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An Analysis of the Propriety of Public Interest in Compulsory Acquisition of Lands in Nigeria

Anugbum Onuoha, PhD.
Faculty of Law, Rivers State University, Nigeria

Abstract

The concept of public interest can be visualized as a continuum that represents the values, aspirations, and objectives of the community or polity. The goal of this article is to explore the propriety of the use of powers conferred by the extant laws for compulsory acquisition of property in Nigeria with focus on the applicability of the concept of overriding public interest. The article argues that, there are no legal safeguards to check the abusive use of government power in the application and use of the authority conferred upon the State Governors with regards to compulsory acquisition of lands in Nigeria. Secondly, it is argued that, there are no yardsticks in place to gauge the excesses of free-riders that degrade lands compulsory acquired for public interest. Consequently, the article recommend amongst others, that there should be safeguards in the law of property in Nigeria whereby lands compulsorily acquired by the government should be used for public projects rather than taken by government personnel for personal uses. Aside from the compensations payable to the private land owners, further payments should be made for relocation and stress caused to the private owners as it applicable in other jurisdictions such as Canada. The Land Use Act should be repealed and replaced by legislation that takes into account the traditional land tenure system which pre-existed across all regions of Nigeria prior to the enactment of the Land Use Act.

Keywords: Lands, Compulsory Acquisition, Free-riders, Nigeria

1. Introduction

Article 17 of the Universal Declaration of Human Rights provides that “everyone has the right to own property alone as well as in association with others” to the extent that “no one shall be arbitrarily deprived of his property.” Similarly, the United Nations’ Food and Agriculture Organization (FAO), defines land as “a delineable area of the earth’s terrestrial surface, encompassing all attributes of the biosphere immediately above or below the surface including those of the near surface including: The soil and terrain forms, the surface hydrology- including shallow lakes, rivers, marshes, and swamps. The near-surface sedimentary layers and associated

groundwater reserve, the plant and animal populations, the human settlement pattern and physical results of past and present human activity (terracing, water storage or drainage structures, roads, buildings, etc.” Franco et. al, observed that, “what land is and what it means to us is found in many diverse relationships that humans have built over time with people and other life forms in the landscapes where we live. These relationships express particular understandings, perceptions and choices regarding our place and role in the world. The phrase - the multi-dimensional character of land, is a reference to all the possible ways in which land holds meaning for people and in which people find meaning in land.” The importance of land cannot be overemphasized hence, one of the very attractive definitions of land is provided in the English Law of Property Act 1925, section 205(1)(ix) inter alia:

Land includes land of any tenure, mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other hereditaments; also a manor, advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over, or derived from land.”

English law definition of land comprises several things, afar the earth surface, with fixtures, and easements. It is generic standpoint of law that land does not only denote the top soil or the earth surface. According to Black’s Law dictionary 2nd edition: Land is the soil and entirety attached to the soil, “whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences ... land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.” Basically, “land is defined as a real property. Land is also an area of ground with defined boundaries, including minerals or resources below the surface and anything growing on or attached to the surface.” English law further regards land that lie under water as part of the overall meaning of land. However, it does not consider things that lies on the land beneath as part of land. Nonetheless, section 132 (1)(b) of the British Land Registration Act, explains that:

Land includes land covered with water. For most practical purposes, water may be used by the person owning the land on which it is, but there are restrictions on some activities, such as large-scale abstractions of water or activities which may pollute it (see, for example, the Water Resources Act 1991). Tidal waters are treated differently.

They generally belong to the Crown or to a local authority, and the public has the right to pass over tidal waters and to fish in them.

In view of the high significance of land to private, communal and public entities, taking land forcefully from the owners under the facade of public interest can have severe implications. To this extent, the next segment explores the concept and applicability of public interest.

