



THE LAND USE ACT

- Twenty Five Years After

Edited by
I. O. Smith

A Publication of the Department of Private & Property Law, Faculty of Law, University of Lagos.

© Department of Private and Property Law, Faculty of Law, University of Lagos, Nigeria. 2003

All Rights Reserved. No part of this publication may be reproduced or transmitted in any form or by any means including photocopying and recording, without the prior permission of the copyright holder, application for which should be addressed to Department of Private and Property Law, Faculty of Law, University of Lagos, Nigeria.

ISBN 978-059-072-2

First Published in 2003

by

Department of Private and Property Law, Faculty of Law,
University of Lagos, Akoka-Yaba, Lagos- Nigeria.

Printed by: **FOLAR PRINTS**
16, Adaranijo Street, Lad-Lak
Phone: 08033039158, 01-2904148

LIST OF CONTRIBUTORS

1. **Hon. Justice I. A. Umezulike (OFR.)**, Professor-of-Property Law
2. **Professor Musa G. Yakubu**, Faculty of Law, Amadu Bello University, Zaria - Nigeria.
3. **I.O. Smith**, Associate Professor of Law, Ag Head, Department of Private and Property Law, Faculty of Law, University of Lagos-Nigeria.
4. **Enefiok Essien**, Associate Professor of law, Faculty of Law, University of Uyo, Nigeria.
5. **Emeka Chianu**, Senior Lecturer, Faculty of Law, University of Benin, Benin City, Edo State-Nigeria
6. **M.A. Banire**, Senior Lecturer, Department of Private and Property Law, Faculty of Law, University of Lagos-Nigeria
7. **Nsongurua J. Udombana**, Senior Lecturer, Department of Jurisprudence and International Law, University of Lagos, Nigeria
8. **Taiwo Ajala**, Senior Lecturer, Ag Head, Department of Private and Property Law, Faculty of Law, Lagos State University, Ojo - Nigeria.
9. **Amokaye Oludayo G.**, Senior Lecturer in Property and Environmental Law, Department of Private and Property Law, University of Lagos - Nigeria.
10. **Tunde Otubu**, Lecturer, Department of Private and Property Law, Faculty of Law University of Lagos, Akoka-Yaba, Lagos-Nigeria.
11. **L.O.C Chukwu**, Lecturer, Department of Private & Property Law, Faculty of Law, University of Lagos, Nigeria

12. **Akeem Olajide Bello**, Department of Public Law, Faculty of Law, University of Lagos.
13. **Onuoha Reginald Akujobi**, Lecturer, Department of Private and Property Law, Faculty of Law, University of Lagos.
14. **C. O. Adekoya**, Lecturer, Faculty of Law, Olabisi Onabanjo University, Ago-Iwoye, Ogun State, Nigeria
15. **Shogunle B.A**, Lecturer, Faculty of Law, Olabisi Onabanjo University, Ago-Iwoye. Ogun State-Nigeria
16. **K. O. Amusa**, Lecturer, Faculty of Law, University of Lagos-Nigeria.
17. **Gbenga Akingbehin**, Lecturer, Dept. of Public Law, Faculty of Law, University of Lagos, Akoka-Yaba, Lagos-Nigeria.
18. **Olugbenga Ojo**, Legal Practitioner

CONTENTS

	Pages
List of Contributors	v-vi
Preface	vii-viii
Contents	ix-xvi
Table of Cases	xvii-xxviii
Table of Statutes	xxix-xxxvi
 CHAPTER 1 CONSTITUTIONAL ENTRENCHMENT OF THE LAND USE ACT- AN ARGUMENT FOR EXCISION	1-18
- <i>Akeem Olajide Bello</i>	
Introduction	1-2
The Purpose of the Act	3-5
Justification for Entrenching the Act	5-7
Constitutional Status of the Act	7-12
Justification for Excision and Implication of Excising The Act	12-17
Concluding Remarks	17-18
 CHAPTER 2 LAND USE ACT AND CONSTITUTIONAL MATTERS ARISING	19-48
- <i>C. O. Adekoya</i>	
Introduction	19-20
Whether The Land Use Act is an Integral Part of the Constitution or An Existing Law	20-26
Whether the Provisions of the Act Supercede Those of the Constitution	27-31
Whether the Executive Governor of a State can Exercise Powers of Military Governor under the Act	31-34
Whether the Land Use Act Expropriate	34-38
Right to Compensation under the Act	38-40
The Question of Jurisdiction to Entertain Judicial Proceedings under The Act	41-44

