

CUSTOMARY LAND TENURE SYSTEM AND THE LAND USE ACT: A COMPARATIVE ANALYSIS*

Abstract

The three basic needs of man have been described to be food, clothing and shelter. In pursuance of the third element which is shelter comes in a vital element which is land which will lead to houses for individuals and the populace in general. The concept of land possession and ownership which we have operating today varies from what we used to have under the Pre-colonial and even colonial administration due to the fact that there were various ethnic groups in the country that regulated the system and concept of land from their different beliefs and idiosyncrasies. This work elucidates the concept of land under customary land tenure system and the effect of the Land Use Act of 1978 with regards to alienation, acquisition and disposition of land. This work adopts a doctrinal method of research to further compare and contrast the provisions of the Land Use Act with Customary Land Tenure system as to whether the Land Use Act totally abrogated the provisions of the Customary Land Tenure system, or merely served as a guide to the full realization of the mentality of the various ethnic groups when it came to the practicality of the much desired land tenure system.

Keywords: Customary, Land, Tenure system, Land Use Act.

1. Introduction

The importance of land to many over the years can hardly be over-emphasized as land represents or two-fifth of the earth surface and serves as a medium by which human activities are predicated.¹ The emergence of the Land Use Act generated so much criticisms, controversies, arguments that even in the interpretation of its provisions as contrary to the previous customary land tenure system, some philosophers, academic posit that the Land Use Act has worked more wrongs than fulfilling the basic essence of a subsequent legislation which is to correct the wrongs of a previous legislation, practice or norm in every society. I.O. Smith said, ‘Its birth like that of a child born to family in a state of barrenness has raised the hopes, but has since been a troublesome child’² In July 1985, the Chief Justice of Nigeria made a statement during a television interview which is remarkable for its condor, when he said, ‘what the statute seeks to achieve is difficult to understand, enunciating the enormity of problems encountered by the courts in the application of the Land Use Act 1978.’³ This is evident from the conflicting decisions of courts⁴, controversial commentaries of learned writers, and the continuous alienation of land by laymen in complete disregard of the rights of occupancy system. On the part of the ‘legal minds,’ the lack of sufficient understanding is exacerbated by the adoption of a doctrinal approach instead of attempting to analyze and critically appraise the pre-existing system so to fully appreciate the implication of its interaction with the rights of occupancy system. In elucidating and demystifying the intricate details of the similarities and differences between the Customary Land Tenure system and The Land Use Act, it is proper to give a solid preamble as to what were applicable in the Customary Land Tenure System and juxtapose it with what is currently in practicable in the provisions of the Land Use Act.

2. Customary Land Tenure System

This is seen as the system of landholding which is indigenous to Nigeria.⁵ In giving a proper conceptual clarification of what the Customary Land Tenure system precluded, it is vital to understand the concept of ‘Customary’, ‘Land’ and ‘System’. Customary, gotten from the word ‘Custom or customs’ if plural is the action or ways of behaving that is usual and traditional among the people in a particular group or place, also meaning

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¹ Olusegun Yerokun, *Casebook on Land law, Comments and cases*, Princeton Publishing Company Ltd. P.97.

² ‘The land Use Act: Twenty-five years after’, Department of Private and Property law, Faculty of Law, University of Lagos, Akoka- Yaba, Lagos, Nigeria, 2003 p. 49.

³ Adefi M. D. Olong, *Land Law in Nigeria*, Second Edition, Malthouse Press Limited, p. 115

⁴ J. A. Omotola, *Cases on the Land Use Act* (Lagos Univ. Press, 1983)

⁵ I. O. Smith, (2013) *Practical Approach to the Law of Real Property in Nigeria*, Revised Edition, Ecowatch Publications Limited p. 63

something that is done regularly by a person.⁶ Customary has been said to be the practice that by its common adoption and long, unvarying habit has come to have the force of law.⁷ They are the general rules and practices that have become the norm through unvarying habit and common use.⁸ According to the Property and Conveyancing Law 1959, Land can be said to be the earth surface and everything attached to the earth otherwise known as fixtures and chattels real, also including incorporeal rights like a right of way and other easements as well as profits enjoyed by one person over the ground and buildings belonging to another.⁹ Land has also been defined as an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it.¹⁰ System has also been described to mean an organized set of working principles usually intended to explain the arrangement or working of a systematic whole, and can also be known to be an organized and established procedure.¹⁰ Originally, customary land tenure meant the soil and the soil only.¹¹ With this, we can infer that the Customary Land Tenure System can be said to be the various principles, norms and rules that governed the transactions that were made on land in the various places in Nigeria prior to the Introduction of the Land Use Act of 1978 which was intended to govern the Nigerian nation as an entity and not the over Two Hundred and fifty (250) ethnic groups with their different ways of acquiring, Enjoying and Disposing land. Critics who have looked at the Land Use Act from the angle of jurisprudence have come to alliance of the fact that it is easy to condemn it i.e. the Land Use Act as a piece of legislation not rooted in the National consciousness of the Nigerian people and which as a result did not consider the economic implication on Nigerians¹². These principles were broadly uniform throughout the country but varied in their various details as a result of the various ethnic differences. There were basically two systems of land tenure, one regulated by either English Statute of general application enacted in England prior to 1st January 1900 and Statutes enacted by local legislature or colonial statutes expressly made applicable in Nigeria. The Northern states had acquired a form of nationalized system of land tenure as far back as 1916¹³ by virtue of the statute which was mandatory, while the people in the southern part of Nigeria had always had a choice as to the form of acquisition and/or vesting of land.