2. An Overview Of The Concept Of Overriding Public Interest And Compulsory Acquisition Of Lands

The generic explanation is that, when a property is compulsorily acquired by the government, it is known as “taking.” According to the Encyclopaedia Britannica, “the creation of a property interest de novo and its transfer from one person to another have little in common.” Therefore, forceful transfer from private to public authority are not conventional land transactions hence, creates complicated situations. In the United States and Philippines the power of the State to compulsorily acquire private property resides in its eminent domain powers. In India, Malaysia and Singapore the Land Use Laws specifically provide for circumstances where lands may be compulsorily acquired for public use with or without compensation.

In the United Kingdom, New Zealand and the Republic of Ireland, the government can only use its statutory powers to compulsorily purchase land at market value instead of compensation. In Australia, compulsory acquisition involve compensation at market value of the land. In France, Italy, Mexico, South Africa, Canada, Brazil, Portugal, Spain, Chile, Denmark, Norway, Sweden, Finland, Germany, Panama, it is known as expropriation of land whereby the government compulsorily acquire private property for public use with compensation calculated in value of current market value and inflation.

In Spain, Article 33.3 of the Constitution of 1978 permits the government to forcefully take land from private owners by way of expropriation in circumstance that can only be defensible where it is for overriding public interest. There is no provision in Spanish law for compulsory acquisition without compensation. This is because all members of the European Union are bound by the European Convention on human rights. Article 8 of the Convention provides that:

Everyone has the right to respect for his private and family life, his home, and his correspondence and prohibits interference with this right by the state, unless the interference is in accordance with law and necessary in the interests of national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or

morals, or protection of the rights and freedoms of others. This right is expanded by Article 1 of the First Protocol to the Convention, which states that: Every natural person or legal person is entitled to the peaceful enjoyment of his possessions.

Similarly in the Islamic Republic of Pakistan, the Land Acquisition Act, authorises the State to acquire private land compulsorily and pay compensation at the prevalent market value only where the land is crucially needed for public use. In Chile, Art. 19, No. 24, of the Chilean Constitution provide as follows:

In no case may anyone be deprived of his property, of the assets affected or any of the essential faculties or powers of ownership, except by virtue of a general or a special law which authorizes expropriation for the public benefit or the national interest, duly qualified by the legislator. The expropriated party may protest the legality of the expropriation action before the ordinary courts of justice and shall, at all times, have the right to indemnification for patrimonial harm actually caused, to be fixed by mutual agreement or by a sentence pronounced by said courts in accordance with the law.

Perhaps, one of the most attractive and fair model is that of Canada. In Canada, compulsory acquisition is confined within the federal and provincial laws in the form of expropriation rights of government. It provide the statutory rules for the government to acquire private lands for public purposes, provided that the procurement is permitted by the applicable government agencies. The owners of properties so compulsorily taken are eligible to compensation at the prevailing market worth of the confiscated property. There are also provisions in the form of damages for disturbance, loss of earning (if the land was used by the owner for business), and also some payment to enable the owner to relocate (this is known as special difficulty relocating allowance). Furthermore, in the event that the property owner is dissatisfied by the amount of compensation and other payment received, he may bring action before the court for the payment to be revised.

In Nigeria, the only ground by which a Sate Governor may revoke land rights of private citizens is where the revocation is for “overriding public interest.” Therefore, it is crucial to fully explore the concept of public interest. Arguably, the concept is intertwined with several other principles that drives democratic ideals including transparency and accountability.

Similarly, the concept has been linked with and sometimes used interchangeably with “common good”, “common interest”, and “public good.”

In *State v. Crockett*, the court said: “Public interest means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected.” Lippmann explained opined that, “public interest may be presumed to be what men would choose if they saw clearly, thought rationally, [and] acted disinterestedly and benevolently.” In *Munn v. Illinois*, the court provided an expanded meaning of public interest with regards to property and the revocation power of the government inter alia:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.... When ...one devotes his property to a use in which the public has an interest, he ...must submit to be controlled by the public for the common good.

