 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 the law, that among other things-

- a) Requires the prompt payment of compensation thereof; 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”.

From the foregoing, it is evident that the constitution makes the payment of compensation mandatory. Thus, an aggrieved person affected by compulsory acquisition would have a right of access to a court of law for redress. This was the position of the court in the case of *Olotu V. Attorney General*<sup>19</sup> where it held that “...claims for compensation for lands by the government for public purposes under statute or statutory...”. Although the constitution proclaims the prompt payment of compensation, it is however silent on the quantum of compensation or factors to be considered when paying compensation as a result of compulsory acquisition.

### 2.1.2 Compensation under the Land Use Act

The Land Use Act<sup>20</sup> empowers the government of a state to revoke right of occupancy for overriding public interest. The governor is specifically obligated under S. 28 (4) to revoke a right of occupancy in the event of the issuance of notice by or on behalf of the president, declaring a particular land to be required for public purpose by the government. S. 29 of the Act makes further provision for the payment of compensation and provides as follows:

<sup>13</sup> (1973) 3SC 103.

<sup>14</sup> See S. 44 (1) of the Constitution

<sup>15</sup> Cap L5 LFN 2004, See S. 29

<sup>16</sup> Cap 07 LFN 2004. See S. 6

<sup>17</sup> 2005. See S. 77 (9)

<sup>18</sup> No. 20 of 2007

<sup>19</sup> (1957) 1 NSCC, p. 71

<sup>20</sup> Cap L5 LFN 2004, See S. 28 (1)

Section 29(1) states:

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

Also, section 29 (2) provides:

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

Although the Land Use Act, despite making provision for the payment and the value of such payment, it fails to provide for the time frame within which the compensation is to be paid. The Act also provides for another form of compensation known as the resettlement in lieu of payment of compensation.<sup>21</sup>

### 3. PAYMENT OF COMPENSATION UNDER THE OIL PIPELINE ACT

The Act provides for the payment of compensation where lands are compulsorily acquired for laying of oil pipelines. Furthermore, Section 6 (3) of the Act<sup>22</sup> provides for three situations in which compensation is payable by a pipeline licensee on account of damage to land and any building, crops, and profitable trees thereupon. The Act also empowers the court to grant award in the event of any dispute about the amount of compensation payable in respect of any damage.<sup>23</sup>

### 4. COMPENSATION UNDER THE ELECTRICITY POWER SECTOR REFORM ACT

Section 77 (9) of the Electricity Power Sector Reform Act (EPSRA)<sup>24</sup> provides thus: “When the president issues a notice under subsection (6), the governor shall, in accordance with the provisions of section 28 (4) of the Land Use Act, revoke the existing right of occupancy in respect of the land and grant a certificate of occupancy in favour of the concerned licensee in respect of the land identified by the commission in such notice and the grant of such certificate, the right of occupancy over the land shall vest in such licensee to the exclusion of the previous holder of the right of occupancy in respect of the land, who shall be entitled to claim compensation in accordance with the provisions of the Land Use Act.<sup>25</sup>

According to Yemi Oke<sup>26</sup>, while commenting on subsection (9) of Section 77 EPSRA, the revocation of land for ‘overriding public interest’ may not ordinarily justify revocation of

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<sup>21</sup> See S. 33 of the Act

<sup>22</sup> Oil Pipelines Act, LFN 2004

<sup>23</sup> Ibid, S. 20

<sup>24</sup> See note 17 supra

<sup>25</sup> See section 77 (9) (11) of the EPSRA 2005

<sup>26</sup> See Dr. Yemi Oke, Compulsory Purchase as an Alternative to Revocation of Title to Land for Electricity Purposes in Nigeria, an Article published in the Journal of Property and Private Law, a

existing rights of occupancy or allocation of same to a business enterprise simply because such entity's trade in electricity or related activities. Beyond all doubts, companies holding either generation, transmission or distribution licenses are business enterprises trading with the ultimate objective of profit maximization in electricity. They are not charitable enterprises.<sup>27</sup> He suggested that where it becomes inevitable on the ground of national exigencies, a declaration that the land is required for purposes of generation, transmission and distribution of electricity should be based on payment of compensation equal the current commercial or market value of the land in question as it exist in respect of compulsory purchase of land. Payment of a commercially realistic amount in compensation will, according to the learned author mitigate the apparent social injustice of declaring that a person's right of occupancy would be revoked for going concerns and mercantilists' entities engaging in electricity trading on the ground of 'Public need'<sup>28</sup> and anyone whose right of occupancy has been revoked under the EPSRA could claim for compensation under the LUA.<sup>29</sup>

