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**THE IMPLICATIONS OF NATIONAL LAND LEGISLATION ON SECURITY OF  
TENURE AND WEALTH CREATION IN THE RURAL AREAS OF NIGERIA**

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**ABSTRACT**

In the rural and communal settings, land rights are culturally attached to indigenous peoples in Nigeria, especially the inhabitants of the southern part of the country. Culturally, the customary land tenure system has generic value and security in such ways that it could be transferred from one owner to owner without restrictions. However, the security of tenure and the ease of transfer has been eroded by national legal developments. Security of land tenure is a vital ingredient which enhances transferability of greater altitudes of investment and access to financial incentives including fiscal credits. Security of tenure also expedites the allocation of the other factors of production thereby aids the maximization of allocative efficiency of resources. This article therefore, critically evaluated the effects of the extant laws on the security of land tenure among the rural agrarian communities in Nigeria. It further argued that the mode of property rights under the national laws have severe negative effects on allocative and social efficiency hence, have extensive effects and several social consequences. It concluded that the erosion of the customary security of tenure which pre-dated the current land use legislation has sweeping consequential effects on food security, health and social welfare of the rural agrarian communities thus, counterproductive with regards to policy, rural production mechanisms, investments, and wealth creation.

*Keywords:* Land, Tenure Security, Agrarian, Laws, Investments, Nigeria.

*JEL Classifications:* J43, O13, P32, Q15, Q24.

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## 1. THE CONCEPT OF LAND AND TENURE

It is crucial to commence by expressing the puzzling précis of Alden,<sup>2</sup> inter alia:

A popular orthodoxy is that African tenures are equitable, that there is no landlessness, and family size serves as the key determinant of differences in farm size. Historically this was true in areas where fertile land was abundant and pioneer farming the rule. The right to access land and resources remains a dominant principle in most African regimes, but it has become less easy to deliver as the population has increased (nine-fold over the 20th century) and as the gap between rich and poor has grown.

Property rights are the rights of ownership construed within the legal, social, and political standpoints. Hence, property rights are rights in rem. It also refers to the extent of ownership attached to the use of societal resources. Generally, “ownership of property defines the claim rights, privileges and powers the owner of the property has as well as the duties such ownership imposes on him/her as the owner and other members of the society in relation to the property.”

Land is a real property because it does not alter its value. It is regarded as tangible property hence, section 2(1) of the Conveyancing Act defines property as rem which features include both realty and personalty. Land is portrayed to comprise of land of all tenures, tenements, hereditaments, corporeal and incorporeal including but not limited to houses and other forms of constructions attached to land. According to the Food and Agricultural Organisation (FOA), “Land tenure is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. (For convenience, “land” is used here to include other natural resources such as water and trees). Land tenure is an institution,<sup>3</sup> i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions.”<sup>4</sup>

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<sup>2</sup> Alden Wily, L. Customary Land Tenure in the Modern World; Rights and Resources Initiative: Washington, DC, USA, 2012.

<sup>3</sup> F. D Lugard. The Dual Mandate in British Tropical Africa. London: William Blackwood & Sons Ltd, 1926.

<sup>4</sup> Paul Munro-Faure, Paolo Groppo, Adriana Herrera, Jonathan Lindsay, Paul Mathieu and David Palmer. Land Tenure and Rural Development. FAO Land Tenure Studies 3. Food and Agriculture Organization of the United Nations, Rome, 2002. Online at:

Simply put, land tenure is a very vital aspect of the societal economic, social, and political configuration.<sup>5</sup> Consequently,

The fiscal or administrative goal toward which all modern states aspire is to measure, codify, and simplify land tenure in much the same way as scientific forestry reconceived the forest. Accommodating the luxuriant variety of customary land tenure was simply inconceivable ... Land is owned by a legal individual who possesses wide powers of use, inheritance, or sale and whose ownership is represented by a uniform deed of title enforced through the judicial and police institutions of the state ... In an agrarian setting, the administrative landscape is blanketed with a uniform grid of homogeneous land, each parcel of which has a legal person as owner ... property and its owner on the basis of its acreage, its soil class, the crops it normally bears, and its assumed yield than to untangle the thicket of common property and mixed forms of tenure.<sup>6</sup>

## **2. LAND RIGHTS AND TENURE SECURITY**

The Food and Agricultural Organisation (FAO) explains that, “security of tenure is the certainty that a person’s rights to land will be recognized by others and protected in cases of specific challenges. People with insecure tenure face the risk that their rights to land will be threatened by competing claims, and even lost as a result of eviction. Without security of tenure, households are significantly impaired in their ability to secure sufficient food and to enjoy sustainable rural livelihoods.”<sup>7</sup>

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[www.fao.org/3/y4307e/y4307e05.htm](http://www.fao.org/3/y4307e/y4307e05.htm) accessed 24 March 2020; A Ijaiya, ‘The Land Use Act: A Critical Review’ in *An Annual Publication of Law Students’ Society University of Ilorin, Faculty of Law* 2006. pp. 196-203; International Labour Organization (ILO). *Indigenous and Tribal Peoples Convention*; ILO: New York, NY, USA, 1989.