	Conflict of Rights between the Federal and State Government	44-46
	Conclusion	46-48
CHAPTER 3	THE ENACTMENT OF THE LAND USE ACT ON 29TH MARCH, 1978: NATIONALISATION OR EXPROPRIATION?	49-60
	- Shogunle B.A.	
	Introduction	49-50
	The Pre 1978 Era	50-51
	The Mischief Sought to be Arrested	51-52
	Definition of Terms	53-54
	Nationalization or Expropriation?	54-60
	Conclusion	60
CHAPTER 4	WEIGHED IN THE BALANCES AND FOUND WANTING: NIGERIA'S LAND USE ACT AND HUMAN RIGHTS	61-89
	- Nsongurua J. Udombana	
	Introduction	61
	The Jural Postulates Of The Land Use Act	61-66
	Human Rights And The Land Use Act	66
	A. The Right to Life and to Human Dignity	67-71
	B. The Right to Food	71-74
	C. The Right to Property and to Housing	74-80
	An Assessment	80-87
	Conclusion	87-89
CHAPTER 5	TRUSTEESHIP CONCEPT UNDER THE LAND USE ACT: MIRAGE OR REALITY?	90-115
	- M. A. Banire	
	Introduction	90-93
	Concept Of Trust	93
	* Definition	93-94

CHAPTER 1

CONSTITUTIONAL ENTRENCHMENT OF THE LAND USE ACT- AN ARGUMENT FOR EXCISION*

INTRODUCTION

The Land Use Act¹ (hereinafter referred to as "the Act") is perhaps the most revolutionary² and controversial piece of legislation in Nigeria's legal history. One of the controversial issues relating to the Act is the rigid procedure for its amendment and the status of the Act vis a vis the Nigerian Constitution³. The issue has attracted divergent academic⁴ and judicial opinions⁵. The Act has been entrenched in the Constitution and given a special status, which prescribes a special procedure for its amendment. The provisions of section 315(5) of the Constitution of the Federal Republic of Nigeria 1999⁶ (hereinafter referred to as "the Constitution") achieved this. The procedure prescribed for the amendment of the

* Akeem Olajide Bello, L.L.M. Department of Public Law, Faculty of Law, University of Lagos.

1 Cap 202, Laws of the Federation of Nigeria, 1990.

2 In *Savannah Bank (Nig.) Ltd. v. Ajilo* [1989] NWLR (Pt. 97) 305 at p.315 paras. E -F Obaseki JSC commenting on the revolutionary effect of the Act observed that the Act swept away all the unlimited rights and interest that Nigerians had in their lands and substituted them with very limited rights and rigid control of the use of their limited rights by the Governors and the Local Governments.

3 Other controversial issues arising from the Act includes: (i) the issue of the extent and the enormity of the powers vested in the Governors; (ii) the issue of the adequacy of compensation provisions under the Act; (iii) and the exclusion of the jurisdiction of the Courts in relation to compensation claims.

4 Niki Tobi, "Existing Laws and the New Constitution", Nig. L.J. (1977-1980) p.101; Adeoye, "The Land Use Act 1978 and the 1979 Constitution" Vol. 10 & 11 J.P.P.L. (1988/89) p. 23; Akande, "The Land Use Act 1978 and the Nigerian Constitution" (1982), N. C. L. Rev. p.319; Kalu, "Land Use Act and The Constitution" in *Essays in Honour of Judge Elias*, (Omotola ed.) p. 106; Osipitan, "The Land Use Act and the 1979 Constitution: Conflicts and Resolutions" Vol. 2 No. 3 JUS (1991) p. 50.

5 There are many judicial authorities on this issue, but see generally: *Nkwocha v. Governor of Anambra State & Ors* [1984] 1 SCNLR 634; *Lemboye v. Ogunsuji* [1990] 6 NWLR (Pt. 155) p.210; *Kanada v. The Governor of Kaduna State & Anor* [1986] 4 NWLR (Pt.35) 361, *Kukoyi v. Aina* [1999] 10 NWLR (Pt. 624) 633.

6 See also the equivalent provision under section 274(5) of the Constitution of the Federal Republic of Nigeria 1979.

Act is as stipulated in section 9(2) of the Constitution⁷. This special procedure confers a rigid status on the provisions of the Act.

The Act could therefore not be amended through the normal legislative process⁸. This has made it difficult to adjust the provisions of the Act to reflect various suggestions and criticisms, which have been made concerning its application. Amending the Act during a military administration would perhaps be much easier than during a democratic government. This is because of the fusion between the executive and the legislative arm of government. However, for 17 out of the 25 years of the existence of the Act, military regimes have been in power and yet it has not witnessed any meaningful amendment.

The constitutional entrenchment of the Act has been trailed with controversies and problems of interpretation. The purpose of this chapter is to demonstrate that the Act has failed to achieve the objectives of its founding fathers. It has provoked conflicting interpretations of its true constitutional status. It has also generated several problems in the process of applying its provisions. The rigid status of the Act consequent upon its entrenchment has made it very difficult to amend its provisions. This discourse shall therefore advocate for the excision of the Act from the Constitution. This would involve a brief examination of the purpose of the Act, the rationale for entrenching the Act in the Constitution and arguments for excising the Act from the Constitution and the implications of the excision. We shall now turn to an examination of the purpose of the Act.