## 5. COMPENSATION UNDER THE NIGERIAN MINERAL AND MINING ACT

Where the Governor exercises his power of revocation under the Land Use Act in respect to lands required for mining purposes, Section 104 of the Act<sup>30</sup> obligates the Governor to pay compensation to the holder of the revoked certificate of occupancy. The Governor shall then be reimbursed with the amount of compensation paid by him by the holder of the mining license. However, the Act does not specify the quantum of compensation to be paid.

Compensation is also payable by the holder of a mining licence to an occupier of land held under a state lease or subject of right of occupancy in the event of any disturbance to the surface right of such owner or occupier and any damage done to the surface of the land on which the exploration or mining is being done or been carried out, or for loss of crops, economic tree, building or work damaged or removed or destroyed by the activities of the lessee.

Payment of compensation is usually limited to loss of improvement which includes building, economic trees, crops, fencing, well, road and irrigation. Sadly, neither the constitution of the Federal Republic of Nigeria nor the Land Use Act provide for measurement mechanism for quantifying compensation, thus leaving this to the discretion of the government or the court of law where applicable, which in most cases only apply the market value principle, and this in most cases waters down other important consideration attached to the property like communal living and architectural layout etc. This in most cases makes compensation payable on compulsory acquisition for overriding public interest to be meager, inadequate and falls short of the real market value of the property<sup>31</sup>.

## 6. CHALLENGES ASSOCIATED WITH COMPENSATION

The most complex and controversial aspect of compulsory acquisition is where the issues arise in respect of compensation for losses suffered and who-gets-what when the government acquires a piece of land. A long-standing principle in many jurisdictions is that compensation should be guided by the objectives of "equity" and "equivalence"—that is, the adequacy of compensation should be measured against the goal of ensuring that people are

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publication of the department of Property & Private Law, Faculty of Law, University of Lagos, Akoka-Yaba, Lagos, Nigeria. P. 46- 47

<sup>27</sup> Ibid

<sup>28</sup> Ibid 26

<sup>29</sup> S.77 (9) of EPSRA

<sup>30</sup> Nigerian Mineral and Mining Act, No. 20 of 2007

<sup>31</sup> O.G. Amokaye, *The impact of the Land Use Act upon Land Rights in Nigeria* in R. Home(ed) *Local case studies in African Land Law*, Pretoria University Law Press (PULP) 2011, p.74

neither impoverished nor enriched (Keith, 2008)<sup>32</sup>. A variation on this standard view argues that it may be appropriate in some cases, particularly where a taking is occurring in the context of a development project or program, to aim beyond equivalence to improving the position of those affected wherever possible. This is the principle articulated in the World Bank Policy on Involuntary Resettlement: “Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.”<sup>33</sup>

In either case, applying the principles of compensation in practice has always been an extremely complex challenge. Appreciation of this complexity has deepened as fuller and more nuanced views of the rights that people’s hold over land has taken root in many parts of the world.

### 6.1 Compensable Interest

Fekunmo,<sup>34</sup> enunciated that compensation in cases of compulsory acquisition of land means the sum of money which is to be paid by a public body carrying out some authorized undertaking under statutory powers in respect of the compulsory acquisition of land which is required for the purpose of the undertaking and the injury resulting from the execution of the works to land. Nuhu<sup>35</sup> affirmed that when land is compulsorily acquired for a just purpose, there should be prompt and adequate payment of compensation that will better the lots of the interested parties in question in other to enhance their livelihood and contributions to the economic and social activities of the society. Compensable interests in compulsory acquisition include but not limited to:

#### (a) Private rights over state land

In many countries, full private ownership of land does not exist, and instead people hold land under long-term leaseholds, certificates of occupancy, concessions or other arrangements while the state retains ownership of the land. This is equally the provisions of Section 1 of the Land Use Act which vests all lands in the federation in the governor of each state. In these cases, state ownership is nominal, and private rights over state land are held and transacted for all practical purposes as if the land were privately owned. In other cases, the nature of the retained state interest may be more significant. In any event, in applying the principles of compulsory acquisition, it is important to focus on the private rights to land that will be terminated as a result of a taking, whether or not such rights amount to a narrow definition of ownership.<sup>36</sup>

#### (b) Multiple layers of rights

There may be multiple layers of rights held by any number of rights holders. This is because there are situations where a privately owned parcel may be subject to leaseholds, mortgages, rights of way for utilities or transportation, concessions, rights of traditional or other uses, etc. Ownership of land, trees, buildings and other improvements may all be separately held and each of these separate interests may represent a significant loss to its

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<sup>32</sup> See note 4 supra

<sup>33</sup> World Bank Operational Policy 4.12 on involuntary Resettlement, Para, 2 (c).