<sup>5</sup> I. O. Smith, *The Law of Real Property of Nigeria* (Law Centre, Lagos State University, 1995)

<sup>6</sup> James C. Scott. *Seeing Like a State*. Yale University Press, 1999, p. 36.

<sup>7</sup> [n. 1]

The United Nations defines tenure as “the way in which the rights, restrictions and responsibilities that people have with respect to the land are held.”<sup>8</sup> By the same token, the United Nations Habitat defined land tenure as “the way land is held or owned by individuals and groups, or the set of relationships legally or customarily defined amongst people with respect to land ... tenure reflects relationships between people and land directly, and between individuals and groups of people in their dealings in land.”<sup>9</sup> Prior to the colonisation and amalgamation of Nigeria, most of the tribes and ethnic groups in southern part of the country were engaged in hunting, gathering, fishing and agrarian occupations.<sup>10</sup> People were wholly dependent on their private and communal land tenures which were secured.<sup>11</sup> There were security of land tenure across the communities. Land tenure security denotes the rights of persons and communities to actual protection from arbitrary and forceful evictions from their lands.<sup>12</sup>

Land tenure security is, therefore, an element of property rights: the right to remain on one's land and make use of and profit from that land in ways the individual or groups value (so long as they do not harm others). In urban settings, land tenure is often insecure for slum dwellers and for the poor. In rural settings, land tenure is also often insecure for the poor, as well as for women, who face problems such as unlawful evictions by family members after the death of a husband or father.<sup>13</sup>

Until the discovery of oil and gas, most communities in Nigeria had to grow their own food, using their own lands and labour.<sup>14</sup> As the national economy slowly moved

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<sup>8</sup> United Nations, 1999. Security Of Tenure, Available at:

<http://www.un.org/ga/Istanbul%2B5/32.pdf> accessed 23 March 2020, at p. 32

<sup>9</sup> UN-Habitat, 2008. Secure Land Rights for All, Nairobi.

Available at: [https://www.responsibleagroinvestment.org/sites/nd\\_rights\\_for\\_all-UN\\_HABITAT.pdf](https://www.responsibleagroinvestment.org/sites/nd_rights_for_all-UN_HABITAT.pdf).

<sup>10</sup> Ambreena Manji, "Land Reform in the Shadow of the State," *Third World Quarterly* 22, no. 3 (2001): 327-42.

<sup>11</sup> Liz Alden Wily, *Governance and Land Relations: A Review of Decentralisation of Land Administration and Management in Africa* (London: International Institute for Environment and Development, 2003), 7, table 2; Also in Alden Wily, L. *Customary Land Tenure in the Modern World; Rights and Resources Initiative*: Washington, DC, USA, 2012.

<sup>12</sup> Christian Lund, Rie Odgaard, and Espen Sjaastad, *Land Rights and Land Conflicts in Africa: A Review of Issues and Experience* (Copenhagen: Danish Institute for International Studies, 2006), 3, [http://www.diis.dk/graphics/Publications/Andet2007/rod\\_landrights\\_SOA.doc.pdf](http://www.diis.dk/graphics/Publications/Andet2007/rod_landrights_SOA.doc.pdf) accessed 24 March 2020

<sup>13</sup> Boudreaux, Karol and Daniel Sacks. "Land Tenure Security and Agricultural Productivity," *Mercatus on Policy* no 57. Mercatus Center at George Mason University, 2009.

<sup>14</sup> Klaus Deininger, *Land Policies for Growth and Poverty Reduction* (London: Oxford University Press; Washington, DC: World Bank, 2003), 11.

towards crude oil, people in many communities in the Southern part of the country drifted away from the traditional occupations to white collar jobs in various sectors including the industrial sector.<sup>15</sup> The need for the government to legislate to create legal regimes for land control to favour investments arose.<sup>16</sup>

### **3. THE EVOLUTION OF THE LEGAL REGIME OF LAND TENURES IN NIGERIA**

In this segment, the paper explores the various stages of legal developments in Nigeria's land tenure system.

#### ***3.1 The Development and Effects of Customary Tenure***

As earlier stated, the customary land tenure system was the main mode of land holding and land transactions that existed in Nigeria for several centuries before the entry of the European colonists into the country.<sup>17</sup> Custom revolved around several set of traditional miens relating to various ethnic and tribal groups.<sup>18</sup> The norm of cultural beliefs and traditions were strictly recognised<sup>19</sup> and obeyed by the natives of the communities and regarded as sacred. In *Odutola v. Sanya*,<sup>20</sup> the court held that, custom regulates the traditional legal frameworks therefore, it was and still, is generally a question of fact in today's legal system hence, when custom is a prerequisite to be evidenced in court, it must hinge on fact. In *Olubodun v. Lawal*,<sup>21</sup> the court stated that, the ingredients of customs are not uniform across ethnic lines therefore that, the basic attributes of customary conducts are not exactly the same among the natives of various regions in Nigeria. However, that, in sales of land under native laws and customs<sup>22</sup> there are three

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<sup>15</sup> Clarissa Augustinus and Klaus Deininger, "Innovation in Land Tenure, Reform and Administration in Africa," in Land Rights for African Development: From Knowledge to Action, CAPRI Policy Brief (Washington, DC: CGIAR Systemwide Program on Collective Action and Property Rights, 2006), 14.