The linkages between public interest and common good were expressed in the work of Kingston, as follows:

A common good is a public good by which no one in the community can be excluded from the use. Another feature of the common or public good is that there is no additional financial burden of more people using the good. The use by one person does not diminish the use by another (“non-rivalrous”). Economists suggest that, “the marginal cost of adding one more consumer is zero.” Certain common goods suffer the abuse by the “free-rider”. Where there is payment for the use of the common good such as communal electricity, some persons (free riders) may consume the commodity without making the required payments - “tragedy of the commons.

In order to fully understand the interrelationship between public interest and public good with regards to compulsory acquisition of lands in Nigeria, a brief review of literature is required to progress this treatise.

3. Review Of Selected Literatures

One of the contentious issues concerning the concept of public good is the relative unrealistic means of distributing the benefits. For example, Kingston explained that it is not easy to apportion and accomplish "allocative efficiency" of public goods. This is because "the property rights are not assigned to enable the owners of the rights to exchange those rights for some form of interest."

Ostrom conducted several research on public-based natural resources governance and introduced the concept of common-pool resource, describing it as those resources where the property rights arrangement are vested in the public and every member of the public are the users. Subsequently, the people share rights and obligations connected with those resources. To substantiate her position, she classified goods into two major types namely: Private and public goods. Under public goods, she listed the following examples- forests, grazing areas and Rivers. Simply put, every members of society have unrestricted access to the pool of resources, with the effects that the resources could be over-exploited or over-used. It is the over-exploitation of the common which prompted the concept of the tragedy of the common.

Hardin explains that public goods are meant to serve public interests or common purpose in the form of shared-resources however, there is the tragedy flowing for public resources where the individual users often behave independently according to their own self-interest, such behaviours do go antagonistic to the common good of all users hence, the shared-resources deplete, depreciate and lose its relevance, hence, the tragedy of the common. The tragedy of the commons has since been adopted by scholars and regarded as legal, social and economic problems which occur in circumstances of over-consumption of public facilities, under investment by the public authorities, and mismanagement of public utilities by public agencies of government. The tragedy of the commons can only happen when the resources are scarce and there is high competition for the use of the resource (rivalrous) and non-excludable. Rivalrous use of common pool resources make some users to act as free-riders. Free-riders are members of the public that tend to use the common good recklessly hence, speeds the degradation rate of the common resources which ultimately exhausts the resources. According to Aristotle, "for that which is common to the greatest number has the least care bestowed upon it."

In the analysis conducted by Botchway, he observed thus: "what is left to the owners in possession at the date of acquisition is the right to compensation." Therefore, compensation following a compulsory acquisition of land should flow from the principle of sameness or the doctrine of *Restitutio in Integrum*. Therefore, an expropriated person, when compensated,

should not be better or worse off than before the acquisition. Compulsory acquisition douses the proprietary rights and the interests of the confiscated owners and vests all such rights in the Governors that demarcates all or part to the acquiring authority.

4. Public Interest And The Compulsory Acquisition Of Lands In Nigeria

The starting point of this segment is to highlight the provisions of Section 43 and Section 44(1) of the Constitution of the Federal Republic of Nigeria. Section 43 provides inter alia: “Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.” Section 44 (1) stipulates that:

No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:-

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

The aforementioned Section 43 and Section 44(1) of the Constitution enriches Section 28(1) of the Land Use Act which provide as follows:

It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest. However, revocation can only be valid in the face of 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.

The Section 28(1) of the Land Use Act derives strength from the words “except in the manner and for the purposes prescribed by a law” contained in Section 44(1) of the Constitution. Secondly, Section 315(5)(d) of the Constitution precisely listed the Land Use Act among the existing laws that has been given effect by section 315(1).

Although Section 29(2) states that all persons affected by the revocation shall be compensated by the governor however, it is only the governor that can decide the value of money each person

can receive. This has been a subject of intense debate and discontent in Nigeria in that, in some cases, the compensations are far less than the actual value of the property so revoked.