<sup>34</sup> Fekumo, J.F. (2001). Oil Pollution and the problems of compensation in Nigeria. F & F publishers, Portharcourt.

<sup>35</sup> Nuhu M.B. (2006). Compulsory Acquisition and Compensation of Land in Federal Capital Territory, Abuja (a case study of the University of Abuja permanent site). Journal of Environmental Technology and Science-etsj, (1) 1.

<sup>36</sup> See note 3 supra

holders if the parcel of land is acquired by government and the right is terminated. Unfortunately, existing compulsory acquisition laws and practices may not be well adapted to capturing all relevant interests in a land parcel. Some laws may target land owners without mentioning the array of other potential rights that may also be relevant and affected by the acquisition. A more frequent scenario is that even where the legal framework clearly recognizes subsidiary or secondary rights, the processes put in place for identifying, notifying and compensating interest holders are not well-designed to discover the existence of such rights in a particular context, or to bring the holders of those rights into the discussion of compensation. This is particularly the case with respect to customary rights.

(c) Unregistered or inaccurately documented rights

It is not unusual for compulsory acquisition laws to presume a level of documentation of rights that may in fact not exist. Also, some laws tie eligibility for compensation narrowly to whether the land right is registered in accordance with the country's land registration legislation. This can be problematic where, as is frequently the case, only a fraction of a given country's land has actually been registered. Although many countries have modern registration laws on the books, but implementation frequently suffers from financial or other capacity constraints or a lack of political will. And in many cases registration systems may not capture all important secondary rights that are present. In such cases, the strict application of a "registered-interests-only" rule to compensation would result in many interests going uncompensated or under-compensated. In situations like this, the government (Directorate of Roads) may assist unregistered landowners to register their land, just so that the land can then immediately be expropriated and the owners compensated in accordance with the expropriation legislation.

(d) Customary rights

Under the customary right, recent decades have witnessed a growing willingness on the part of a number of national governments to accord some formal recognition to customary rights. A clear example of this is Ghana, where up to 80% of all land are recognized in accordance with the Constitution as owned by traditional communities. Similarly, in other countries, including Mozambique, Tanzania, Uganda, Burkina Faso, Mali, Philippines, Cambodia, Peru and elsewhere in Latin America, land laws have been adopted that provide for the recognition of customary tenure regimes to varying degrees. Thus, the distinction between customary and statutory tenure is in a number of places less significant than it used to be. This trend is encouraging because it promises more robust and equitable treatment under law for land rights that governments have historically tended to ignore or acknowledged weakly.<sup>37</sup>

On the other hand, in many countries, while the principle of recognition of customary rights is proclaimed, the legal framework for such recognition is vaguely articulated and moves towards operationalizing it. As a result, the situation on the ground is often one where rights remain unclear and vulnerable. This is also compounded by the fact that many compulsory acquisition laws on the books pre-date recent land law reforms and are ill-suited to deal with issues such as the valuation and compensation for customary rights.

(e) Shared Resources

Land held by groups or under some sort of collective arrangement can pose special challenges to the application of the principles of compensation, both in customary and some non-customary tenure. An example of the former is Ghana, where traditional authorities

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<sup>37</sup> *ibid*



(referred to in some parts of the country as “stools” or “skins”) hold allodia” (full) ownership to the land on behalf of their communities. A non-customary law is the ownership of rural agricultural land in China, where law recognizes the collective as owner. In such instances, the law treats the traditional authority or the collective entity as the holder of the compensable interest in land, and relies on them—implicitly or explicitly, depending on the country, to ensure that land rights compensation is appropriately shared within the group. Yet in both contexts, there have been significant and growing concerns that deficiencies in intra-group governance structures have led to compensation not reaching the actually displaced individual or household. This has received particular attention in recent years in China, where central government authorities have issued increasingly strong policy statements designed to ensure that land compensation paid under the Land Administration Law actually reaches the “land losing farmer.”<sup>38</sup>