⁷ The provision is in pari materia with section 9(2) of the 1979 Constitution.

⁸ The normal legislative process for amending an Act requires that the proposal for amendment should be supported by a majority of the members of the National Assembly, see section 56 of the Constitution. The special procedure under section 9(2) requires that a proposal for the alteration of the Land Use Act should be supported by not less than two-thirds majority of all the members of the National Assembly and approved by a resolution of the Houses of Assembly of not less than two-thirds of all the States.

THE PURPOSE OF THE ACT

General Olusegun Obasanjo the Nigerian Head of State at the time the Act was promulgated in a broadcast, which introduced the Act, stated the purpose of the Act as follows: "The main purpose of this Decree is to make land for development available to all including individuals, corporate bodies, institutions and governments ... Fast economic and social development at all levels and in all the parts of the Country is our main consideration"⁹.

The preamble to the Act also gives inkling into the objectives of the Act. It states as follows:

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 right 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.

Commenting on the above provision, Adigun noted that implicit in the preamble is the doctrine of the inalienable rights of every Nigerian to partake of the factor of production¹⁰. After setting out the broadcast of General Olusegun Obasanjo and the terms of the preamble to the Act, Ekpu summarised the intendment of the Act as follows: (1) the provision of a uniform land tenure system in the country, (2) to make land easily and cheaply available to all Nigerians and the government for development purposes, and (3)

⁹ See the paper presented by the Faculty of Law, University of Lagos, titled "The Land Use Act as a Model for the Attainment of Economic Development through Land Reform", presented at the 27th Annual Conference of N.A.L.T. 1989 at pp. 9-10 where the broadcast of the then Head of State was quoted.

¹⁰ Olayide Adigun, "The Land Use Act and the Principles of Equity or the Equity of the Land Use Act," in *The Land Use Act - Report of A National Workshop*, p. 66 (J.A. Omotola ed, Lagos University Press, 1982).

to check the practice of land speculators, whereby some wealthy individuals indulged in a lucrative trade in land¹¹.

The Act vests all land comprised in the territory of each State in the Federation in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act¹². The Act vests the control and management of land in urban areas in the Governor of each state¹³. The powers of control and management of land vested in the Governor includes granting statutory right of occupancy, granting easements, power to demand and revise rent for any land granted, and power to impose penal rent etc¹⁴. Other powers vested in the Governor include the power to approve alienation of a right of occupancy¹⁵, and the power to revoke a right of occupancy for overriding public interest. Overriding public interest is defined to include a situation where land is required by the government for public purposes and where land is required for mining purposes and for the laying of oil pipeline¹⁶. The control and management of land in rural areas is vested in the Local Government within the area of the jurisdiction where the land is situated¹⁷. The Act authorises Local Government to grant customary right of occupancy with respect to land in rural areas¹⁸. The Act recognises the legal interest of persons vested with developed land before its commencement. Such interests are

11 A.O.O. Ekpu, "The Role of Local Government in the Implementation of the Land Use Act: The Bendel State Experience" in *The Land Use Act Administration and Policy Implication*, (Olayide Adigun ed.), being the Proceedings of Third National Workshop on the Land Use Act, (Lagos: University of Lagos Press, 1991) p. 42 at p. 44; See also Hon. Justice S. F. Adeoye, "Some Aspects of the Land Use Act", (1982) N. C. L. Rev. p. 312 and M. G. Yakabu, *Land Law in Nigeria*, pp.209-213 (Macmillan Publishers, 1985).

12 See section 1 of the Act. Section 49 preserves any title to land held by the Federal Government or any of its agency, such land shall continue to vest in the Federal Government or any of its agency concerned.

13 Section 2(1).

14 Section 5.

15 Section 21 and 22.

16 Section 28.

17 Section 2 (2).

18 Section 6.

converted into a statutory right of occupancy¹⁹. Where undeveloped land is vested in any person before the Act, one plot or portion of the land not exceeding half hectare shall continue to be held by that person as if he had been granted a statutory right of occupancy. All rights formerly vested in the holder in respect of the excess of the land were extinguished and became vested in the Governor.²⁰

There is no doubt that the Act going by the statement of its founding fathers, its preamble and some of its provisions is designed to achieve a radical social reengineering designed to make land accessible and tackle some identified societal ills. Laudable as these objectives may be, it is the opinion of this writer that it does not justify the entrenchment of the Act in the Constitution and subjecting its amendment to the rigid provisions of section 9(2) of the Constitution. It is appropriate at this stage to consider the reasons why the founding fathers of the Act smuggled it into the Constitution of the Federal Republic of Nigeria 1979.

