THEORETICAL REFLECTIONS ON QUESTIONS OF EQUITY AND FAIRNESS OF COMPENSATION ON COMPULSORY LAND ACQUISITIONS IN NIGERIA

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ABSTRACT

The paper examined the theoretical reflections on questions of equity and fairness of compensation on compulsory land acquisition in Nigeria. This was with the view of undertaking holistic analysis and appraisal of the concept of equity and fairness of compensation payable to a land owner whose land was compulsorily acquired by the government or its agents for overriding public interest for developmental purpose or purposes. The study relied on Primary and Secondary sources of information while the primary source includes the Land Use Act, the Constitution of Federal Republic of Nigeria 1999 (as amended) while the secondary sources includes books, journal articles, conference proceedings, newspapers, Magazines, and internets, data collected will be subjected to content analysis .The study found that compensation paid to land owners whose land were compulsorily acquired by the government is grossly inadequate to compensate the land owner that is to put him or her in the position he or she was before the property was acquired.

1.0 INTRODUCTION

Land stands as the most invaluable resource for both nations and individuals. The manner in which a country utilizes its land plays a crucial role in determining its level of prosperity and development, or conversely, whether it remains underdeveloped and impoverished like a third-world nations. The foundational principle guiding the philosophy of land acquisition is the Theory of Social Contract, which posits that individuals willingly surrender a portion of their authority, possessions, and freedom to benefit the community through a social pact. The concept underscores that only the governing body, or sovereign, possesses the authority to determine its scope of influence.

2.0 THEORETICAL CONSIDERATIONS

2.1 Theory of Social Contract

Rousseau, a proponent of this theory, asserted that citizens owe the State any services they can provide, as demanded by the sovereigns. However, it is essential to acknowledge that the sovereign is bound not to impose unnecessary burdens on its subjects, for the welfare of the community. In fact, the sovereign lacks the capacity to even will such actions, as both the law of reason and the law of nature dictate that everything must have a justifiable cause.

Laska argued that Rousseau's invention of property marked humanity's expulsion from the State of Nature in his presentation of the Theory of Social Contract. For this reason, they

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gave up their rights to the community as a whole what Rousseau called the "General Will" rather than to a single person. As a result, using and managing a state's or nation's land resources is frequently a problem. Therefore, a state or government will not only make an effort to impose some control over how resources and land are utilized and managed on its territory, but will also reserve some authority for itself to buy or access land for industrial, agricultural, and social development. According to the theory of the social contract, an individual is thus thought to have agreed to cede some of his unassailable land rights to the sovereign government in exchange for the building of roads, schools, hospitals, police stations, army barracks, and other social infrastructure as well as protection from external aggression and internal insecurity. Hence, the idea of obligatory acquisition is based on philosophy.

2.2 Theory of Collective or General Will

Munro proposed the concept of a general will, which represents the collective will of a community, aiming for the common good or shared interests. This idea has roots in Aristotle's belief that actions aligned with the common good are morally right. Throughout history, from ancient Greek city-states to modern political philosophy, the notion of the common good has suggested that certain benefits can only be achieved through collective efforts.

The fundamental principle underlying public purpose is to maximize benefits for the widest possible audience, even if it involves taking away privileges from others. Consequently, when the state exercises its power of expropriation in accordance with the law, challenges to its actions are typically unsuccessful.

However, in democratic societies, the government's right to compulsorily acquire private property has always been balanced with respect for individual property rights. This principle of fair compensation when property is acquired in this manner is evident in various constitutional documents, including the Magna Carta of 1215, the Bills of Rights of 1689, the American Constitution, and the Universal Declaration of Human Rights of 1948. Nigeria's constitutions from 1963, 1979, and the current 1999 version (as amended) also include such provisions. Even during times of war or emergencies, individuals are entitled to receive adequate compensation when their property is confiscated.