As earlier mentioned, the Nigerian Constitution forbids forceful taking of private property by the government without adequate compensation however, Section 47(2) of the Land Use Act expressly provides that: “No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under [the] Act.” This provision violates the individual rights to liberty of person and also contrary to the right to dignity of person. Albeit, Section 34(1) provides that: “Every individual is entitled to respect for the dignity of his person, and accordingly - (a) no person shall be subject to torture or to inhuman or degrading treatment.” The forceful taking of private property by government is degrading and inhuman treatment which ought to be preserved in accordance with the Constitution contemplations.

5. Analysis Of The Propriety Of Public Interest In Compulsory Acquisition Of Lands In Nigeria

The Land Use Act provides coercive models which may be inappropriate. For instance, it authorises the State governors to seize and compulsorily take lands of private and communal entities without notice and without compensation. The punitive powers to forcefully take lands without due process and without compensation are contained in Section 28(2) (a) and (3) (d) of the Land Use Act. There are other circumstances which may trigger the use of coercive powers by the Governors to take lands from private owners without compensations as follows: (a) Upon receipt of a statutory right of occupancy over land by a private citizen, terms and conditions are stringently attached thereof. Section 10 of the Act provides inter alia:

Every certificate of occupancy shall be deemed to contain provisions to the following effect: (a) 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; (b) 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 this Act.

In the event that the holder of statutory rights of occupancy is breach of any such terms and conditions, the breach could automatically trigger forcefully revocation without compensation.

This is draconian and could be construed as act of impropriety. Specifically, Section 28(5) of the Act provides inter alia:

The State Governor may revoke a statutory right of occupancy on the ground of: (a) a breach of any of the provisions which a certificate of occupancy is by section 10 deemed to contain; (b) a breach of any term contained in the certificate of occupancy or in any special contract made under section 8; (c) a refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Military Governor under subsection (3) of section 10. Consequently, section 28(6) and section 28(7) states that:

The revocation of a right of occupancy shall be signified under the hand of a public officer duly authorised in that behalf by the Governor and notice thereof shall be given to the holder; [and] The title of the holder of a right of occupancy shall be extinguished on receipt by him or a notice given under subsection (5) or on such later date as may be stated in the notice.

Another circumstance that could trigger the use of coercive powers to compulsorily acquire or take lands from the private owners is when such owners fail to seek the consent of the Governor prior to alienation of the land. This is because section 22 of the Act provides that:

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, [and] transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained ... (1) Provided that the consent of the Governor- (a) shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor: (b) shall not be required to the re-conveyance or release by a mortgage to a holder or occupier of a statutory right of occupancy which that holder or occupier has mortgaged and that mortgage with the consent of the Governor: (c) to the renewal of a sub-lease shall

not be presumed by reason only of his having consented to the grant of a sub-lease containing an option to renew the same.

The implication of the failure to seek Governor's consent for alienation of property by private owners was the subject of the case of *Savannah Bank v. Ajilo*, where it was held that the transfer of land title from one person to another without the consent of the Governor rendered the transaction null and void. However, the decision in *Savannah Bank* lacked statutory clarity in that the Land Use Act is silent as to the consequences of failure to obtain the Governor's consent. Notwithstanding, Section 22(2) which provided for the mandatory consent of the Governor did not provide penalties for failure to do so, the Act simply provide as follows:

The Governor when giving his consent to an assignment mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) may be signified by endorsement thereon.

It is against the background of the gap in the Land Use Act regarding the mandatory obligation imposed on land owners to seek the consent of the Governor in all alienation of land that the case of *Awojugbagbe Light Industries Ltd v P. N. Chinukwe & Anr* emerged, where the subject-matter of the case rested on the application to the Supreme court to review the judgment of the Court of Appeal for a "declaration that the Properly and Conveyancing Law of Oyo State and the Mortgage Deed registered as NO.2/2/2632 and dated 8/10/85 to the extent that they provide for, confer or vest the 2nd defendant mortgage with power to sell the mortgaged premises and/or without subjecting such sale to prior Governor's consent are inconsistent with the provisions of the Land Use Act and therefore unconstitutional, illegal, unenforceable, invalid and null and void and of no effect." The grounds for seeking the order was based on the fact that the consent of the Governor was not sought with regards to the alienation of the land in the matter. "It was held by the learned justice of the Supreme Court appeal that this appeal is accordingly dismissed. The decision of the Court of Appeal is affirmed. N1,000.00 costs to the respondents."