JUSTIFICATION FOR ENTRENCHING THE ACT

The Land Use Act was promulgated into law on the 29th of March 1978²¹. The Act was not contained in the Draft Constitution prepared by the Constitution Drafting Committee. It was also not contained in the version of the Constitution approved by the Constituent Assembly. The government thought it fit to include certain additional provisions in the Constitution of the Federal Republic of Nigeria 1979. The Land Use Act was one of the changes introduced into the Constitution of the Federal Republic of Nigeria 1979²². The reason for its inclusion is stated as follows: "...the Supreme Military Council has approved the same subject to such

19 Section 34

20 Section 34(5).

21 Decree No. 6 1978.

22 The following statutes were included in the 1979 Constitution: The National Youth Service Corps Act No.24 of 1973, The Public Complaints Commission Act No. 31 of 1975 and the National Security Agencies Act, No. 16 of 1976.

changes as it has deemed necessary in the public interest and for purposes of fostering the promotion of the welfare of the people of Nigeria”²³.

It is our submission that the complex and rigid procedure for amending the Act is a great disservice to public interest. Public interest demands that where the application of law is causing undesirable consequences and impeding economic activities such a law should be amenable to amendment through the normal legislative processes. Several suggestions have been made for amending some provisions of the Act, which are perceived to be a hindrance to business and commerce. The rigid procedure prescribed for amending the Act surely has accounted for why the Act has not witnessed any substantial amendment to reflect these suggestions. One is not surprised that the Act has not undergone any serious amendment during the military regimes spanning from December 1983- November 1995. It was surely the intention of its military founding fathers to make the Act rigid. The Act has not fared better during the years of its existence in a democratic government between 1979 and 1983 and between 1999 to date.

The then military government perhaps felt that the Act was too revolutionary to survive in a democratic government. Indeed it is doubtful if the Act could have survived if it had not been entrenched in the Constitution having regard to the scale of criticisms and controversies that has trailed its provisions. The Military Government aware of this state of affairs was anxious to preserve the Act. It was as if the government could not trust the sense of judgment of the incoming legislators. The government believed in its own wisdom that the Act is good for Nigerians and should be allowed to remain by making the procedure for its change complex. Before examining whether it is desirable to entrench the Act in the Constitution, it is important to consider the status of the Act. The entrenchment of the Act in the Constitution has generated several

23 See the preamble to the Constitution of the Federal Republic of Nigeria (Enactment) Act, Cap 62, Laws of the Federation of Nigeria, 1990.

issues relating to its Constitutional status. We shall now turn to an examination of these issues.

CONSTITUTIONAL STATUS OF THE ACT

Several controversial issues have arisen as a result of the entrenchment of the Act in the Constitution. Some of the issues that have received divergent academic and judicial responses are as follows:

- (i) Whether a Civilian Governor under the Constitution of the Federal Republic of Nigeria 1979 succeeded to the powers vested in a Military Governor under the Act;
- (ii) Whether the Act is an existing law under the Constitution of the Federal Republic of Nigeria 1979 and 1999;
- (iii) Whether there are conflicts between the provisions of the act and some provisions of the Constitution.
- (iv) If the answer to the question in (iii) above is in the affirmative, which prevails the provisions of the Act or the provisions of the Constitution?

The courts in answering these issues initially adopted conflicting and contradictory approaches. The result has been uncertainty and confusion. While some of the issues can be regarded as settled for now, the same cannot be said concerning the others. A consideration of the relevant provisions under the Constitution and judicial pronouncements will make this very clear.

Section 315 of the Constitution²⁴ permits the continued application of existing laws that were in existence before the coming into being of the Constitution. An existing law was defined in section 315(4)(b) as follows: "any law and includes any rule of law or any enactment

²⁴ The equivalent provision under the Constitution of the Federal Republic of Nigeria 1979 is section 274.

or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date”.

Such existing laws shall have effect with such modifications as may be necessary to bring them into conformity with the provisions of the Constitution and the laws would be deemed to be an Act of the National Assembly or a law made by the House of Assembly of a State within their respective constitutional legislative competence²⁵. The Constitution empowers appropriate authority to make textual modifications in existing laws to bring them into conformity with the provisions of the Constitution²⁶.

The Supreme Court in *Nkwocha v. Governor of Anambra State & Ors*²⁷ settled some of the issues highlighted above and made important pronouncements on the import of section 274(5), which is identical with section 315(5) of the Constitution of the Federal Republic of Nigeria 1999. Before examining the decision of the court it is important to set out the provisions of section 315(5). It provides as follows:

Nothing in this Constitution shall invalidate the following enactments, that is to say:

(a).....

(b).....

(c).....