<sup>16</sup> Pauline E. Peters, "Challenges in Land Tenure and Land Reform in Africa: An Anthropological Perspective," (working paper no. 141, Harvard Center for International Development, March 2007), 7.

<sup>17</sup> Emeka Egburuonu, How to Handle Land Cases in Practice (Basic Rights Publication Ltd.2001)

<sup>18</sup> R. Ellickson, "Property in Land" (1993), 102 Yale L.J. 1315.

<sup>19</sup> R. W James, Nigerian Land Use Act: Policy and Principles (Unife Press Ltd 1987)

<sup>20</sup> (2008) All FWLR (Pt. 400) p. 780

<sup>21</sup> (2008) All FWLR (Pt. 438) p. 1468

<sup>22</sup> Niki Tobi, Handbook on the Land Use Act (ABU Press Ltd, 1989, Zaria)

essential attributes that are almost the same in all customary cores and fringes<sup>23</sup> of Nigeria namely: (a) The payment of the agreed price of the property by the purchaser; (b) The presence of witnesses; and, (c) the promise of handing over the actual possession of the land to the purchaser. These three ingredients are substantially acceptable as proof of sales of land hence, when successfully demonstrated in pleadings are satisfactory.<sup>24</sup>

Nonetheless, with regards to customary tenancy, it is formed<sup>25</sup> when the customary land owner or natives such as an individual, a family or a community endows the right of occupation of land to another person or to another cluster of persons that are not from the same family or community to hold onto a piece of native<sup>26</sup> land to which the customary tenants accept the title of the land as being owned by the grantor(s) through the payment of customary tributes. However, there are instances where strangers may enter into the native lands of others, occupy and make substantial improvements thereof without the permission<sup>27</sup> of the native owners.<sup>28</sup> Where this happens, the modern legal system will see the stranger as having acquired the rights of adverse possession as in *Aro v. Jaja*<sup>29</sup> the court stopped Andoni ethnic peoples of Niger Delta from evicting King Jaja from the occupancy of Opobo.

The Andoni peoples were the customary owners of the lands that King Jaja settled when he was banished by the King of Bonny, he (King Jaja) along with his followers became customary tenants of the Andoni peoples, having made improvements to the lands, the court refused to evict them on the grounds that the Opobo people had been customary tenants for more than five decades thus, effectively had rights of adverse possession of the lands. In *Nsirim v. Nwakerendu*,<sup>30</sup> the court acknowledged that the land occupied by the Opobos is the property of the Andonis and that it was given to the founders of Opobo by the Andonis when the Opobos ran away from Bonny in the middle of a civil

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<sup>23</sup> O.U Nweke. *The Land Use Act Decree 1978: A Critical Analysis* (Fab. Anieh (Nig) Ltd, 1989, Jos)

<sup>24</sup> *Adesanya v. Aderonmu* (2000) FWLR (Pt. 15) p. 2492; *Lasisi and Anor v Tubi & Amos* (1974) 12 SC 71 at 74

<sup>25</sup> R. Niezen. *The Origins of Indigenism: Human Rights and Politics of Identity*; University of California Press: Berkeley, CA, USA, 2003.

<sup>26</sup> T. Elias, *Nigerian Land Law* (London: Sweet & Maxwell, 1971).

<sup>27</sup> J.A Omotola, *Cases on the Land Use Act* (Lagos University Press, 1985)

<sup>28</sup> T. Elias. *The Nature of African Customary Law* (London: Routledge & Kegan Paul Ltd.,, 1962).

<sup>29</sup> (1961) LLR 200. Also see: *Akpan Awo v. Coockey-Gam* (1913) 2 NLR 100; *Oshodi v. Balogun* (1936) 4 WACA 1.

