

**Nigerian Bar Association
Abuja**

Publication Article

Gwagwalada Branch

November 2012

**BALANCING THE COMPETING PRIVATE AND
PUBLIC INTERESTS IN LAND IN NIGERIA'S
EMERGING DEMOCRACY**

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1. Introduction

The beauty of any democratic government is its tendency to unleash rapid economic, political and social development of the people. This positive impact of the system of government on the people has come to be referred in this clime as “dividends” of democracy.

In pursuance of its socio-economic development agenda, the government’s requirement of land appear to be increasing in geometric progression and consequently more and more private property is being acquired by the government to satisfy the ever increasing need for land. This situation has created many conflict situations between the government and the citizens in respect of their interest in land.

However, since the government is created to service the people and no the other way, a tenuous balance between the two contending interests must be maintained. In this piece an attempt is made to highlight the jurisprudential sources of public and private interests in land, the sources of potential conflicts of interest between them and how such interests may balance. The position is taken that it is in the mutual interest of the state and the citizen that the inherent interest of citizens in land be respected and enforced by the state.

2. Private and Public Expectations in a Democracy

Democracy has often been described as “*government of the people, by the people and for the people*”. In simpler term, democracy is a system of government where the people rule themselves in their mutual interest. In other words, the government is made up of the same people who are beneficiaries of the government. Thus in an ideal democracy the same people are the leaders and the followers, a scheme that produces a win-win situation for the people. In practice however, since the over 160 million Nigerian cannot be in government at the same time, the people are given opportunity to determine who represent them in a system of free and fair election. While those who make laws (legislature) and others who execute the laws (Executive) are elected, the other groups who interpret the laws (Judiciary) are selected in a system of mutual cooperation between the Executive and the legislature in such a way as to ensure that they serve the interest of the people.

The three arms of the government represent the mutual and general interest of the whole populace while each member of the populace represents his personal interest, thus the public and private expectation in a government. Both have a legitimate expectation of the good life- security, welfare, and protection of property and protection from arbitrariness. The scheme may be summarized in the saying that the people (public) should not harm the person (citizen) while the person should not harm the people. As Chukwudozie, C.N put it “in fact, if government has to exist, it must be government of the people, by the people, and for all round benefit of the people¹ .

3. Private and public Interest in Property

The Constitution guarantees the fundamental right of every person to acquire or own property in any part of Nigeria² . It further mandates that the only condition in which a citizen’s property may be compulsorily acquired must be in accordance with an Act of National Assembly which must make provision for the compensation of the person concerned³ . The importance of this constitutional entrenchment of right to property may be more appreciated when we remember that the Constitution is not the source of fundamental rights. They are inherent, peremptory, divine and extra legal. Their source stems from the humanity of man who is created and imbued with some attributes of God Almighty. In fact, the right to and protection of right to property is one of the first imperative for the creation of the state and by extension, government. According to Jacques Rousseau, the great and chief aim of man coming “into commonwealth is the preservation of their property”⁴ .

In other words, the right of private citizens to property and its protection is at higher pedestal than the right and interest of the peoples’ representatives (the government) in property. Thus while the one is meta-constitutional, the other is less constitutional. That is why public right or interest to property can only be acquired in accordance with the

¹ Introduction to Human Rights and Social Justice (Onitsha, Cape Publishers International Ltd 1999) p.25

² S.43(1) of the 1999 Constitution

³ Section 44(1) of the 1999 Constitution

⁴ Cited in Eso, K: Thoughts on Law and Jurisprudence (Lagos, M.J. Professional Publishers Ltd.) p.79

tenor of an Act of the National Assembly made in that behalf and subject to prompt payment of compensation⁵. Section 44(1) provides:

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 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 enabling statute for the compulsory acquisition of private property today is the Land Use Act 1978⁶. Section 1 of the Act vests all the land comprised in the territory of each state in the Governor of the state to be held and administered for the use and common benefit of all Nigerians.

Sections 5,6,34 and 36 of the Act effectively reduced the quantum of interest in Land by individuals, communities, families or corporate organizations from absolute ownership to right of occupancy which may be for a term of years or for indefinite term.

In attempt to satisfy the constitutional requirement for compensation for compulsory acquisition of property, section 29 of the Act makes provision for compensation for unexhausted improvement only. In other words, no compensation is payable for bare land but for only developments thereon.