(d) the Land Use Act 1978

and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent

25 Constitution of the Federal Republic of Nigeria 1979 Section 315(1)(a) & (b).

26 Section 274(2). Appropriate authority was defined in subsection (4) to mean the President in relation to the provisions of any law of the Federation or the Governor of a State in relation to the laws of a State.

27 [1984] 1 SCNLR 634.

as any other provisions forming part of this Constitution with the provision of section 9(2) of this Constitution²⁸.

The Supreme Court held that a State Governor under the Constitution of the Federal Republic of Nigeria 1979 succeeded to the powers of the Military Governor under the Land Use Act. In the lead judgment delivered by Eso JSC, he rejected the view that the Land Use Act is an integral part of the Constitution and commented on the import of section 274(5). The statement of Eso JSC is important and it is worth quoting in *extenso*:

Now, the position is, in view of all these provisions of section 274, that the Land Use Act is not an integral part of the Constitution. It is an ordinary statute which became extraordinary by virtue of its entrenchment (Section 274(5)) in the Constitution, for if the Act has been a part of the Constitution it would not have been necessary to insert in sub-section (5) of section 274 the words 'Nothing in this Constitution shall invalidate' as the draftsman of the Constitution cannot make the Constitution to invalidate part of itself, nor would it be necessary to have in sub-section (6) of Section 274 that the Act shall continue to have effect as a 'federal enactment' that is, a law made by the National Assembly, the Constitution itself not being a 'federal enactment'. In other words, the Act which is Federal enactment, shall continue to have effect as, what it already is a federal enactment.

And so, it is meaningful when sub-section (5) of section 274 provides that the Act 'shall continue to apply and have full effect in accordance with its tenor' that the tenor of the Act, as a single piece of legislation, is the nationalisation ...

28 This provision was not initially part of Draft of the Constitution of the Federal Republic of Nigeria 1979. It was inserted into the Constitution by the Supreme Military Council. It would appear that challenging the validity of the inclusion of the Land Use Act in the Constitution will serve no useful purpose, see Kalu "Land Use Act And the 1979 Constitution", in *Essays in Honour Judge T. O. Elias*, (Omotola ed., Lagos: Faculty of Law, University of Lagos, 1987) and J. A. Akande "The Land Use Act and the Nigerian Constitution" (1982) N.C.L. Rev. p.319. See however, Abiola Ojo, *Constitutional Law and Military Rule in Nigeria*, pp.77-78 (Evans Pub. 1987).

Once the import of section 274 and 276 of the Constitution is thus separated, it would be clear that there is no conflict in the Act and the Constitution nor in the provisions of the Constitution in relation to the Act, for it is the same organic law of the land that has provided for the status of the Act (Section 274) and made it a Federal enactment which...²⁹

Other Justices³⁰ of the Supreme Court with the exception of Nnamani JSC agreed with Eso JSC that the Land Use Act is not an integral part of the Constitution and expressed the view that the Act is an existing law as defined in section 274(4) of the 1979 Constitution. The issue therefore appears settled³¹. The Court declined to entertain the issue of whether any provision of the Land Use Act, which conflicts, with the Constitution is void to the extent of its inconsistency. The court was of the opinion that the issue was academic because it did not arise in the proceedings before the Court of Appeal. However, a careful reading of the statement of the import of section 274(5) of the Constitution of the Federal Republic of Nigeria 1979 by Eso JSC to which the other Justices concurred indicate that the resolution of the issue could be implied from the decision. It is submitted that it could be inferred from the decision of the court that the import of section 274(5) is to give the provisions of the Act an exalted status similar to that of the Constitution itself. Consequently as the court noted there is no conflict in the Act and the Constitution. If there is no conflict between the Act and the Constitution, the issue of whether any provisions of the Act would be void for inconsistency cannot therefore arise. The comments of Nwokedi J., the trial Judge in Nkwocha's case admirably puts the import of section 274(5) in very clear terms. He observed as follows:

My duty as I see it is to give effect to the plain meaning of the language of the Constitution. In my view, that language of S. 274(5) makes the provisions of the Land Use Decree equivalent

²⁹ p. 652.

³⁰ Mohammed Bello JSC (as he then was), Irekefe JSC, Aniagolu JSC, Uwais JSC (as he then was).

³¹ However, see Akande, "The Land Use Act 1978 and the Nigerian Constitution" 1982 N.C.L.Rev. p.319.

to any other provision of the Constitution by the use of the words 'to the like effect as any other provision forming part of this Constitution'... For the same reason in my opinion, no reliance can be placed on Section 1(3) of the Constitution for the purpose of attacking the validity of the provisions of the Land Use Decree, since the Constitution has itself provided that the provisions of the Land Use Decree are to have the same force and to be equivalent to any other provisions of the Constitution with the result that none of those provisions can be said to be provisions of 'any other law' for the purpose of Section 1(3) which is inconsistent with the provisions of the Constitution³².