Customary Tenure Nationwide

The reception of English law into Nigeria formed part of a political process, hereby creating an interest in land and governed tenure in these interests nationwide. Tenures as regards parcels of land all over the country which were specifically taken over by the state were governed by the provisions of the various state land laws.¹⁴ State land is held by the state and includes land which was acquired before the Nigerian independence by the British crown either by agreement, cession, or conversion, and land acquired by virtue of the Public Lands Acquisition statutes¹⁵. Such land could only be held on lease from the appropriate state government in line with Section 2 of the state Lands Act which defines state land as all public lands in Nigeria which is for the time being, vested in the president on behalf of or for the benefit of the nation and government.¹⁶

Customary Tenure in the Northern Nigeria

The customary tenure in northern Nigeria suffered early disruptions by the Fulani jihadists, who introduced a feudal tenure wherein they claimed Over-lordship of the land after the Islamic conquest.¹⁷ When the country became a colony of Britain, the colonial officials under the leadership of Lord Lugard, to whom land rights were ceded in 1903, introduced statutory regulation of land rights under the Lands and Native Rights Ordinances of 1910, as amended in 1916. The 1916 Ordinance was also amended and substantially reenacted in the Land Tenure Law of 1962. This law prescribed certain lands in northern Nigeria as 'native lands' and vested the management and control of these lands in the Minister (later Commissioner) for Lands and Survey to administer such lands for the

⁶ www.merriam-webster.com/dictionary/custom accessed on the 3rd of October 2018 as at 12:09 pm

⁷ B. A. Garner, 'Black's Law Dictionary', Tenth Edition, Thomson Reuters, p. 468

⁸ *Ibid.*

⁹ B. A. Garner 'Black's Law Dictionary', Tenth Edition, Thomson Reuters, p. 1008.

¹⁰ Available online at www.merriam-webster.com/dictionary/system accessed on the 3rd of October 2018 as at 12:23 pm.

¹¹ R.W. James, *Modern Land law of Nigeria*, University of Ife Press, Ile-Ife Nigeria 173, p. 14

¹² M. E. Nwocha, Impact of the Nigerian Land Use Act on Economic Development in the Country, *Acta Universitatis Danubius. Administratio*, Vol 8, No 2 (2016). Available online at <http://journals.univ-danubius.ro/index.php/administratio/article/view/3976/3876>. Accessed on 13/12/2018

¹³ Land and Native Rights Act 1916, CAP 96, Laws of the Federation of Nigeria, 1958.

¹⁴ State Lands Act, ch. 45 (Nig. 1958), and the State Land Laws of each state of the federation, e.g., Western States, ch. 29, Eastern States, ch. 122.

¹⁵ *ibid*

¹⁶ Public Lands Acquisition Act, Ch. 167 (Nigeria and Lagos 1958); Laws of Western Nigeria, Ch. 105 (1959); Public Lands Acquisition (Miscellaneous Provisions) Decree No. 33 of 1976.

¹⁷ The jihad (1804-1810) was led by Uthman Dan Fodio and marked the beginning of the introduction of Islam into northern Nigeria.

use and common benefit of the natives.¹⁸ **Section 6** of the Land Tenure Law of 1962 empowered the minister to grant rights of occupancy to natives. The consent and approval of the minister was also required for the occupation and enjoyment of land rights by non-natives.¹⁹ Non-natives defined by the law as a person whose father was not a member of any tribe indigenous to northern Nigeria.²⁰