## 7. COMPULSORY ACQUISITION WITHOUT COMPENSATION

Compensation denote some form of restitution which aims to place a property owner, as near as possible to the position he would have been had his property not been acquired for public purposes. Compensation in cases of compulsory acquisition of land means the sum of money which is to be paid by a public body carrying out some authorized undertaking under statutory powers in respect of the compulsory acquisition of land which is required for the purpose of the undertaking; and the (if any) injury resulting from the execution of the works to land which is not required for the purpose of the undertaking.<sup>39</sup> Garner<sup>40</sup> describes compensation as “a fair payment by the Government for property it has taken under eminent domain. The property’s fair market value, so that the owner is not worse-off after the taking.” Compensation serves to right what would otherwise count as wrongful injuries to persons or their property.<sup>41</sup> Compensation flows naturally from any act of compulsory acquisition. In theory, compensation makes the injured person whole; it aims at repaying for losses and should therefore be guided by the principles of equity and equivalence. It is ordinarily payable not only for the land taken by the State but also for other losses occasioned by the act and process of public acquisition of land<sup>42</sup> and this must have informed the provision of the constitution<sup>43</sup> on prompt compensation and access to court for the determination of the adequacy or otherwise of the compensation payable.

Despite this right to compensation by the government, there are instances where the law deviates from the golden rule of compensation by denying land owners any compensation at all or paying what amounts to inadequate compensation for the loss occasioned by the acquisition, which happens to be the rancour of this paper.

### 7.1 Compulsory Acquisition Without Compensation Under the Land Use Act

Section 1 of the Land Use Act provides that: -

“Subject to the provisions of the Act, all land comprised in the territory of each State in the Federation are vested in the Governor of that State and such land shall be held in trust and

<sup>38</sup> *ibid*

<sup>39</sup> Fekumo, J. F. *Oil Pollution and the Problems of Compensation in Nigeria*. F& F publishers, Port Harcourt. (2001) p 7ss

<sup>40</sup> Garner, B. A. (Ed.) “*Just Compensation*” (1999) 7th Edition, West Group, St. Paul, Minnesota, p.277

<sup>41</sup> Prosser W.L and Wade J. W, *Restatement (Second) of Torts* (ALI 1979) Sec 903

<sup>42</sup> In the UK there are in addition statutory entitlements to which the claimant may be entitled such as Home Loss Payments to a person who is displaced from a dwelling by compulsory powers or Basic Loss and Occupiers’ Loss Payments to a person who is displaced from property or land other than a dwelling by compulsory powers

<sup>43</sup> Section 44 constitution of Federal Republic of Nigeria 1999 (as amended)

administered for the use and common benefit of Nigerians in accordance with the provision of this Act”<sup>44</sup>.

The Land Use Act in the above section vests all lands in every State of the Federation in the Governor of the State who holds same in trust and is enjoined to administer them for the use and common benefit of all Nigerians in accordance with the provisions of the Act.<sup>45</sup> By this act, Nigeria now operates a contractual system of tenure validated by a Certificate of Occupancy, which sets out terms of tenure including access, succession, duration and rents.<sup>46</sup> What this means is that rather than own land in perpetuity, the citizen is granted a determinable right of use over the land. The effect is that total ownership of land was vested in the Governor and private persons were only entitled to a leasehold interest through a right of occupancy.<sup>47</sup> According to Nwabueze,<sup>48</sup> the meaning and effect of vesting all lands in the government is that private ownership is hereby abolished and the title of the former private owners transferred to the Government. However, some commentators and academic writers like Omotola<sup>49</sup> James,<sup>50</sup> Fekumo<sup>51</sup> and Smith<sup>52</sup>, known as the private property right school, are of the view that the Act does not dispossess or extinguish individual rights to lands. Thus the rights of the citizen to enjoy his interest in land remains, and the right to alienate this interest is only impaired to the extent that the transaction relates to land coming under section 36 of the Act. Omotola argues further that if the Governor is the owner of all lands in the state it would not have been necessary to insert section 28 of the Act which gives the Governor the power of revocation.<sup>53</sup> Fekumo, in supporting the views of Omotola, opines that sections 24, 29(3) and 35 of the Act recognize the various units of ownership before the Act; meaning that customary right of occupancy as defined in the real sense predates the Act. He therefore concludes by saying that a careful look at the whole context of the Land Use Act; it will appear to warn that there are three types of ownership: customary ownership, customary right of occupancy and statutory right of occupancy. According to him, what has happened under the Act is that the Governor, as trust-owner, has the radical title in the land, leaving the real ownership with the indigenous owners.<sup>54</sup> These scholars argued further that the Governor is not the beneficial owner of the land by virtue of Section 1 of the Act, but only a trustee, as the section created a trust in favour of all Nigerians.