2.3 Sovereignty Theory

The ability to compel property acquisition is a fundamental aspect of sovereignty, and this is known as eminent domain. Under this legal concept, the government has the authority to seize private property for public use, provided that the public interest can be proven beyond a reasonable doubt. This power is essential for the functioning of the state, as it allows the government to acquire private land when necessary to fulfil its governmental tasks.

Three key elements of sovereignty are associated with eminent domain power, as explained by Kale. First, the State possesses the authority to seize private property. Second, this authority must be exercised for the benefit of the public, and thirdly, the state is obligated to compensate individuals whose properties are seized. The underlying principle is that the

greater interest of society outweighs individual interests, justifying the acquisition of property from unwilling sellers.[2]

In *Kohl et al vs. United States*,[3] According to the American Court, the proper understanding of the eminent domain right appears to be that it is a sovereign right to acquire private property for its own public interests, rather than for the benefit of another. There is no necessity beyond that, and this is the only thing that supports a right. As a result, Kohl's decision allowed for property condemnation, despite the fact that the Court had defined the phrase "public use" in a limited and particular sense. Another time, the court described this authority as the State's legal right to seize an individual's private property and use it for public purposes.[4]

The practice of forceful acquisition has reportedly been riddled with issues and tensions. Most of the time, the populace handles land matters as if the LUA does not exist. This implies that there are two regimes of processes used to acquire land: a formal, government-approved method and an informal one based on customary law. As a result, land acquisition issues are exacerbated because the LUA's provisions have not been reconciled with land customary law since its creation. Lindsay noted in this regard that, while the development of effective and equitable legal and administrative structures for exercising this power remains an unfinished issue in many countries around the world. The power of forced acquisition is profoundly embedded in practically all legal systems.

Allegations of power abuse and corruption throughout the government acquisition procedure accompany this unsolved issue of multiple land holdings. However, in order to demonstrate that the necessary process has been followed, the State must compensate the displaced. Even though a private company is the ultimate user, the process for paying compensation is the main problem in property purchase.

2.4 Theory of Functional Allocation of Uses

The landowner's unlimited enjoyment and use of his property at the expense of others is the conventional doctrinal and philosophical underpinning of a proprietary right. He has some freedom to do whatever he wants with some of his possessions and receives some rewards (utility, welfare, or good). According to Amokaye, one noteworthy example is the former military government's purchase of land in Maroko. When the land was allocated to wealthy individuals and land developers, it aggravated the problem by forcing a huge exodus of impoverished Nigerians. Despite the passage of time, the issue remains unresolved because the original owners of the land are still promised compensation.[5] The community as a whole is content to have the property allocated to whomever among such competing exclusive owners. This classical assumption is rooted in the theory of functional allocation of uses which presupposes that private ownership will allocate and reallocate resources to socially desirable uses.[6]

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[2] *ibid*. at 19.
[3] 91 US 367.
[4] *United States v. Jones* (I853) 27 Ed 105, 107.
[5] *Ibid*.
[6] *Ibid.*

However, the idea of strict property ownership in the Austinian sense never exists nor can it exist. Judicial and legislative trends in the modem times across many jurisdictions lean heavily in favour of restricted and regulated proprietary right. Such rights are curtailed through the strict application of eminent domain. Sax, whilst justifying governmental intervention in land allocation for the overall public interest, submitted that the basis for compulsory land acquisition is hinged on the failure of the private property to functionally allocate land to diverse public needs, a concept he termed non-exclusive consumption. He asserted that as non-exclusive consumption values rise in importance, and the capacity of the property system to make correct allocation thereby diminishes, it seems inevitable that one begins to ask himself why aligning with those private property rights which increasingly produce unwanted results.[7]

It therefore follows that there is a justification for government's exercise of compulsory land acquisition powers for overriding public interest. Infrastructure such as health facilities, schools, housing schemes, corporations and road networks amongst other things are necessary components of living standards of the people in every society. Where the government is in the readiness to provide any of the above infrastructure, it may proceed from acquiring private land to meet its obligations to the citizens but such powers become validly exercised when it conforms to the enabling statute. The end result of governmental involvement is not just to accomplish the greatest socially advantageous usage, but also to equalize the position of competing resource-users when they each want to exploit the land. The relevance of this theory is to enable government to acquire land for its developmental projects and to put the resource-users in equality position. Any device different from this in Nigeria is a contravention of the relevant laws and provisions of the Constitution.