The implication of the decision of the Supreme Court in Nkwocha's case and the clear statement of Nwokedi J. have received ample academic support. Akande agrees with the position of Nwokedi J. that there can be no inconsistency between the provisions of the Act and any other provisions of the Constitution³³ that would make the Act invalid. Osipitan contends more forcefully that the provisions of section 274(5) provides adequate safety valve for all the provisions of the Act which are in apparent or real conflict with the provisions of the Constitution³⁴. The writer agrees with the implications of the import of section 274(5) of the Constitution. It is therefore submitted that judicial decisions³⁵ which declared some provisions of the Land Use Act invalid on grounds of inconsistency with the Constitution and academic opinions³⁶ which supported these decision are with due respect erroneous.

32 [1983] 4 NCLR 719 at pp. 732-733.

33 Akande, *op.cit.* p. 327; see also Niki Tobi, *Hand Book on the Land Use Act*, (Nigeria: Ahmadu Bello University Press Ltd., Zaria, 1989), p. 25.

34 Osipitan, "The Land Use Act and the 1979 Constitution: Conflicts and Resolutions" Vol. 2 No. 3 JUS 1991 p. 50; Osipitan, "Public Law and the Land Use Act 1978" in *Issues in Nigerian Law* (J.A. Omotola ed., Faculty of Law, University of Lagos) 1991, p.90.

35 *Chief Bola Adewunmi v. Ogunbowale & Ors* ID/115/81 Unreported (See Cases on Land Use Act, (J.A. Omotola ed.) ; *Lemboye v. Ogunsiji* [1990] 6 NWLR (Pt. 155) p.210; *Ebitech v. Obiki* [1992] 5 NWLR (Pt 243) 599; *Kanada v. The Governor of Kadamana State & Anor.* [1986] 4 NWLR (Pt 35) 361; *Kukoyi v. Aina* [1999] 10 NWLR (Pt. 624) 633.

36 F.O. Adeoye, "The Use Act, 1978 and the 1979 Constitution: The Question of Supremacy" Vol. 10 & 11 J.P.P.L. (1988/89) p.33 at pp. 36-37; See also P.A.O. Oluyede, *Modern Nigerian Land Law* (Evans Brothers (Nigeria) Publishers Ltd, 1989, pp. 448-449.

The rigidity of the Act is a product of its entrenchment. The provision of section 315(5) of the Constitution has been interpreted as making the provisions of the Act equivalent to any other provisions of the Constitution by the use of the words "to the like effect as any other provision forming part of this Constitution". This implies that the provisions of the Act are capable of alteration or repeal only to the extent as any other provision under the Constitution, namely section 9(2) of the Constitution³⁷. The Supreme Court in *Nkwocha's* case confirmed the rigid status of the Act vide section 9(2) of the Constitution³⁸. We shall now turn to an examination of the provisions of section 9(2). It provides as follows:

An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

The implication of the above provision is clear. Two-thirds majority of the National Assembly and the two-thirds of the House of Assembly of all the States is required to support the proposal for amendment. This is in sharp contrast with the normal legislative process for amending an Act, provided in section 56 of the Constitution, which requires that, the proposal for amendment should be supported by a majority of the members of the National Assembly. It would be a herculean task to secure the required majority to effect an amendment of the Land Use Act.

JUSTIFICATION FOR EXCISION AND IMPLICATION OF EXCISING THE ACT

The implementation and administration of the Act has given rise

37 *Per* Nwokedi J. in *Nkwocha v. Governor of Anambra State & Ors* [1983] 4 NCLR 719 at p. 732.

38 *See* [1984] 1 SCNLR 634 at p. 654 para. B; *per* Irekefe JSC., pp.654-655 paras.H-A; *per* Bello JSC., p. 664 para. B; *per* Uwais JSC (as he then was).

to several problems, which have attracted the attention of writers and commentators. These problems have continued to persist. This is so perhaps because of the cumbersome and rigid process of amending the Act. One of the problem areas³⁹ in the administration of the Act is the vexed issue of consent and its implications for industrial and economic development. The problems relating to the issue of consent is fundamental. It has adversely impacted on achieving one of the objectives of the Act, which is to make land available for development. It is still as difficult today for individuals to obtain land as it was before the Act⁴⁰. The implementation of the consent provisions and the severe bottlenecks in the path of those willing to acquire or transfer land for industrial or commercial purposes has betrayed the ideal of making land easily available⁴¹. Commenting on this issue Olayide Adigun and A.A. Utuama observed as follows:

The operation of the consent provisions of the Act have made land transactions more difficult and less economic. In fact, it can be said that the delay in seeking compliance with the consent provisions of the Act has tended to reduce considerably the number of land transactions; consequently capital formation has not been satisfactory, so also is the general development process in the country⁴².