Customary Tenure in the Southern Nigeria

Tenure in southern Nigeria which was regulated by customary law had its roots in the traditional conception of land. Traditionally, land had economic, social, political, and religious significance. Land was conceived as a sacred institution given by God for the sustenance of all members of the community, and as such it belonged to the dead, the living, and the unborn.²¹ Since the view was that the living merely held land as a kind of 'ancestral trust' for the benefit of themselves and generations yet unborn, it was inconceivable for any individual to claim ownership of the land or part thereof or to sell it as was established in the case of *Okiji v. Adejobi*²², *Okoiko & Anor. v. Esedalue & Anor.*²³ While testifying before the West African Lands Commission in 1908, Chief Elesi of Odogbulu, a traditional ruler, expounded the traditional conception of land thus: 'I conceive that land belongs to a vast family of which many are dead, few are living and countless members are still unborn.'²⁴ This group ownership of land seems to cut across the whole of the West African sub-region. In Nigeria, as in almost all of the former British colonies in West Africa, ownership of land in the accepted English sense is unknown. Land there is held under community ownership, and not, as a rule, by individuals. In the leading case of *Amodu Tijani v. Secretary of Southern Nigeria*,²⁵ Viscount Haldane, delivering the opinion of the Privy Council, gave judicial impetus to the corporate ownership of land in southern Nigeria by adopting the following analysis of the indigenous system of land tenure: 'The next fact which it is important to bear in mind in order to understand the native land law, is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual.' This group ownership under the indigenous system gives rise to some distinctive features: (a) All members of the group, community, village, or family have an equal right to the land, but in every case the chief or headman of the group occupies a unique position in relation to the land; (b) The chief or headman of the family or group has charge of it and, in a loose mode of speech, is sometimes called the owner. To some extent, he is in the position of a trustee, although not in the English law sense, and as such holds the land for the use of the group.

Any member of the group who needs a piece of land for farming or residential purposes would go to the chief or headman for permission to use the land; but the land so given still remains the property of the group. Important disposition of land, however, cannot be made by the chief without consulting the elders of the group. For instance, the elders' consent must be given before a valid grant of the land can be made to a stranger. When such a grant is made, the stranger becomes the customary tenant of the group, giving rise to a very peculiar tenure under customary law, known as customary tenancy.

3. Customary Tenancy

This tenancy has no equivalent in English law. It is not a lease-hold interest, a tenancy at will, or a yearly tenancy. The principal incident of customary tenure is the payment of annual tributes, not rents, by the customary tenant to its overlord.²⁶ In essence, the customary tenant is not a lessee or borrower; he is a grantee of land under customary tenure and holds a determinable interest in the land which may be enjoyed in perpetuity subject to good behavior on the part of the tenant.²⁷ He enjoys something like 'EMPHYTEUSIS', a perpetual right in the land of another.²⁸ The principles governing this customary tenure are now well established by various judicial authorities. For instance,

¹⁸ Land Tenure Law of 1962

¹⁹ Ibid.

²⁰ Ibid.

²¹ Kenneth Tafira, **Why land evokes such deep emotions in Africa**. Available online at <http://theconversation.com/why-land-evokes-such-deep-emotions-in-africa-42125>. Accessed on 13/12/2018

²² (1960) FSCLR 44, 5 Federal Supreme Court Reports;

²³ 1974)3 Supreme Court Reports, 15

²⁴ (1908) West African Lands Commission 183, para. 1048

²⁵ (1921) 2 A.C. 399

²⁶ *Abudu Lasisi v. Oladapo Tubi*, 12 Sup. Ct. Rep. 71 (Nig., Dec. 1974).

²⁷ *Chief Etim v. Chief Eke*, 16 Nigeria Law Reports [hereinafter Nig. L. Rep.] 43 (1941); *Mohammed Ojomu v. Salawu Ajao*, 9 Sup. Ct. Rep. 2:2 (Nig., Sept. 1983); *Bassey and Others v. Chief Eteta*, 4 West African Court of Appeal [hereinafter w. Afr. Ct. of App.] 153 (1938).

²⁸ *Josiah Aghenghen and Others v. Maduku Waghoreghor and Others*, 1 Sup. Ct. Rep. 18 (Nig., Jan. 1974).

the tenant must use the land for the purpose for which it was granted and no other,²⁹ he must pay yearly tributes to the grantor as an acknowledgment of the latter's overlordship,³⁰ and neither party can alienate the land without the consent of the other.³¹ The interest thus secured by the tenant in the land is one of inheritance, and the land will revert to the overlord only upon proven misbehavior on the part of the customary tenant or in the rare case of the extinction of the tenant's family.³² The only weapon in the hands of the overlord for effectively dealing with the tenant after the grant is the power to forfeit the tenancy. Grounds for forfeiture include abandonment,³³ alienation or attempted alienation of the land without the consent of the overlord,³⁴ denial of the overlord's title,³⁵ using the land for purposes for which it was not granted,³⁶ and withholding tributes persistently.³⁷ Forfeiture, however, is not automatic.³⁸

Nigerian courts have often been willing to grant relief against forfeiture, such as a fine, except in cases where refusal to grant forfeiture would tend to defeat the ends of justice.³⁹ The customary tenure system was majorly in use to regulate usage of land in terms of farming and other economic purposes before the emergence of Land Use Act which is applicable nationwide.