Accordingly, the Supreme Court held that the failure to obtain Governor's consent does not render the transaction null and void rather it makes the transaction "inchoate" whereby the party that has failed to comply with the requirement can complete the transaction by sending the

instruments of the transaction to the Governor's consent after the transaction. However, there is no guarantee that the Governor will give the required consent under such circumstances. It is crucial to understand the effects of null and void in land transaction. Where null and void is sustained, the holder of the right to the land stands to forfeit his right by outright revocation without any compensation. Forfeiture of land rights to the Government which is same as taking without compensation is given statutory authority by section 44(2) of the Constitution of Federal Republic of Nigeria 1999 (as amended) where in subsection (1), it expressly stated inter alia: "Nothing in subsection (1) of this section shall be construed as affecting any general law; (a) for the imposition or enforcement of any tax, rate or duty; (b) for the imposition of penalties or forfeiture for breach of any law, whether under civil process or after conviction for an offence; (c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts."

Nonetheless, revocation without compensation could occur on grounds of refusal or neglect to accept and pay for a certificate issued in evidence of a right of occupancy. Section 9 (3) provides as follows:

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.

6. Conclusion

The use of coercive statutory power of government to compulsorily acquire property of private persons is enshrined in national, regional and international laws however, what is not backed by any extant law is the arbitrary use of such powers and the use of such powers to punish political opponents and rivals. Nearly all the extant international laws emphasize on the need for adequate compensation for compulsorily acquired properties. For example, Article 14 of the African Charter on Human and Peoples' Rights, 1986 states: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." By this provision, every regional government is obligated to ensure the security of title and tenure under the various legislation by which land is regulated. The essence of the obligation is to safeguard fairness and equity in the exercise of governmental powers over private and communal lands.

Section 28 (5) (b) of the Land Use Act provides the circumstances that may result in expropriation without compensation. One of such circumstances is a breach of at least one of the terms and conditions confined in the statutory certificate which authenticates legal occupation of the property. Besides, there may be special contract entered between the Governor and the holder of the certificate of occupancy which could be compulsorily revoked in the event of breach by the private entity. This category of alienation is contrary to the provisions of the Land Act because property contracts that are not protected by Land Use Act known as special contracts are so risky to the extent that revocation and/or compulsory acquisition on the grounds of break of the contract may not attract compensation even if the contract so specify.

7. Recommendations

Nigeria should adopt the legal framework of Canada where compulsory the owners of properties that are compulsorily acquired are paid compensations at the prevalent market prices of the appropriated properties. Secondly, there should be statutory provisions in the form of damages for disturbance, loss of earning (where the lands used by the owner for business or occupational functions). Payments should also be made for relocation of the owners. Additionally, where the land owners are dissatisfied by the amount of compensation and other payment received, they should be allowed by law to claims in the court of competent jurisdiction hence, section 47(2) of the Land Use Act which provides inter alia: “No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act,” should be expunged.

Where and when compulsory acquisition inevitably takes place, there should be compensation of the owners and the compensation should be measured using the current market value of the property and the cost of improvement made on the lands.

There should be safeguards in the law of property in Nigeria whereby lands compulsorily acquired by the government should be used for public projects rather than taken by government personnel for personal uses. Aside from the compensations payable to the private land owners, further payments should be made for relocation and stress caused to the private owners as it applicable in other jurisdictions such as Canada. The Land Use Act should be repealed and replaced by legislation that takes into account the traditional land tenure system which pre-existed across all regions of Nigeria prior to the enactment of the Land Use Act.