2.5 Welfarism Theory

Attaining a welfare state is one of the cardinal objectives of most modern governments and one of its core processes is acquisition of private land for public purpose. *According to Black's Law Dictionary, "public purpose" is an action undertaken by or under the supervision of a government for the benefit of the entire community. While researching the welfare state, Kale discovered that the basic idea behind 'public purpose' is the concept of maximum benefit for the greatest number of people. In some circumstances, the greatest advantage to a group of individuals cannot be provided until another's privilege is taken away.*

Jhering, a proponent of Sociological Jurisprudence, based his postulation on law as expressed in its aim, which is to defend society's and the individual's interests by coordinating those interests, so eliminating circumstances likely to lead to conflict. As a result, the law prioritizes the interests of society, but in the event of a dispute, the requirements of individuals within society come second. Overall, his concept of law is associated with man's

[7] *Ibid.* at 487.

wants in society.[8] The security and wellbeing of the populace are among the core goals of the Nigerian government, which is in keeping with the pursuit of the ideology of welfarerism.[9]

2.6 Eminent Domain

Eminent Domain[10] is defined as the right or power of a unit of government or a designate private person or individual to take private property for public use, following the payment of a fair amount of money to the owner of the property. The theory behind Eminent Domain is that the Local government can exercise such power to promote the general welfare, in areas of public concern such as health, safety or morals. The Constitution of Ghana[11] states that "where a compulsory acquisition or possession of land affected by the state in accordance with clause (1) of this Article 20(3) involves displacement of any inhabitant, the state shall resettle the displaced inhabitant on a suitable land with due regard for their well-being and social and cultural values.

3.0 THE THEORETICAL FOUNDATION OF THE LAND USE ACT, 1978

The Land Use Act bestows upon the Governors of each Federation State the ownership of all lands within their jurisdiction. However, this ownership is held in trust and administered according to the provisions outlined in the Act, with the primary objective of benefiting all Nigerians. This provision is guided by the principle of pursuing the common benefit of the people.

The Act's allocation of land ownership to the State reinforces the State's authority to compulsorily acquire land for projects that serve the overriding common interest of the populace. Udombana, while emphasizing this perspective, argues that the State's acquisition of property for public use or the regulation of land use does not infringe upon human rights. Rather, all governments exist to advance the common good, and this consideration remains at the core of such actions.

Traditionally in Nigeria, land is seen as God's gift to the whole community. It could not be the subject of individual ownership to the exclusion of others. It belonged to the community in general and the family in particular and therefore, there was a regulation to the use to which land could be put, while alienation without the requisite consents would vitiate such transaction. With the arrival of Europeans, all lands were vested in the Queen, and individual ownership of property for varying lengths of time became available, however customary land tenure remained acknowledged.[12] At independence, the situation remained largely the same even though there was a limited constitutional right to property.[13] However, following the passage of the LUA and its subsequent establishment as a constitutionally recognized law, all lands were transferred to the governor of the state for the common good of the populace, and

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[8] *Ibid.*

[9] See section 14 (2) (b) of the Constitution of the Federal Republic Nigeria, 1999 (as altered).

[10] Eminent Domain, the compulsory purchase, resumption/compulsory acquisition or expropriation. It is the inherent power of the state to seize a citizen's property or right in property with due monetary compensation but without the owner's consent. See the *Black' s Law English Dictionary* 7th edition.

[11] 1992, Chapter 5 Articles 20(3).