The process of obtaining consent has been turned into money

39 The other problem areas in the implementation of the Act include: (i) the problem of interpreting the true constitutional status of the Act; (ii) the issue of the extent and the enormity of the powers vested in the Governors; (iii) the issue of the adequacy of compensation under the Act and the exclusion of the jurisdiction of the Courts.

40 J.A. Omotola, *Law And Land Rights: Whither Nigeria?*, An Inaugural Lecture Delivered at the University of Lagos on Wednesday, June 29, 1988. (Lagos: University of Lagos Press, 1988) p.12.

41 F.O.Adeoye & H.D. Ogunniran, "The Socio-Economic Implications of the Consent Provisions of the Land Use Act" in *The Land Use Act-Administration and Policy Implication*, p.80 (Olayide Adigun ed); see also Kole Olowajana, "The Land Use Act and The Banking Industry" in Olayide Adigun, *supra*, p.113; Ladi Taiwo, "Practical Implications of the Land Use Act on Mortgages" in Olayide Adigun *supra*, p. 134.

42 Adigun & Utuama, "A Decade of Land Reform in Nigeria: The Land Use Act 1978 in Perspectives" in *Proceedings of the 26th Annual Conference of the National Association of Law Teachers*, (1988) p. 31 at 48.

making venture in some states. It has resulted in unnecessary delay in the process of giving consent thereby slowing down land development⁴³.

Another important reason for excising the Act from the Constitution is that the entrenchment of the Act in the Constitution has been trailed with problems of interpretation and ambiguities. Commenting on this problem, a learned writer had this to say:

It must be admitted that if there be any award for bad drafting, the draftsman of the Land Use Act will easily win the first prize. For in my little experience of twenty years of continuous research, I cannot think of any statutes which has produced so much ambiguities, contradictions, absurdities, invalidities and confusions as the Act has done. The Judges who have to give meaning to its provisions therefore deserve my sympathy. The impossibilities of the Statute has led to many of them not bothering to interpret its provisions. Some Judges at best state its Section 1 and seek shelter in its preamble and what they conceive as its general intendment. Others have admitted publicly that the Act defies their comprehension. The result is that ten years after commencement, the provisions of the Act remain largely uninterpreted.

The above statement made about 15 years ago is still valid today. The task of interpreting the true constitutional status of the Act has been trailed with controversies. Initially, there was a problem as to whether a civilian governor succeeded to the office of the military governor. The Supreme Court in *Nkwocha's* case eventually resolved this. Despite the resolution of this issue there is the powerful argument canvassed by Nwabueze which was not considered in *Nkwocha's* case to the effect that the implication of the provision of section 274(6) of the Constitution of the Federal Republic of Nigeria 1979 that the Act continues to have effect as a federal enactment is to bring the Act within the meaning of all laws made by the National Assembly and thereby within the

43 A.B. Kasumu, "The Question of Consent to Alienation - Effect On Development" in *The Land Use Act-A Report of National Workshop* p. 100 (J.A. Omotola ed.).

powers of the President to execute under section 5 of the Constitution. The implication of this he argued is that the Federal military government fully aware of section 5(1) of the Constitution must be taken to have intended to remove the Act from the executive authority of the state governments and to place it under that of the federal military government⁴⁴. Controversy also trailed the issue of whether the Act is an existing law or an integral part of the Constitution. Although this issue was also settled by the Supreme Court in *Nwkocho's* case there is powerful argument to the contrary⁴⁵. The issue of whether there is a possible conflict between the provisions of the Act and other provisions of the Constitution also generated a lot of controversy. This is the unfortunate situation brought about by the way and manner the Act was smuggled into the Constitution. If the intention of then military government to entrench the Act in the Constitution had been subjected to public debate and scrutiny, some of the problems encountered in its application could probably have been foreseen and avoided. It is submitted that having regard to the preceding arguments, the Act should be excised from the Constitution. Excising the Act from the Constitution does not presuppose that the Act should be repealed. It only implies that the legislative power to amend the Act would be subject to the scheme of the division of legislative powers under the Constitution of the Federal Republic of Nigeria 1999. Excising the Act from the Constitution would have some constitutional implications. We shall now turn to an examination of these implications.

If the Act is excised from the Constitution the legislative powers of the Federal and state government with respect to land would fall to be determined by the provisions of the Constitution of the Federal Republic of Nigeria 1999. Land is not specifically mentioned as a legislative item under the Constitution. The Constitution recognises that the federal and the state government must each have power to acquire and hold land for the purposes of their respective

⁴⁴ Nwabueze, *op.cit.* p. 163-164.