<sup>30</sup> (1955) 15 WACA 71

unrest. According to Nwabueze,<sup>31</sup> the Andonis are not in denial as to the fact that the main Opobo Township was an outright perpetual grant of tenancy by the Andonis however, that the Andonis insisted that, all other Opobo communities including Epelema, Queens Town, Kalaibiana and others were given to the founders of Opobo for farming purposes hence, customary tenancy only. It is therefore clear to emphasize that:

A customary right of occupancy is by no means ownership, even though it may be perpetual in duration ... a customary right of occupancy confers no right of property, but only possession; it lacks the cardinal attribute of ownership, namely: The power of disposal and despite its infinitude of duration in some cases, it is no more than a tenancy creating certain rights and obligations between the occupier as tenant and the grantor, and determinable upon certain conditions.<sup>32</sup>

The complex nature of the true nature of customary tenancy has been visited by the courts in Nigeria. In *Aghenghen v. Wagheroghor*,<sup>33</sup> the Supreme Court of Nigeria explained that customary tenancy is “a determinable interest in the land which may be enjoyed in perpetuity subject to good behaviour.” This is because, the donee of the land is not a borrower, not a lessee, not a licensee, not tenant at will and a yearly tenant rather he is a customary grantee with only possessory interest.<sup>34</sup> The possessory interest is given in perpetuity.<sup>35</sup> However, the problem with customary tenancy is that none of its attributes are in tandem with the English land tenure.<sup>36</sup> Nonetheless, the court has held in *Chief Etim v. Chief Eke*,<sup>37</sup> *inter alia*:

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<sup>31</sup> B.O Nwabueze. Nigerian Land Law. Enugu: Nwamife Publishers, 1974 (Reprinted in 1982), at pp. 26-27

<sup>32</sup> B.O Nwabueze, *ibid*, p. 27.

<sup>33</sup> [1974] NSCC 20

<sup>34</sup> M. M Abubarka., ‘The Land Use Act Policies: An overview’ in Journal of Private and Comparative Law, vol. 1 No. 1, A Publication of Private Law ABU, Zaria pp. 69-98, 2006.

<sup>35</sup> Lucio Muñoz, The Search for Equity in Access to Land in Latin America: Which are the Main Characteristics that Define a Sustainable Land Reform Model?" REDES, Costa Rica, C.A, 2001.

<sup>36</sup> *Nwosu v Uche* (2005) 17 NWLR pt. 955, p. 574; *Ejanemonya v. Omiobuike* (1974) 2SC 33

<sup>37</sup> (1941) 16 NLR

It is now settled law that once land is granted to a tenant in accordance with native law and custom, whatever be the consideration, full rights of possession are conveyed to the grantee. The only right remaining in the grantor is that of reversion should the tenant deny title or abandon or attempt to alienate. The grantor cannot convey to strangers without the grantor's permission of any right in respect of the land.

It implies that the interest in the land being held by the Donee can be transmitted to his successors but cannot be conveyed to third parties without the express permission of the Donor. In the same vein, the Donor cannot assign or grant the same land to a third party while the customary tenancy has not been determined without the permission of the Donee.<sup>38</sup>

### **3.2 The Land Use Act<sup>39</sup>**

Prior to the promulgation of the Land Use Decree in 1978 by the Military Regime, there was relative freedom of land ownership which was based on ethnic and tribal customs hence, the customary law prevailed in land ownership matters. In 1999, the Civilian Authorities re-enacted the entirety of the Decree as Land Use Act. Section 1 of the Act vested all lands in the Governor of the States as follows: "All lands comprised in the territory of each state in the federation are hereby vested 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 this Act."<sup>40</sup> By this provision, a trust<sup>41</sup> of land has been created in each state of the country with the State Governors as trustees. Therefore, the Governors are the legal but not the absolute owners of the lands. The provision has the effect of alteration of the customary tenure of individual, corporate and community lands rights in Nigeria.<sup>42</sup>

Section 2 created two types of lands in Nigeria, urban and rural. It vested the urban lands in the state governors and rural lands in the local government councils.<sup>43</sup> It also provided that each state shall establish "the Land Use and Allocation Committee." Section 4 conserves the State Land Laws provided that such laws are not contrary to the provisions of the Land Use Act. Section 5 authorises the State Governors to grant a

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<sup>38</sup> *Isibor v Tanson* (1968) NMLR 76; *Ojomu v Ajao* (1983) 9 SC 22.

<sup>39</sup> Chapter L5 Laws of the Federation of Nigeria 2004

<sup>40</sup> *Adisa v Oyinwola* (2000) 10 NWLR 116

<sup>41</sup> *Abioye v. Yakubu* (1991) 5 NWLR (pt. 190) p. 130

<sup>42</sup> *Nkwocha v Gov. of Anambra State* (1984) 6 SC p. 362

<sup>43</sup> J.A Omotola, *Essay on the Land Use Act 1978* (Lagos University Press, 1984)



*statutory right of occupancy* to applicants. Furthermore, Section 6 authorises the local government councils to grant *customary right of occupancy* on non-urban lands to applicants for residential and agricultural uses. Therefore, section 6 replaced the customary land tenure system which ownership of land was indefinite<sup>44</sup> with *customary right of occupancy* akin to leasehold on fixed duration of holding.<sup>45</sup> For example, section 6 (2) not demolished fee system mode of land ownership in the rural areas, it also compel the customary land tenure holders to surrender parts of their lands in that It specifies the maximum size of land that the local government can grant customary right of occupancy for agricultural purposes *inter alia*: “No single customary right of occupancy shall be granted in respect of an area of land in excess of 500 hectares if granted for agricultural purposes, or 5,000 hectares if granted for grazing purposes, except with the consent of the Governor.”