4. Is Section 29 of the Land Use Act not Unconstitutional?

It is curious that while the Constitution contemplates compensation for interest in immovable property acquired which include bare land and the development on it, the Act purport to compensate for only unexhausted improvements only. The question is whether compensation for unexhausted improvement satisfies the constitutional requirement for compensation for interest in immovable property. It is submitted that a person's interest

⁵ See section 44(1) of the Constitution

⁶ Cap .L5, Laws of Federation of Nigeria, 2004

in immovable property is usually settled even before he puts any development on it. For instance, a person who acquires interest in land by grant more often than not pays consideration for the bare land before he starts to develop it. As such his interest in the land goes beyond and is established even before the so-called unexhausted improvement which the Act purport to limit compensation to. Accordingly when juxtaposed with section 44(1) of the 1999 Constitution, section 29 of the Land Use Act is unconstitutional to the extent that it limits compensation for land compulsorily acquired for overriding public interest to only unexhausted improvement. It is against this background, that Abugu in “Land Use and Reform in Nigeria: Law and Practice”⁷ has advocated for compensation to be extended to loss of use of land for those putting land in active and beneficial use as at the time of acquisition by the government.

5. Sources of Conflict in Private and Public Interest in Property.

The first source of conflict between private and public interest in property in Nigeria appears to be the misconception among public officers that private interest in property is held or exists at the pleasure of the government. So operating under this mindset, many public officers show disregard for the constitutional and statutory safeguards of private interest in property. It is to be noted that even with the acclaimed vesting of all land in the state in the governor, the land is held by the governor as a trustee for the benefit of the people. As a matter of fact, the land holding and interest in property of individuals families and communities remain substantially the same subject only to where such lands is required for public purpose, which purpose must be justified by law.⁸

The other sources of conflict may be inherent in the law itself, i.e, the Land Use Act. The combined effect of both sources of conflicts may be seen in the following potential conflicts situations:

- a. Inadequacy of compensation⁹. The Law did not make provision for compensation for loss of use of Land and replacement value of land in active use upon acquisition.

⁷ (Abuja, Immaculate Prints, 2012) p.164

⁸ See sections 34 and 36 of the Act Adole v. Gwar (2005) 5 mjsc 38, Ogunleye v. Oni (1990) 2 NWLR (pt: 135) 745 at 784

⁹Abugu op cit P. 164

Again even though the constitution directs prompt payment of compensation, no provision is made for payment of interest for delayed compensation.

- b. Non-compliance with the procedure set out for revocation of right of occupancy, for instance, non-service of revocation notice or revocation through newspapers and radio or television announcement contrary to the express provision for service of notice under the Act.¹⁰
- c. Rash or harsh execution of revocation or taking possession after compulsory acquisition. Public officers demolish private property without recourse to court order or giving owners of such property opportunity to be heard. They issue only demotion notice which Abugu has described as “a judgment given without a hearing”,¹¹
- d. The tendency to enter into possession of compulsorily acquired property before compensation is paid. If private interest in property predates public interest, it follows that as a matter of good governance, compensation should be paid before taking over such property by the government.¹²
- e. Delay in obtaining governor’s consent. Applicants for governor’s consent are made to wait unusually long before governor’s consent is obtained for transfer of interest in land. This tendency holds down business transaction and affects the pursuit for mass housing by mortgage institutions.
- f. Arbitrary charges for ground rents and other fees. While section 16 of the Act contemplates nominal charges for ground rents which should not take cognizance of the value of land or development thereon, many state governments charge very high economic rent on rights of occupancy.

6. Balancing the Private and Public Interest in Property

The Nigerian democratic experience is coming with some inherent values which have come to be referred to as “dividends of democracy”. These values manifest in increased government expenditure in development of infrastructure for the welfare of the people: more roads, more schools, hospitals, power installations etc. All these involve the acquisition of private property. But the welfare services are meant to benefit the people who are living, certainly not for the dead. Unless properly handled the acquisition of a

¹⁰ Ibid P.149. see also Sec. 44 of the Act.

¹¹ Ibid, P.155

¹² Ibid P.156, see generally, The Problems with the Act, Ibid pp.199-216

person's property is like the acquisition of his life, his hope and his entire being. Again, Rousseau in describing a person's interest in his property said that "it more nearly affects the preservation of life.... and more easily usurped and more difficult to defend than life"

¹³

Thus, while the citizen should not begrudge the government of its power to acquire private property for overriding public interest, the government should be more humane in enacting and implementing laws that affect citizen's interest in their property.

7. Conclusion

The difference between the government and the people can be likened to the difference between water and steam. While the steam evaporates from water at a certain temperature, it condenses and falls as rain later at another temperature. Those in government today were private citizens yesterday and will be so tomorrow. Private and public interest in property are equally important and legitimate. In fact, both can harmoniously exist side by side in a true democracy. It is therefore in the mutual interest of both the state and the citizens that the inherent private interest in property is respected and enforced by the state.

¹³ Eso, Op.cit p.79