According to Otubu<sup>55</sup>, in all, the import of the provision of section 1 is that the legal status of the Nigerian land user becomes that of right of occupancy, not one of ownership; and the economic interests and benefits of occupancy are severely limited by law since proprietary interests in land are lost and claims are restricted to improvements made on the land.<sup>56</sup> Otubu is thus of the view that the Act stripped off ownership rights vested in individuals, families,

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<sup>44</sup> Land Use Act 1978 CAP L5 L.F.N. 2004

<sup>45</sup> Land Use Act, s.1.

<sup>46</sup> See: [www.serac.org/SERAC-LANDUSEACT.doc](http://www.serac.org/SERAC-LANDUSEACT.doc) accessed 24/07/2012

<sup>47</sup> Adefulu. A & Esionye. N: An Overview of Nigeria’s Land Use Amendment Bill. Available at: <http://www.mondaq.com/x/81844/agriculture+land+law/An+Overview+Of+Nigerias+Land+Use+A+amendment+Bill> accessed 17/04/2012

<sup>48</sup> Nwabueze ‘Nationalization of land in Nigeria’ paper delivered at Annual Bar Dinner, Onitsha Branch on 8<sup>th</sup> December, 1984 p. 1

<sup>49</sup> Omotola.J.A. “Does the Land Use Act Expropriate? (1985) 3 *JPPL* p. 1.

<sup>50</sup> James R.W. “*Nigerian Land Use Act, Policy and Principles*” Unife Press 1987 p. 33.

<sup>51</sup> Fekumo.J.F Does Land Use Act Expropriate? - A Rejoinder. (1978/88) 8/9 *JPPL* p 5-20

<sup>52</sup> Smith I.O “*Practical Approach to Law of Real Property in Nigeria*” (Ecowatch) 1999 p. 70-71.

<sup>53</sup> Omotola J.A. *Tenth Anniversary of the Land Use Act. (1978/88) JPPL p1*

<sup>54</sup> Fekumo.J.F. *supra* note 35 p 15-18

<sup>55</sup> Dr. Tunde Otubu, Department of private and property law, faculty of Law, University of Lagos. In his article “Compulsory Acquisition without compensation and the Land use Act”

<sup>56</sup> See Land Management Under the Land Use Act available at:

<http://www.onlinenigeria.com/land/?blurb=530> accessed 24/06/2013

and communities prior to its enactment and vest the same in the governor. Smith in his inaugural lecture<sup>57</sup> agrees to this where he said:

“Section 8 of the Land Use Act subjects an actual grant of statutory right of occupancy by the Governor to a fixed term. The term is usually expressed to be for duration of 99 years; it could be less. Because a fixed term will inevitably come to an end by effluxion of time, technically, all rights appertaining to the land reverts back to the reversioner i.e. the Governor, at the expiration of the term, and like the situation under a leasehold interest, the holder is expected to relinquish possession. Where there are no improvements on the land, no issue arises as to the status of the holder for, he owns not the land but only the improvements made thereon ...”

It is thus clear that the Act nationalized all lands in favour of the State, whilst allowing private ownership of the improvements on the land. The argument of the private property rights school to the contrary failed to consider the import of the provisions of section 29 subsection (1) and (4) which in reality divested private beneficial interest in land simpliciter and vests same in the State. The provision provides that the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their unexhausted improvements; and compensation under subsection (1) of this section shall be, as respect the land, for an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy was revoked<sup>58</sup>.