The Act further eliminated all the remnants of customary land tenure by its provision in section 6(3) empowers the “local government to enter upon, use and occupy for public purposes any land within the area of its jurisdiction.” The rights conferred on the applicants by the local government and the Governors are mere possessory.<sup>46</sup> Sections 21 and 22 forbids holders of certificate of occupancy from alienating the lands with express consents therefore, Section 21 makes it illegal for anyone to “alienated by assignment, mortgage, transfer of possession, sublease or otherwise” of any such lands “without the approval of the appropriate Local Government.” Section 22 provides: “It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained...” In the event of negligence or failure to obtain the consent of the Governor pursuant to Section 22 and the consent of the local government pursuant to section 21, Section 26 renders the transaction or alienation

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<sup>44</sup> A. Eju, "The Role of the Local Government in the Implementation of the Land Use Act: The Bendel State Experience" in O. Adigun ed., the land Use Act: Administration and Policy Implications (Lagos: University of Lagos Press, 1991).

<sup>45</sup> P.O.A Oluyede, Modern Nig Land Law (Evans Bros (Nig) Ltd, Ibadan, 1989,)

<sup>46</sup> Anugbum Ohuoha. The Effects of Customary Right of Occupancy on Indigenous Land Use of the Ikwerre People of Nigeria. *Humberside Journal of Law & Social Sciences*. Volume 10(1) 2020 pp. 26 - 42

void.<sup>47</sup> However, the effects of section 26 has been modified by the Supreme Court of Nigeria in the case of *Awojugbagbe Light Industries Ltd vs. Chinukwe & ANOR*,<sup>48</sup> where it was held that, the failure to obtain consent of the Governor prior to alienation of land does not void the transaction rather that it renders the transaction inchoate. Section 28(1) of the Act empowers the Governors to revoke both rights viz: Customary right of occupancy and Statutory right of occupancy under certain circumstances.<sup>49</sup> Section 28(1) of the Act provides *inter alia*: “It shall be lawful for the Governor to revoke a right of occupancy<sup>50</sup> for overriding public interest.”<sup>51</sup> However, a revocation can only be lawful where there is an overriding public interest including but not limited to the purpose of exclusive government use; development for public good; and on the grounds of preservation of public safety.<sup>52</sup>

Section 29(2) required that compensation should be paid to the dispossessed former holder of the right of occupancy.<sup>53</sup> Hence, “If the holder or the occupier entitled to compensation ... is a community, the governor may direct that any compensation payable to it shall be paid: (a) to the community; or (b) to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law; or (c) into some fund specified by the Governor for the purpose of being utilised or applied for the benefit of the community.” Nevertheless, the dispossessed right holder cannot approach any court in Nigeria to challenge the amount of money paid to him as compensation. This is because section 47(2) of the Act provides that: “No court shall have jurisdiction to inquire into any question concerning

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<sup>47</sup> Any transactions such as assignment, mortgage, transfer of possession, sublease or otherwise without the governor’s consent is void. However, section 49 explains the effects of the operations of Section 21, 22, and 26 does not apply to lands owned by federal government agencies; Also see the case of *Savannah Bank (Nig) Ltd vs. Ajilo* (1989) 1 NWLR (pt 97) 805.

<sup>48</sup> (1995) 5 NWLR (Pt. 390) 409

<sup>49</sup> Anugbum Onuoha [n. 45] 31

<sup>50</sup> *Kachalla v. Banki* (2006) All FWLR (Pt. 309) p. 1420

<sup>51</sup> Overriding public interest is explained in Section 28(2) of the Land Use Act as follows: “(a) The alienation by the occupier by assignment, mortgage, transfer of possession, sublease, or otherwise of any right of occupancy or part thereof contrary to the provisions of this Act or of any regulations made thereunder; (b) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation; (c) the requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.” The following cases clearly adumbrated on the effects of the concept of “overriding public interest” - *Sule Adukwu and 4 Ors. vs. Commissioner for Works, Lands and Transport, Enugu State & 3 Others* [1997] 2 N.W.L.R. (Pt. 489) pg.588; *A.G. of Bendel v Aideyan* (1989) 4 NWLR (Pt. 118); *C.S.S. Bookshops Limited v The Registered Trustees of the Muslim Community In Rivers* [2006] VOL. 8 MJSC 16; *Nitel and Others v. Chief Ogunbiyi* (1992) 7 NWLR (Pt. 255) 543; and *Foreign Finance v. L.S.D.P.C* [1991] 4N.W.L.R. (Pt. 184) p. 157.