4. The Land Use Act

An uncontested and unarguable development in the Nigerian Land Law and Conveyance was the enactment of the Land Use Act which was promulgated on the 29th of March 1978 following the recommendations of a minority report of a panel appointed by the Federal Military Government of the time to advise on future land policy.⁴⁰ The Land Use Act coming to correct several wrongs came to basically redirect the wheels of justice in line with the diversity of customary laws on land tenure and difficulty in applying various customs of the different people. Secondly, was the rampant practice in Southern Nigeria with regards to fraudulent sales of land, that is when land was usually sold to different people at the same time causing various litigations on the same land.⁴¹ Arguments in favor of the Land Use Act have been posited to justify the invasion of the Land Use Act with claims that:

1. It sought to effect structural change in the system of Land Tenure;
2. It sought to achieve fast economic and social transformation;
3. It sought to negate economic inequality caused by the appropriation of rising land values by land speculators and Land holders; and
4. It sought to make land available easily and cheaply, to the government, private individuals and developers.

The preamble to the land Use Act vests all land comprised in the territory of each state solely in the Governor of the state, who is deemed to hold such land in trust for the people⁴² and would henceforth be responsible for allocation of land in all rural urban areas resident in the state and to organizations for residential, agricultural, commercial, and other purposes while similar powers with respect to non-urban areas are vested in the Local governments.

²⁹ *Ukwa and Others v. Akwa Local Council and Others*, Nig. Monthly L. Rep. 41, 42 (1966); *Ochonma v. Unosi*, 4 E. Nig. L. Rep. 107 (1960).

³⁰ *Chief Uwani v. Akom and Others*, 8 Nig. L. Rep. 19 (1928); *Chief Braide v. Chief Kalio*, 7 Nig. L. Rep. 34 (1927).

³¹ *Onisiwo v. Gbangboye*, 7 W. Afr. Ct. of App. 69 (1941); *Ashiyambi v. Adeniji*, Nig. Monthly L. Rep. 106, 107 (1966); *Chief Esi v. Itsekiri Communal Land Trustees and Others*, W. Reg. Nig. L. Rep. 15,21 (1961).

³² *Oshodi v. Dakolo*, Appeal Cases 667 (Nig. 1930); *Ovie v. Onovibokirhe*, W. Reg. Nig. L. Rep. 169 (1957).

³³ *Sunmonu v. Disu Raphael*, Appeal Cases 881 (Nig. 1927); *Ramotu Otun and Others v. Osenatu Ejide and Others*, 11 Nig. L. Rep. 124 (1932).

³⁴ *Baillie v. Offiong*, 5 Nig. L. Rep. 29 (1923).

³⁵ *Onisiwo v. Gbangboye*, 7 W. Afr. Ct. of App. 69 (1941); *Onisiwo v. Fagbenro*, 21 Nig. L. Rep. 3 (1954); *Inasa v. Oshodi*, Appeal Cases 99 (Nig. 1934).

³⁶ *Asani Taiwo and Others v. Adamo Akinwunmi and Others*, 5 Univ. Ife L. Rep. Pt. 1, 674 Sup. Ct. Rep. 143 (1975); *Olotu v. Dawuda and Others*, 1 Nig. L. Rep. 58 (1904); *Chief S.U. Ojeme and Others v. Alhaji Momdu II and Others*, 1 Sup. Ct. Nig. L. Rep. 188 (1983).

³⁷ *Ochonma v. Unosi*, 4 E. Nig. L. Rep. 107 (1960); *Eyamba v. Holmes*, 5 Nig. L. Rep. 85 (1924).

³⁸ *Asani Taiwo and Others v. Adamo Akinwunmi and Others*, 5 Univ. Ife L. Rep. Pt. 1, 674 Sup. Ct. Rep. 143 (1975); *Olotu v. Dawuda and Others*, 1 Nig. L. Rep. 58 (1904); *Chief S.U. Ojeme and Others v. Alhaji Momdu II and Others*, 1 Sup. Ct. Nig. L. Rep. 188 (1983).

³⁹ *Lawani v. Tadeyo*, 10 W. Afr. Ct. of App. 37 (1944); *Coker v. Jinadu*, Lagos L. Rep. 77 (1958). This rule has been criticized by many authors. See, e.g., OLAWOYE, supra note 17, at 107; B.O. Nwabueze, *Nigerian Land Law* 154 (1972).