⁴⁵ Akande, *op cit.* see foot note 11.

functions⁴⁶. The recognition is predicated upon the doctrine that the power is incidental to the existence of both governments and to the discharge of their functions⁴⁷ and also consistent with the eminent domain power of the government. Item 68 on the Exclusive Legislative List provides that the legislative powers of the Federal Government with respect to matters therein extend to any matter incidental or supplementary to any other matter mentioned on the list. Part III of the Second Schedule to the 1999 Constitution defines incidental and supplementary powers to include the acquisition and tenure of land. Nwabueze has argued that irrespective of the omission of such provision in the Constitution with respect to matters falling under the Concurrent Legislative List and the Residual List the same implication applies.⁴⁸ The Federal Government is directly vested exclusively with power over "mines, and minerals, including oil fields, oil mining, geological surveys, and natural gas"⁴⁹. Section 40(3) of the 1999 Constitution vests in the Federal Government ownership in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria. It is submitted that subject to the aforementioned exceptions the power to legislate over land will rest within the residual legislative competence of the states by the time the Act is excised from the Constitution.

One of the advantages of excising the Act from the Constitution is that it would make it amenable to amendment by the National Assembly through the normal legislative process, which only requires a simple majority to pass a bill into law. The legislature would then have the liberty to amend the Act to reflect societal needs and advance the economic well being of the people. An

46 The Land Use Act in section 28(2)(b) recognises this fact by empowering the Governor to revoke a right of occupancy if land is required by the Federal Government for public purposes of the Federation. Section 49 of the Act preserves the title to land held by the Federal Government or any of its agency before the commencement of the Act.

47 B.O.Nwabueze, *Federalism in Nigeria Under the Presidential Constitution*, p. 153 (Sweet & Maxwell, London, 1983).

48 *Ibid.* p. 153.

49 Item 39 in the Exclusive Legislative List of the Constitution of the Federal Republic of Nigeria 1999.

excision of the Act however does not presuppose a total abolition of the Act. What is required is a thorough reappraisal of the provisions of the Act in the light of some of the problems and bottlenecks that have been experienced in its application and suggestions for reform. Fortunately, these have been adequately documented for posterity⁵⁰. Entrenching the Act in the Constitution has had the effect of insulating it from genuine proposals for amendment.

This discourse respectfully associate itself with the views expressed by Nwabueze, that land being a matter of local concern, should be the responsibility of the State governments in accordance with the rationale for the division of powers in a federation, which accords autonomy to the state governments in matters of local concern⁵¹. Availability and access to land is a crucial factor in the promotion of social and economic development. One of the attracting features of federalism is that each component unit should have the freedom to develop at a pace and in whatever direction that best suits its peculiar circumstances. Issues of accessibility of land (subject to the exceptions earlier noted) it is submitted should be left within the domain of the states. This would also have the added advantage of ensuring healthy competition among the States.

CONCLUDING REMARKS

An attempt has been made in this chapter to situate the constitutional status of the Act. The adage that says that the "evil that men do lives after them" has proved to be true concerning the Act. It has continued to be trailed with criticisms and complex problems of interpretation and application. Whatever might have been the "noble intention" of its founding fathers in entrenching the Act in the Constitution, experience garnered in the last 25 years of its existence has shown that there are more compelling reasons

50 See *The Land Use Act – Report of a National Workshop*, (J.A.Omotola ed., Department of Private and Property Law, University of Lagos, Lagos University Press, 1982); *Proceedings of Third National Workshop on the Land Use Act* published as *The Land Use Act –Administration and Policy Implication* (Olayide Adigun ed.)

51 Nwabueze, *op. cit.* p. 166.

and argument to excise the Act from the Constitution. This writer supports the view that nothing will be lost by excising the Act from the Constitution⁵². There is currently a general consensus that there is the need to amend the Act⁵³. It is suggested that efforts should not be wasted in merely amending the Act. The Act should be excised from the Constitution and matters affecting title to land and land use should be allowed to revert to the legislative domain of the states. This in our humble will better serve the interest of the generality of Nigerians. There is no basis to entertain any fears of discrimination and unfair treatment of non-indigenes. There are enough constitutional provisions to allay such fears⁵⁴.

52 Kalu, "Land Use Act and The Constitution" in *Essays in Honour of Judge Elias*, p.114 (Omotola ed., Faculty of Law, University of Lagos, Lagos).

53 See the editorial comment of *The Guardian Newspaper*, Monday December 16, 2002.

54 See The Constitution of the Federal Republic of Nigeria 1999, sections 36, 42, 43, and 44.

Since the
29th day of
so much
the inter
academic

A lot of b
in the aca
dimension
as more
comments
judges an
some prov

This chap
the issue
competent

* C. O. Ad
Ogun Sta

1 Formerly
Nigeria,

2 See Justic
p.105

3 See Omot
Principles

4 Court & L
works sor

5 See J. O. A
the Niger

6 See F.O. A
Consent F

Ibid