<sup>52</sup> Kato Gogo Kingston and Mercy Oke-Chinda. The Nigerian Land Use Act: A Curse or A Blessing To The Anglican Church And The Ikwerre Ethnic People Of Rivers State. African Journal of Law and Criminology, Volume 6(1) pp. 147-158 (2016)

<sup>53</sup> *Ezennah v. Attah* (2004) All FWLR (Pt. 202) p. 1858 at 1884

or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act.”

The rural customary land owners in Nigeria are particularly hurt by the provision of section 47(2) in that, they cannot challenge the excessive power of the State Governors confined in Section 34(5) which states that: “Where on the commencement of this Act the land is undeveloped, then:

- a) One plot or portion of the land not exceeding half hectare in area shall subject to subsection (6) below, 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; and
- b) All the rights formerly vested in the holder in respect of the excess of the land shall in 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>54</sup>

#### **4. THE CONSEQUENCES OF THE LAND USE ACT ON TENURE SECURITY IN RURAL NIGERIA**

The essence of customary land tenure was to sustain collective customary rules which extended to collective land ownership such as communal lands which enabled uninterrupted ownership of lands for centuries.<sup>55</sup>

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<sup>54</sup> This completely destroys the little comfort contained in Section 34(2) which states: “Where the land is developed, the land shall continue to be held by the person in whom it was vested immediately before the commencement of this Act as if the holder of the land was the holder of a statutory right of occupancy issued by the Governor under this Act.” Even though the Act also provides in Section 36 (2) *inter alia*: “Where the lands were being used for agricultural purposes, the users of such are allowed to continue to be eligible to possess and continue using it for agricultural purposes as if they were holders of customary right of occupancy approved by the relevant local governments,” there is no guarantees and security of tenure is not provided by the law.

<sup>55</sup> Oxfam. International land coalition, rights and resources initiative. In Common Ground. Securing Land Rights and Safeguarding the Earth; Oxfam: Oxford, UK, 2016.

As earlier explained, the term *land tenure* is used to describe a system of land ownership. Therefore, the customary land tenure was the main mode of ownership under the natives and indigenous systems of Nigeria and several other African Countries prior to the advent of colonial laws. The customary land tenure endures centuries of Nigerian rural landscapes and was used “to express and order ownership, possession, and access, and to regulate use and transfer. Unlike introduced landholding regimes, the norms of customary tenure derive from and are sustained by the community itself rather than the state or state law (statutory land tenure).”<sup>56</sup>

Tenure security in land creates absolute certainty and provides the enabling grounds for investments and sustainable development.<sup>57</sup> For decades, customary land tenure was the prime mode of asserting ownership of lands in most parts of Nigeria.

The system was sustainable and equitable whereby the management and administration of lands were in the hands of family heads, clan heads, tribal chiefs and communal elders which were powerful customary institutions. One of the main arguments of the proponents of the universal land legislation in Nigeria is that, the customary land tenure deprived investments. It is hereby argued and contended against the assertion, that the traditional institutions were unstable hence could not guarantee security of land tenures. The proponents’ argument propels on the singular pivotal view that land under the native laws and customs were not lawfully registered. Therefore, that land registration under the English law style apparently to warranties better security and certainty. However, the extant land legislation did not only give rooms for land registration, it goes further to reduce the customary perpetuity of tenure to term of year absolute which itself an erosion of security of tenure. This is because only the remainder of the right of occupancy can be assigned or transmitted to third parties, unlike the customary tenure which allow the assignment and transfer of all the estates in land infinitely, without encumbrances. Abdulai<sup>58</sup> argued that there are no concrete evidence in “the sub region to indicate that land title registration has done little to guarantee security and certainty

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<sup>56</sup> Liz Alden Wily. Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa - Brief #1 of 5. Briefs on Reviewing the Fate of Customary Tenure in Africa, 5<sup>th</sup> Anniversary of Right Resources, November 2011, p. 1. Wily further explains that: “Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility. Of critical importance to modern customary landholders is how far national law supports the land rights it delivers and the norms operated to sustain ...”

<sup>57</sup>LandMark. Global Platform on Indigenous and Community Lands. Available online: [www.landmarkmap.org](http://www.landmarkmap.org) Accessed on 27 March 2020.

<sup>58</sup> Raymond Abdulai. Is land title registration the answer to insecure and uncertain property rights in sub-Saharan Africa? RICS Research paper series, Volume 6, Number 6 (2006), p.7

of land tenure; and (b) there is no clearly discernible link between land title registration and investment behaviour.”