[12] K M Mowoe, *Constitutional Law in Nigeria* (2008) Lagos, Malthouse Press Ltd. P. 512.

[13] Section 31 of the 1960 and 1963 Constitutions of Nigeria respectively.

the state was given the authority to purchase any type of land on its territory in the name of the overriding public interest.

But after the LUA was passed and made into a law that was recognized by the constitution, all lands were given to the state's governor for the benefit of the people, and the state was given the power to acquire any kind of land on its territory in the name of the overriding public interests. In his work, Umezulike[14] advised that the use of land acquired for public purposes be done with great care because it has an impact on how well-functioning a democratic government is perceived. He advised that the issue of official corruption by the government personnel in charge of it should be addressed in order to ensure that the procedure is respected. He contends that changes to economic sector deregulation also necessitate a change in how land is managed in order to fully deregulate the economy. This is necessary to stop the land management issue from preventing private investors from supporting the changes. He emphasized that these new businesses are not subject to monopoly rules and do not benefit from any advantages that previously solely pertained to government-owned businesses because they are privately held and participate in a deregulated market. The implication is that in addition to growing their business, the new company should also cover the costs associated with utilizing other people's property or infrastructure. Finally, Umezulike advised that even though it is an act of power, government expropriation of private property should be done in good faith.

Furthermore, the studies of Umezulike and others under the auspices of NIALS had brought to bear, the modern trend of Public-Private Partnership in governance which needs to be accommodated by the existing legal regime. Though, no recommendation for legal reform was made by the authors, their analyses on the subject suggest an overhaul of the current legal framework in order to isolate the exercise of the expropriation power from susceptible abuse. It is humbly submitted that where the utmost objective of a corporation is profit making, the position canvassed by the authors should be upheld.

Umezulike[15] noted that the LUA's definition of a public purpose is excessively broad and needlessly ambiguous because it covers not only the general public use or exclusive use by the government or its agencies but also the use by a registered company in which the government owns shares, stock, or debentures as well as use for economic, industrial, or agricultural development. In order to make the land available to private entrepreneurs for use in commercial, industrial, or agricultural growth in which the government may have an interest, the author claims that a property might be compulsorily purchased by the government. He argued that the LUA has purposefully overturned the Supreme Court's ruling in *Eruku v. Military Governor of Mid-Western State,*[16] which stated that compulsory land acquisition for private use is prohibited by the Public Lands Acquisition Act and is, therefore, invalid.

[14] O.A. Odiase-Alegimenlen and O.J. Garuba, op. cit.
[15] IA Umezulike, op. cit.
[16] (1974)1 All NLR 163.

According to his reasoning, the Act forbids the re-awarding of the right of occupancy to a later private business in which the government has no stock or other financial stake. Therefore, the Government would fully defend itself if the State could show that the succeeding private firm to which the government has renewed the right of occupancy is one in which it has equity or other economic interest. However, it does not appear that the learned jurist gave considerable thought to the purpose of section 51(1) of the LUA's provision. It is suggested that the draftsmen's definition of "public purpose" should encompass a registered company in which the government owns shares, stock options, or debentures in connection with economic, industrial, or agricultural development in order to provide for future governance flexibility.

In modern times and in the face of rampant economic recessions, globalisation and increased pressure on the government to deliver dividends of democracy are more capital intensive. Most times, governments in have shifted to Public-Private Partnership Scheme to provide social and basic amenities for her citizens. Many at times, land acquired by the government is taken as the government equity contributed to business. It is in this direction that this definition becomes relevant and serves as a saving valve for the government not to be caught in the web of *robbing Peter to pay Paul*.