## *7.2 Circumstances Under Which Land Is Acquired Without Compensation*

Flowing from the foregoing, section 28 of the Act equips the State with the power to revoke rights of occupancy, whilst section 29 requires it to pay compensation for the revoked occupancy rights. However, the grudge of this paper is that the Act declines payment of compensation in some instances and or pays what cannot be conceptually regarded as compensation in other circumstances. This paper therefore discusses instances of compulsory acquisition without compensation. According to the provisions of section 34 (5) (a) of the Act,

“Where on the commencement of this Act the land in urban area is undeveloped, then one plot or portion of the land not exceeding half of one hectare in area shall<sup>59</sup> continue to be held by the person in whom the land was so vested as if the holder of the land was the holder of a statutory right of occupancy granted by the Governor in respect of the plot or portion as aforesaid under this Act; (b) and all the rights formerly vested in the holder in respect of the excess of the land shall on the commencement of this Act be extinguished and the excess of the land shall be taken over by the Governor and administered as provided in this Act”.<sup>60</sup>

<sup>57</sup> Smith I.O: *Sidelining Orthodoxy In Quest For Reality: Towards An Efficient Legal Regime of Land Tenure in Nigeria*. An Inaugural Lecture delivered at the University of Lagos On Wednesday, 18th June 2008 University of Lagos Press, 2008 p 20-21

<sup>58</sup> Section 29 (1) (4) of the Land Use Act

<sup>59</sup> subject to subsection (6) of this section

<sup>60</sup> Subsection (b) of section 34 (5)

The Act further provides that section 34 (5) (a) shall not apply where such person, upon commencement of this Act, is also the holder of any undeveloped land elsewhere in any urban area in the State and in respect of such a person, all his holdings of undeveloped land in any urban area in State shall be considered together such that one plot or portion not exceeding half a hectare in area shall continue to be held by such a person as if a right of occupancy had been granted to him by the Governor in respect of that plot or portion. And, the remainder of the land (so considered together) in excess of half a hectare shall be taken over by the Governor and administered in accordance with the provisions of the Act and the rights formerly vested in the holder in respect of such land will be extinguished.<sup>61</sup> The Act makes no provisions for any form of compensation to be paid to those affected by this provision and also forbids recourse to the courts to challenge these draconian and unconstitutional provisions of the Act. This is a pure expropriatory act on the part of the state without compensation as it negates the compensation principles enshrined in the Nigerian constitution.<sup>62</sup>

There are certain circumstances under the Act where a land and land rights are revoked or compulsorily acquired without compensation. These include where the holder/occupier alienates the right of occupancy without the requisite consent; where there is a breach of any of the provisions deemed to be contained in the certificate of occupancy; where there is a breach of any terms in the certificate of occupancy or special contract made by the Governor; and where a person to whom a certificate of occupancy is issued refuses or neglects to accept and pay for such certificate.

a) Revocation on grounds of alienation without requisite consent<sup>63</sup>

One of the instances under which there can be a compulsory acquisition of private interest in land without provision for compensation under the Act is where the holder of either a statutory right of occupancy or a customary right of occupancy alienates the whole or part of such right either by sale, assignment, mortgage, transfer of possession, sublease, bequest or by any other means without the requisite Governors' consent or approval. The Act under section 22 prohibits and makes it unlawful for any person granted a right of occupancy by the Governor to alienate his right of occupancy or any part thereof without the consent of the Governor first had and obtained as failure of this renders any purported transfer of possession null and void.<sup>64</sup> Also, the holder of the right in addition stands to forfeit his right by outright revocation without any compensation. The application of this provision imposes double jeopardy on the parties to the transaction as the parties would not only have incurred losses on the account of the transaction being declared void for lack of requisite governor's consent; but will also forfeit the land and the development thereon to the State without any corresponding obligation to pay compensation. The parties are not also allowed to remedy their wrongs by re-applying for the Governor's consent. This is indeed a pure case of double kill.

b) Revocation on grounds of breach of the provisions contained in the right of occupancy<sup>65</sup>

By virtue of section 28(5) (a) of the Act, the Governor may revoke a statutory right of occupancy if there is a breach of the provisions contained in section 10 of the Act. Section 10 provides thus-

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<sup>61</sup> See section 34 (6) (a) – (b) of Land Use Act

<sup>62</sup> Section 43 & 44 Constitution of Federal Republic of Nigeria 1999.

<sup>63</sup> see section 28(2) (a) and (3) (d) of the Act.

<sup>64</sup> see section 22 (2) of the Act.

<sup>65</sup> see section 28(5) (a).