The modern land legislation in Nigeria further phased out the crucial customary transaction known as pledge of land. Prior to the enactment of the Land Use Act, a land owner could enter in into a customary contract where he is the ‘Pledgor’ whereby he guarantees his land and/or his interest in land to another person (‘The Pledgee’) by which he the pledgor forbids himself or assures the pledgee that he shall perform some obligations. For instance, the pledger could deposit his land as security to obtain a loan from the pledgee whereby upon redemption of the loan and interest, the land ownership can revert to the pledger. However, the traditional pledge system does not involve the transfer of legal title, the only thing being transferred is the possessory rights. Although, the pledge system was relatively effective as a means of guarantee for loans and other transactions, it faced serious challenges for example, for the parties to be able to enforce the pledge in conventional courts as in *Anyaegbunam v. Osaka*,<sup>59</sup> where it was held that the claimant must prove that the transaction was a pledge; that the parties entered into the pledge in the presence of witnesses at a specific time and day; and, that the consideration for the pledge was an identifiable piece of land which belong to one of the parties.<sup>60</sup> The downside of the customary pledge was the insistence of the retaining of the legal title with the pledger as expressed by the court in *Akuchie v. Nwamadi*,<sup>61</sup> and in *Okoiko v. Esadalue*<sup>62</sup> that once it is a pledge, it will always be construed as a pledge.<sup>63</sup>

The enactment of a generic land legislation without taking reasonable steps and care to accommodate and offer statutory recognition of the pre-existing collective land ownership of the rural communities is substantially causing shortage of food and

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<sup>59</sup> (2000) FWLR (pt. 27) p. 1942

<sup>60</sup> *Ndoro & ORS. v. PIANWII & ORS.* (2002) JELR 44713 (CA)

<sup>61</sup> (1992) 8 NWLR (Pt. 258) p. 214 at 226.

<sup>62</sup> (1974) N.M.L.R. 337

<sup>63</sup> In *Adjei v. Dabanka* (1930) W.A.C.A. 63 at 66-67, it was said that, a pledge is akin modern mortgage. It is an indigenous mode of mortgage by which the owner-occupier of land in order to secure the advantage of money or money’s worth gives possession and use of the land to the pledge creditor until the debt is fully paid or discharged.

space.<sup>64</sup> This is because of the expanding and an increasing use of government powers to confiscate private properties.<sup>65</sup> The customary meaning of property in land has been changed by the Land Use Act, allowing for a greater coercive use of the legal apparatus of government to impair<sup>66</sup> the legal protection of the lands of private persons and communities. For example, there is no provision in the Land Use Act for the recognition of collective community property in that, there the two available registrations are: Statutory right of occupancy and customary right of occupancy which essentially left out the collective communal right over lands.<sup>67</sup> Therefore, the Act have failed to make specific provision for communities to be registered owners on the same template as private individual and corporate entities. This encroachment on the proprietary rights of the rural communities across Nigeria is draconian, pervasive, excessively harsh and severe. Some of the lands of the communities were acquired through inheritance, conquest and purchase.<sup>68</sup> Nonetheless;

For property in land, a local group held by cooperative defence the inalienable rights inherited through group membership. As resource use intensified, households that improved land and houses retained some right of personal property, but without the rights to transfer except through inheritance. Land rights were, however, regularly alienated by conquest, whereby a group and its chief asserted direct control by seizure.<sup>69</sup>

## **5. CONCLUSIONS AND POLICY IMPLICATIONS**

The paper has illustrated that the definitive incentive for land tenure restructuring is the willingness of the Federal government to setup institutional measures that facilitate the process by which every piece of land is allowed to be used by the pre-existing customary tenure owners, in such manner that such lands are parsimoniously

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<sup>64</sup> A. De Janvry & E. Sadoulet. Land Reform in Latin America: Ten Lessons towards a Contemporary Agenda. Prepared for the World Bank's Latin American Land Policy Workshop, Pachuca, Mexico, 14 June 2002. Available online: [https://are.berkeley.edu/~esadoulet/papers/Land\\_Reform\\_in\\_LA\\_10\\_lesson.pdf](https://are.berkeley.edu/~esadoulet/papers/Land_Reform_in_LA_10_lesson.pdf) (accessed 22/3/2020)

<sup>65</sup> M. Lipton. Land Reform in Developing Countries: Property Rights and Property Wrongs; Routledge: London, UK, 2009.

<sup>66</sup> Alden L. Wily. Estimating National Percentages of Indigenous and Community Lands: Methods and Findings for Africa; LandMark: Washington, DC, USA, 2015.

<sup>67</sup> USAID. Property rights and resource governance. In USAID Mexico Country Profile; SAID: Washington, DC, USA, 2011.

<sup>68</sup> R. Smith. We are here: The state of community-based landscapes in Peru. In Landscapes of Equity: The Question for Environmental Justice in the Andes/Amazon Region; Robins, N., Fraser, B., Eds.; University of Nebraska Press: Nebraska, NE, USA, 2018.