⁴⁰ Available online www.google.com/nigerdeltaaffairs.org/index.php/news-and-events/197-summary-of-the-land-use-act-in-nigeria, accessed on the 3rd of October 2018 as at 12:52 pm

⁴¹ Effect of the Land Use Act In Property Development (A Case Study Of Enugu Urban). Available online at <https://uniprojects.net/project-materials/effect-of-the-land-use-act-in-property-development/>. Accessed on 13/12/2018

⁴² Section 1 of the Land Use Act Chapter L5 Laws of the Federation of Nigeria 2004

5. Differences and similarities between the Land Use Act and Customary Land Tenure System

Although there is no direct reference to the indigenous land tenure in the Act, the recognition and preservation of customary land law within the language of the Act may imply the survival of the indigenous land tenure. Section 24 of the Land Use Act preserves the customary law rules governing devolution of property, while Section 25, which prohibits partitioning of land, and expressly exempts cases which are regulated by customary law. Under Section 29, where the holder or occupier entitled to compensation is a community, the governor is empowered to direct payment of the compensation either to the community or to its chief or leader to be disposed of by him for the benefit of the community in accordance with the applicable customary law. Furthermore, under Section 50 of the Land Use Act, a 'customary right of occupancy' is defined as 'the right of a person or community lawfully using or occupying land in accordance with customary law ...' and an 'occupier' is similarly defined as 'any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law....' This is in addition to Section 48 of the Land Use Act, which preserves all existing laws relating to the registration of title to, or interest in, land subject to such modifications as will bring those laws into conformity with the Act or its general intentment. It is submitted that customary land law is an existing law within the meaning of section 48 of the Act. Indeed, it can be asserted that Section 1 of the Land Use Act merely borrows and enacts the notion of corporate ownership and trusteeship under the indigenous land tenure system. The position of the Governor under the Act appears to be comparable to that of the head of the community or family in relation to communal land under customary law. But this would seem to be half-truth only: when the powers of the Governor are closely analyzed, the area of conflict with the head of the community can easily be identified, especially in relation to the power of management and control of the land. This work would hereafter examine the differences between the provisions of the Land Use Act and what was practicable in the customary Land Tenure system using the basic characteristics of the Land Use Act.

6. Title

The Land Use Act unlike the Customary Land Tenure system has vested all lands in the Governor of the state and also all Federal lands in the president as well pronounced in Section 1 and 2 of the Land Use Act. Previously, under the Customary Land Tenure system, all lands were vested in the villages, communities, or families with the Chief or headman of the community or family as the Manager or Trustee, holding the Land in Trust for the entire village or community or family as was lucidly clarified in the case of *Amodu Tijani V. Secretary of Southern Provinces*⁴³ where title was said to vest in a corporate unit and no individual can lay claim to any rat thereof as the owner, due to the fact that the individual right is limited to use and enjoyment of the Land. The Act brought about a uniform position as regards uncertainty in title to Land. Deductively after the commencement of the Act, the previous owners (Communities, families) lost ownership rights to occupy and use the land; hence the Land Use Act diminished the right of owners and not extinguishes the entirety of the rights as seen in Section 5(2) of the Land Use Act which states: 'Upon the grant of a statutory right of occupancy under the provisions of this section, all existing rights to use and occupation of the Land which is the subject of the statutory right of occupancy shall be extinguished.' This was well adumbrated in the famous case of *Edibiri v. Daniel*⁴⁴, where the court held that the Land Use Act never set out to abolish the existing titles and rights to possession of land. Rather, where such rights or titles related to developed lands in Urban areas, the possessor or the owner of the right or title is deemed to be a statutory grantee of occupancy under Section 34(2) of the Act, and if it is non-urban area, the owner is deemed to be grantee of a right of occupancy by the appropriate Local Government under Section 36(2) of the Act. The ownership under the land Use Act has been reduced to Customary Right of Occupancy under Section 50 of the Land Use Act which clearly recognizes the existence of customary rights over land. The law stipulates that: 'Customary right of Occupancy means the right of a person or community lawfully using or occupying land in accordance with customary law, and includes a customary right of occupancy granted by Local government under this act' The fact that the right now vests in the President and the Governor of states infers that citizens have just mere right to occupancy and not Title on the land. Previously, Families, communities held the Land in trust for the people and now the Governor and President holds it in trust for the people. Where a customary land owner had title to a parcel of land before the advent of the Land Use Act, he is deemed to be the holder of right of occupancy depending on the status of land (i.e. urban or non-urban areas)⁴⁵ and subject to limitations contained in the Act.⁴⁶ Where a person has an invalid title to land, the registration of the invalid title is not sufficient to confer on the registered owner any estate in the land and cannot avail him against a person with better title as stated by the Supreme Court in the case of *Sunmonu Olohunde & Anor v. Professor S.K. Adeyoju*⁴⁷ where the Court toed the line