“Every certificate of occupancy shall be deemed to contain provisions to the following effect:

- That the holder binds himself to pay to the Governor the amount found to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation;
- That the holder binds himself to pay to the Governor the rent fixed by the Governor and any rent which may be agreed or fixed on revision in accordance with the provisions of section 16 of this Act.” Accordingly, where the holder fails to fulfil any of the above requirements, he stands the risks of revocation without compensation because the governor has exclusive power to fix and review rents, it may revoke the right of occupancy for failure to pay imposed rent. This makes the governor the law giver and enforcer of all times, thus leaving the holder of the right of occupancy at the mercy of the governor and unjustly enriches the state at the expense of the right holder. In order to ensure equity and fairness in the exercise of this power, the court should be saddled with the responsibility to either revoke or otherwise order the judicial sale of the right of occupancy on the application of the governor. And where sale is ordered, the state should deduct its accrued rents and any excess sum should be returned to the right holder. This will definitely afford justice to all parties concerned.”

- c) Revocation on grounds of breach of terms contained in the certificate of occupancy or special contract by the governor<sup>66</sup>

Where the holder of a certificate of occupancy fails to comply with the terms contained in the certificate of occupancy or the terms of a special contract entered into by him and the Governor regarding the land, as long as the terms are not inconsistent with the provisions of the Act<sup>67</sup>, he stands the risk of revocation of his rights without any right to be compensated. According to Otubu<sup>68</sup> this provision is not only draconian, it is undemocratic. Why will the Governor revoke a right of occupancy for failure of the holder to comply with the terms of unknown special contract or even terms of the certificate of occupancy imposed on him without his consent? The provision gives no room for service of notice of breach and request to rectify the breach before the exercise of the powers of revocation by the Governor. No opportunity is afforded the holder to be heard and, or make amends with respect to the alleged breach. This is a hazy provision and an example of excessive powers of the Governor to circumvent the protection of private property rights as envisaged under the Constitution.

- d) Revocation on grounds of refusal or neglect to accept and pay for a certificate of occupancy issued in respect of a right of occupancy.<sup>69</sup>

By virtue of section 9 (3) of the Act, If 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 and recover from such person any expenses incidental thereto, and in the case of a certificate evidencing a statutory right of occupancy to be granted under paragraph (a) of subsection (1) the Governor may revoke the statutory right of occupancy.” It follows therefore that the Governor may compulsorily acquire land without the payment of compensation where the holder refuses or neglects to accept and pay for a certificate which was issued in evidence of a right of occupancy. Such a holder will not only lose his right of revocation at the instance of the governor, but will also not be entitled to be

<sup>66</sup> see section 28(5) (b) of the Act.

<sup>67</sup> *ibid.*

<sup>68</sup> See note 55 *supra*

<sup>69</sup> see section 28(5) (c) of the Act.

compensated for the revoked right.<sup>70</sup> In the opinion of Otubu<sup>71</sup>, revocation without compensation on this ground is an overkill as the governor could at best exercise a right of lien on the property to the extent of the expense incurred in the process and probably with the interest at current bank rates.

## 8. CONCLUSION AND RECOMMENDATIONS

Compulsory acquisition as a system of acquiring land by the government is backed by law, with an express provision for compensation to the land owner whose land have been compulsorily acquired. It is however worthy of note that section 29 of the Land Use Act will not apply where there is penal revocation of land or land rights. This appears to be a draconian and nebulous provision. It is therefore recommended that penal revocation powers of the Governor under the Act should be subject to judicial process to curb executive tyranny and politically motivated revocations.<sup>72</sup> Furthermore, in order to assure the security of private property rights, revocation of right of occupancy should not be based on such flimsy excuse as unlawful alienation, failure to pay rent, breach of express or implied terms in a certificate of occupancy, collect or pay for a certificate of occupancy, which will not attract compensation.

It is also recommended that compensation should be paid to holders of undeveloped lands, at least to the extent of their investment in securing the land from the state or third parties. The provision of Section 28 of the Act should be modified to permit individuals to challenge the unjust revocation of their interest in land. It is further recommended that where land is acquired for a particular purpose, the Act should make a provision which compels the governor to offer, the acquired land back to the original owner if it is not used for the purpose which it was initially intended. In view of the foregoing the paper recommends the review of the Act in these respects to attune to the current democratic era and in consonance with international best practices in the area.

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<sup>70</sup> *ibid*

<sup>71</sup> See note 55 *supra*

<sup>72</sup> Just few years back it was reported in the news that the authorities of the Federal Capital Territory (FCT) has marked for demolition the property housing the secretariat of PDP, a breakaway faction of the former ruling party. See: <http://www.vanguardngr.com/2013/10/fcta-marks-npdp-secretariat-demolition/> accessed 22/10/2013