<sup>69</sup> T. Earle. Property in prehistory. In Comparative Property Law Global Perspectives; Graziadei, M., Smith, L., Eds.; Edward Elgar: Cheltenham, UK; Northampton, MA, USA, 2017, p. 23

cherished.<sup>70</sup> In essence, the goal of reverting to the customary tenure ownership model should be to guarantee that the most dynamic handlers of land should have unrestricted access and use of their lands. The new model based on the Land Use Act is very faulty in that, the Act was a declaration of the Military authorities that never passed through public consultations, notwithstanding the adoption by the National Assembly in 1999, the extant land use legislation has failed to facilitate wealth creation because the provisions of the Land Use Act and the associated institutional frameworks cannot conform with the basic benchmarks for wealth creation.<sup>71</sup>

According to Johnson,<sup>72</sup> for a legal framework and the associated institutions to be able to create wealth it must possess certain basic criteria as follows: First, the definition of property in the propelling law must be unambiguous and the distribution of the property interest in land must be socially efficient.<sup>73</sup> This implies that land rights must be customary and the allocation must follow the traditionally acceptable pattern established within the culture and tradition where the lands are located.<sup>74</sup> Therefore, land legislation must be formulated with maximum customary inputs to the extent that land “rights must be easy to identify and verify.”<sup>75</sup> Secondly, the laws and institutions “must have legal and tenure certainty.”<sup>76</sup> In the current circumstances, there is clear evidence of insecurity of tenure under the two-tier right of occupancy in Nigeria due to the absoluteness of duration of tenure.<sup>77</sup> This is consistent with Johnson’s postulation that:

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<sup>70</sup> O. E. G Johnson. Reforming the Customary Land Tenure System in Sierra Leone: A Proposal. International Growth Centre London School of Economics and Political Science, Working Paper 11/0558 July 2011 online at: [www.theigc.org](http://www.theigc.org) accessed 30 March 2020

<sup>71</sup> O. E. G Johnson. Economic analysis, the legal framework and land tenure systems. *Journal of Law and Economics* 15(1), 259–76, 1972.

<sup>72</sup> [n. 75]

<sup>73</sup> O. E. G Johnson. Economic aspects of the structure of land rights. In *African Agriculture: Economic Action and Reaction in Sierra Leone* (ed. J. Levi et al), pp. 203–36. Farnham Royal, UK: Commonwealth Agricultural Bureau, 1976.

<sup>74</sup> O. E. G Johnson. *African Economic Development: Cooperation, Ownership, and Leadership*. Lampeter, UK: Edwin Mellen, 2007.

<sup>75</sup> J. P Platteau. Reforming land rights in sub-Saharan Africa: issues of efficiency and equity. Discussion Paper, United Nations Research Institute for Social Development, 1995.

<sup>76</sup> [n.78]; Johnson went further to assert that: “Legal certainty means that rights will be protected against the unlawful acts of others and that the results of legal actions are easy to forecast. Vague definitions and insecure allocations of property rights inhibit the production of wealth, mainly because they increase transaction costs and obstruct exchange.”

<sup>77</sup> *Ibid.*

[Where there is tenure insecurity], the private return on investments in and attached to land will be lower the less certain and/or clearly defined are property rights in land. This will adversely affect the aggregate value of such investments being undertaken. In addition, the discount rate (time preference) in decision-making will be higher when tenure certainty is low.

The abolition of the rural customary land ownership model in Nigeria which more particularly expressed in section 34(5) of the Land Use Act which decreased the sizes of rural undeveloped lands from the pre-existing owners does not facilitate wealth creation rather it fosters poverty and food insecurity. Therefore, the method of allocating wealth ensuing from the use government acquisition of the undeveloped rural lands are not equitable to the extent of creating the enabling grounds for the investors to exploit and invest on the lands fully at zero transaction costs. For instance, the acquisition of rural undeveloped land for crude oil production in the Niger Delta of Nigeria by the government has generates anger and clamour for wealth creation, typically, the clamour for resources control by the pre-existing customary landlords has attracted huge transaction cost which affects the corporations in the oil and gas sector. This is consistent with Johnson,<sup>78</sup> which posited that:

... The cost–reward structure from using land in production must manifest a high degree of what economists call ‘internalization’ of costs and benefits. With perfect internalization, the value created by any particular activity on the land will accrue to those who bore the cost of undertaking the activity. If, within the land tenure system, the cost–reward structure fully internalizes benefits and costs, each user of land is motivated to use land in space and time so as to yield the maximum wealth from the land. Any reduction in wealth as a result of a user’s misallocation implies an equivalent reduction in his or her wealth.

The rural customary land owners ought to be considered in the scheme of enactment of the Land legislation in Nigeria. The current configuration of the maze of Land Use Act is not sustainable in the long run.

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<sup>78</sup> [n. 75]



The negative externalities of a coercive legal framework that is constantly under pressure cannot be expected to last eternity. Nigeria should learn lesson from the French Peasant Revolt of 1789–92 where the rural people rose against the state over what they perceived as injustice over the land use by the aristocrats. During the unrest, penury was rampant in the rural countryside, and in many of the areas, peasant farmers congregated and took collective action against the *Seigneurs*<sup>79</sup> which was the government of France.

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<sup>79</sup> John Markoff. Contexts and Forms of Rural Revolt: France in 1789. *The Journal of Conflict Resolution* Vol. 30, No. 2 (1986), pp. 253-289