⁴³ (1921) A.C. P.399

⁴⁴ (2009) 2 NWLR Pt. 11126, p. 428

⁴⁵ Section 34 subsection 2 of the Land Use Act Chapter L5 Laws of the Federation of Nigeria 2004

⁴⁶ Section 34 subsections 5 and 6 of the Land Use Act Chapter L5 Laws of the Federation of Nigeria 2004

⁴⁷ [2000] 6 SCNJ 470, (2000) 6 S.C. (Part III) 118

of *Ogunleye v Oni*⁴⁸ that a Certificate of Occupancy is not a conclusive evidence of title in favour of its holder, when it held that ‘The point must be stressed that a certificate of statutory or customary right of occupancy issued under the Land Use Act, 1978 cannot be said to be conclusive evidence of any right, interest or valid title to land in favour of the grantee. It is, at best, only a prima facie evidence of such right, interest or title without more and may in appropriate cases be effectively challenged and rendered invalid and null and void’.

7. Control and Management

Prior to the commencement of the Land Use Act of 1978, Land was controlled by the Communities, families through the Olori-ebi, the Chief Headsman who also acts as the manager holding the land for the communal use. The Head of the family acting in the position of trust is always presumed to be the owner of the land. The Land is usually vested in the family head in conjunction with the principal members of the family. The family head is appointed by the deceased member of the family, by the acclamation or by the traditional method. Most times, the family head is usually the eldest surviving male child of the founder of the family. He is seen to be the ‘*Primus Inter Pares*’⁴⁹ and enjoys the family property with the other members of the family. He is expected to manage the property and keep it in good state of repairs. He is the person entitled to take up actions or defend actions involving the family property. He also is the only person to allot family land, conducting private and external business of the family, having the right to enforce forfeiture of the interests of erring customary tenants. The Land Use Act in Section 2 provides that as from the commencement of the Act, all lands in the urban areas were to be under the control and management of the State Governor, and the other lands shall be under the control of the Local government. Unlike the Customary Land Tenure system where the Head of family will seek the advice of the other principal members of the family before doing anything to the land, under the Land Use Act, in Section 2(2), the ‘Land Use and Allocation Committee’ has the responsibility of advising the Governor on any issue as regards the management of the land. While the above applies to state governments, ‘The Land Allocation Advisory Committee’ will be with reference to the local governments and his management of the lands in their care as established under Section 2(5) of the Land Use Act of 1978. Under the Management by the Governor of the state, Section 4 of the Land Use Act makes succinct provision as to the fact that until other provisions are made on behalf and subject to the Act, land under the management and control of the government shall in the case of any state where the Land tenure Law of former Northern Nigerian applies, be administered in accordance with the provisions of the law, and in every other case, in accordance with the provisions of the state law. The advent of the Land Use Act showed the quantum of parcel of land over which a customary land owner may exercise the right of control and management depends on two basic considerations namely: whether the land is situate in urban or non-urban areas and also whether it is developed or undeveloped. Section 32(4) stipulates that 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 a statutory right of occupancy issued by the Governor under this Act. Section 34(5) prescribes that on the commencement of the Act, where it is an Undeveloped land, one plot or portion of the land not exceeding half of one hectare in area shall be subject to subsection (6) of Section 34, continue to be held by the person in whom the land was so vested as if the holder of the land was the owner of the statutory right of occupancy granted by the governor in respect of the plot or portion as aforesaid under this act.

Despite the invasion of the Land Use Act, the customary right of Use and control of the land has not been totally swept away as the Land Use Act only divested any claimant of radical title and limited its claims to a right of occupancy, taking away freehold title vested in Individuals or communities as established in the case of *Salami v. Oke*⁵⁰

8. Right of Occupancy

While under the Customary Land tenure system, land could be gifted, hence inferring the absolute transfer from the grantor to the grantee who may be a stranger or member of the family as seen in the case of *Agedegudu v. Ajenifuja*⁵¹ and for such gifts, no money or payment in whatever kind was required, hence divesting all allodial rights to the grantee. The gift also must not be revocable as was established in the case of *Oshodi v. Aremu*⁵² Under the Customary Land Tenure system, land was also borrowed for farming purposes, as a grant may be made under a native law and custom for a specific duration depending on the purpose for which the grant was made, and where the land is borrowed and put into permanent use, the court is more likely to presume Customary tenancy as seen in

⁴⁸ (1996) 3 NWLR Part 434 pg. 62 at pg. 64

⁴⁹ It means the first among equals or first among peers is a Latin phrase describing the most senior person of a group sharing the same rank or office. Available online at <https://educalingo.com/en/dic-en/primus-inter-pares>. Accessed on 13/ 12/ 2018.