Okonkwo's review of the Nigerian Land Use Act reveals that it lacks a clear definition or framework for what constitutes an overriding public interest, which can lead to abuse of the power of compulsory land acquisition. Section 28 of the Act, which includes a broad term "overriding public interest," has been frequently exploited by the government to justify land acquisitions that may not genuinely serve the common good. Ankama, Aliu, and Maisamari highlight that the Act's provisions encompass such vast and adaptable criteria that a Governor can easily manipulate them to oppose the interests of a title holder without altruistic reasons. To address this issue, they propose simplifying the concept of overriding public interest in the relevant sections to minimize the possibility of abuse or arbitrary actions by the governor. They advocate for a requirement of a court or quasi-judicial hearing to assess the legitimacy of the public purpose put forward by the government before any proposed acquisition.

Onuoha initiates discussions on how the term "public purpose" in the Land Use Act should be interpreted. To ensure certainty and prevent the government from overreaching into areas beyond the theoretical limitations of eminent domain, the author suggests having a limited list of justifications for land acquisitions. While exclusive lists may be rigid and might not cover all potential public demands, the government may still need to acquire land for unforeseen public purposes. However, the author's failure to take a firm position on the matter raises concerns.

Considering the ever-changing dynamics of society, having an exclusive list of purposes for land acquisition may defeat the intention of the Act. Instead, it is argued that the court should retain its inherent powers to determine the legitimacy of public acquisition of private property based on the circumstances surrounding each case. This approach allows for

flexibility in addressing unique situations and prevents undue restrictions on the court's decision-making process.[17]

Amokaye[18] made an inroad into Austinian theory while considering the Governor's power to revoke interest in land and submitted that the idea of strict property ownership never exists nor can it exist. He further submitted that modem judicial and legislative trends in many jurisdictions worldwide, lean heavily in favour of restricted and regulated proprietary right. He quickly brought up the fact that Nigerian private interests are being sold off for reasons other than those permitted by law.

It is submitted that caution must be taken by the court when given a liberal interpretation of the term as in the case of *Clark vs. Nash*[19] to prevent an abuse of the expropriation power of the State.

Mban,[20] whilst evaluating the problems of land acquisition and administration in the public sector argued that since time immemorial, all the tiers of government in Nigeria required land for execution of projects and policies under the directive principles of state administration. The most popular method to achieve this according to the author, is through compulsory acquisition which power is prone to abuse at times. He opined that once the government conjures the all-embracing principles of *public purposes* and *overriding public interest* under sections of the Act, it might proceed to acquire the land of her citizens unimpeded. He also noted that since the definition of *public purpose* is very elastic and under the sections, government might hide to acquire land purely as a punitive measure as experienced during the Shagari-led government where some State Governments resorted to compulsory acquisition of properties of their political opponents under the guise of overriding public interest. This was influenced by some of the political leaders close to the government. The position canvassed by Mban is similar to that expressed by Umezulike and statistics on such political abuse of expropriation power is a booster to the anticipated legal reform.

Conclusively, the above narrated theories further buttress the need for the acquiring authorities to exercise its expropriatory power to acquire land for developmental purposes.

4.0 CONCLUSION

Land is the most important factor of production, because without it there cannot be any production activities. Land in this sense is taken in the economist and legal senses. The difference between the two approaches is that the economist perception of land does not include the aspect of incorporeal heredicment such as easement, profit and licenses. Be that as it may the essential characteristics of land as enunciated by classical economist including Adam Smith and Neoclassical economist including Ricar Leo provide a good foundation upon which the legal analysis of land has proceeded. Thus, it is to a large extent agreed that

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[17] and more so the court has held in Military Governor Oyo State that any other public purpose not stated under section 51 of the Act has to take its coloration or meaning from public purposes stated therein.

[18] C.C. Amokaye,

[19] *Supra.*

[20] B.A. Mban, 'The problems of Land Acquisition and Administration in Public sector' in J.A Omotola (ed) (1982) pg.68

land as a free gift of nature is somehow limited in supply. Finally, that industry that are primarily subjected to law of the diminishing return and that this has a great implication on rent which has been defined as that portion of the produce of the land which is given to the landlord for use of the indestructible price of the soil.