⁵⁰ (1987) 4 NWLR Pt. 63 P.1

⁵¹ (1961)FSC p. 431

⁵² (1952) 14 WACA P.83

*Adeyemo v. Ladipo*⁵³ Under the Land Use Act, Section 5(1) stipulates that It shall be lawful for the Governor in respect of land, whether or not in an urban area to grant statutory right of occupancy to any person for all purposes. This infers the difference that while under the Customary land tenure system, land was majorly granted for farming purposes, under the Land Use Act, it is for all purposes. The Land Use Act also makes clear provisions under Section 7 of the Land Use Act that it shall not be lawful for the Governor to grant a statutory right of occupancy or consent to the assignment or subletting of a statutory right to a person under the age of twenty-one (21) years, unless he has a guardian or a trustee, which unlike the Customary land Tenure system didn't make such provisions. The power of revocation of Customary Right of Occupancy which includes a deemed grant under Section 28 of the Act clearly carries clear implication that such right survived the promulgation of Land Use Act, as Nnaemeka JSC observed in *Abioye v Yakubu*⁵⁴ that if such customary rights are abolished by the Act, there will be nothing to be revoked.

9. Transfer of land

Customary Land Tenure system prescribes that any form of alienation without the proper consensus of the proper members of a family would be deemed void or voidable as in different instances. While the family property may be allotted to the members of the family, allottees cannot alienate or part with possession without appropriate consent as established in the case of *Alao v. Ajani*⁵⁵ where the court held that a member of the family is not permitted to introduce a stranger into the family by the back door. For any alienation to be valid, the concurrence of the Family head and the principal members must be sought and obtained as adumbrated in the case of *Ekpendu v. Erika*⁵⁶ Any alienation without the consent of the family head will be regarded as void ab initio however, when the head of the family alienates a land without the consent of the principal members, such will be deemed to be voidable, and also the consent must be that of adult, or minor through the loco parentis. However, a gift made by the family head without the concurrence of the principal members is void, and also when the gift is made by the principal members without the consent of the head of the family, such alienation will be deemed to be void ab initio. The Land Use Act makes clear and lucid provisions in Sections 21 and 22 that any form of transfer of right of occupancy or any part thereof in the form of assignment, mortgage, sublease, or transfer of possession is unlawful without first seeking and obtaining the consent of the Governor of that state. Thus, it must be noted that mere seeking of the approval will not amount to the grant of the approval. Section 36(5) of the Land Use Act reiterates the fact that invalid transfer is not only void but creates an illegality; hence an offence punishable with terms of imprisonment or fine. For Land in the urban areas, the transferor must first comply with the rule at customary law and obtain the necessary consent of the family or community before seeking and obtaining the consent of the Governor, as both are necessary requirements. However, since the decision of the court in the landmark case of *Savannah Bank v Ammel Ajilo*⁵⁷ there has been an endless controversy over the consent provision of the Land Use Act, the apparent inelegance of its drafting and consequent hardship meted out by its interpretation on its victims sometimes occasioned crocodile tears.⁵⁸ The Land Use Act clearly states in Sections 21 and 22 from the case of *B. Manfang (Nig.) Ltd v. MLSOL Ltd*.⁵⁹ that the owner of a statutory right of occupancy cannot alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, or otherwise without the consent of the Governor first sought and obtained, however, Section 22(1) states that the owner of a customary right of occupancy is not prohibited from entering into any form of negotiation which may end up with a written agreement for presentation to the Governor for necessary consent. Also, in the case of *Attorney General of Lagos state v. National Electric Power Authority*⁶⁰ that the Land Use Act was described as pedestal, a federal enactment which can only be altered by the special mechanism provided for by section 9(2) of the Constitution, hence reiterating the allodial power that had been vested in the Governor of the state.⁶¹ Comparing and contrasting the provisions and what was practicable under the customary land tenure system alongside the Land Use Act, we can deduce that the Alienation and the use of land for the economic, political and social reasons didn't need much stress hence aiding the development of these societies, however, the operation of consent provision embedded in the Land Use Act has made land transactions more difficult and less economic, consequently capital formation has not been satisfactory, so also is the general development process in the country.

⁵³ (1958) WNLR P. 138

⁵⁴ (1991) 5 NWLR Pt. 190 at 130

⁵⁵ (1989) 4 NWLR Pt. 113 p.1

⁵⁶ (1959) 4 FSC p. 79

⁵⁷ (1989) 1 NWLR Pt. 97 at 305

⁵⁸ Hon. Justice Nnamani: 'The Land Use Act- 11 years after' 2 *GRBPL* No. 6 (1989) p.31, A.A. Utuama: 'The Crocodile Tears in Savannah Bank V. Ajllo and Anor.' 2 *GRBPL* No. 7 (1989) p. 29

⁵⁹ (2007) 14 NWLR Pt. 1053 p.114

⁶⁰ Suit No. LD/3772/8 delivered on 5/7/82

⁶¹ Niki Tobi, *Cases and Materials on Nigerian Land Law* Mabrochi Books. 169

10. Relationships

Under the customary land tenure system, customary tenancy is usually granted to another person at customary law, a right of occupation of land to use the land in return for the payment of tribute, however, since the invasion of the Land Use act, every customary land owner now has a limited right on the land in the form of right of occupancy, the radical title now vested in the Governor as the position of the overlord (Landlord) now that of a tenant subject to the administrative control of the governor or the local government. The overlord's possession is no longer exclusive as it is now subject to the right of the governor or the local government administration. As regards the customary right of tenants to enjoy the land in perpetuity subject to good behavior is now precarious under the Land Use Act, as he automatically loses that right when the overlord's right of occupancy is revoked. However, the position of the tenant has not changed as he has no more than an occupational right in the land and is still subject to all incidence of the customary land tenure system as regards the payment of tribute. The relationship between the owner and the customary tenant still manifests itself in the current land use Act whereby the tenant cannot refuse to pay the overlord, such being payment in the form of rent either monthly, quarterly, annually or as the case may be. Such payment that used to signify the grantor's title then, now also serves as a means of acknowledging the overlord's title.

11. Customary pledge

Section 34(4) of the Land Use Act recognizes the institution of customary pledge, as it provides that where land was subject to any mortgage, legal or equitable, or any encumbrance or interest valid in law, such land shall continue to be so subject'. The Act recognizes the right of a pledgor to a statutory right of occupancy with regards to pledged land situate in urban areas while it protects the pledgee's interest in the property by recognizing his interest and making any right of occupancy on the land subject to it. However, it is worthy to note that where a pledgee in occupation and possession of land situate in a non-urban area was, at the commencement of the Act using land for agricultural purposes, he would be entitled to a customary right of occupancy and may be registered as such. In all cases, it is the pledgor that qualifies for the statutory or customary right of occupancy as the case may be. While in possession, the pledgee may create and reap the improvements on the land for his benefit for as long as the debt remains unpaid but he does so ipso facto becomes the owner of the land in question. The customary right of the pledgor to redeem the land together with all improvements on it upon settlement of the debt owing to the pledgee has not been altered by the Land Use Act. The right to occupy and use the land by the pledgee automatically terminates upon repayment of the loan notwithstanding that he has been registered as one to whom a customary right of occupancy has been issued in respect of the land in question. The Land Use Act also reiterates a right of occupancy whether statutory or customary which can be revoked by the Governor for overriding interest of the public.

12. Conclusion

This work clearly distilled the intricate details of the customary and tenure system alongside the Land Use Act, it is submitted that one can logically deduce that the Land Use Act never abrogated nor abolished the doctrines and practices practicable under the Customary Land Tenure system but basically enunciated the salient unwritten practices of the customary land tenure system. This is evident from the transitional provisions that recognizes and protects existing rights on land but does so in a limited form, allowing for the benefit of the land for the entire community which was the main aim of the communal land ownership under the customary land tenure system. The definition clarified under section 51 of the Land Use Act makes allusion to that institutions in different ways i.e. A Customary right of occupancy, allowing for the rights of a person or community awfully using or occupying land in accordance with customary law are preserved though in limited form as seen in the Land Use act. Section 24 of the Land Use Act also allows for the devolution of rights under customary law on the death of the holder of the right of occupancy is preserved thereby sustaining the concept of family property. More so, Section 34(4) of the Land Use Act also recognizing the continuing of the customary pledge that as in place before the commencement of the Act as seen in the case of *Kasili v. Lawal*.⁶² The preservation of the customary land tenure system has been clearly adumbrated in the Supreme Court case of *Ogunola v. Eiyekole*⁶³ 'Land is still under customary tenure even though dominium is in the Governor. The most pervasive effect of the Land Use Act as the diminution of the plenitude of powers of the holder of land, the character in which they hold remain substantially the same.' Drawing from the highly conceptualized details of the thin lacuna between the practicality of the Customary Land Tenure system and the current reality the Land Use Act has exposed the Acquisition, Enjoyment and Disposition of land, it is evident that the Land Use Act has not radically changed the presumption and regulations as to land, but only come to unify the laws and fulfill the law of customary land tenure system.

⁶² (1990) NWLR1 P. 306

⁶³ (1990) 4 NWLR Pt. 146, p.632