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Analysing the Concept of Right of Occupancy under the Nigeria Land Use Act

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The history of the land tenure system dates back to time immemorial. Landholding and administration were customary by indigenous rules of custom prevalent in the part of Nigeria where the land was situated. Ownership of land was majorly family or communal with opportunity for all members of the indigenous groups to access land. Due to societal development and diversity, there existed complexity in land transactions, unfavourable characteristics of the customary land tenure system included uncertainty and the problem of security of title to land, the problem of ascertaining the appropriate vendor, and inflexibility of rules which resulted in difficulty for the government and private entrepreneurs to acquire land. Although there were other legislations in respect of land holding in Nigeria before the Land Use Act, the Land Use Act was enacted to tackle the problems evident in the customary mode of land ownership. By the provision of the Land Use Act therefore, unlike customary land holding system where ownership of land was in the family or community, all land within a state vest in the governor of that state who holds the same in trust for the people of the state (Nigerians generally) although with the exclusion of land vested in the Federal government and its arms. The right/interest an individual can acquire over land is the Right of Occupancy. Although for ease of land administration and eradication of the bottlenecks associated with indigenous land administration, the government of the state now holds a fiduciary position, saddled with the responsibility to administer land for the benefit of all and only gives a right of occupancy to individuals yet the land administration affairs is cloudy, with numerous uncertainties. The government lacks data at the land registries, thus proper administration of land is impaired, the dichotomy between a deemed grant and an actual grant impedes the aim/general intendment of creating the right of occupancy and inconsistencies are created through the co-existence of the provisions of customary land holding and right of occupancy. This work, therefore, seeks to review, analyse, and assess the concept of the right of occupancy,

and examine its implication on customary land tenure systems, leases and tenancies, environmental planning, sustainable housing, and mortgage transactions. In the end, the writer's findings will be revealed and meaningful suggestions for a review of the concept and its implication on other forms of interest in land will be made.

Keywords: *ownership, land, grant, occupancy.*

INTRODUCTION

Land is an essential commodity necessary for the development of man and his society. For a man to continue to live and grow, the land must be available.[1] According to Omotola[2], every person requires land for his support, preservation, and self-actualization within the general ideals of society. The land is the foundation of shelter, food, and employment. Man lives on land during his life and upon his demise, his remains are kept in it permanently. Even where his remains are cremated, the ashes eventually settle on the land. It is therefore crucial to the existence of the individual and of society.

The history of the land tenure system dates back to time immemorial. Landholding and administration were customary by indigenous rules of custom prevalent in the part of Nigeria where the land was situated. Due to societal development and diversity, there existed complexity in land transactions and unfavourable characteristics of the customary land tenure system. Consequently, the state had to intrude and bring about property legislation due to the importance of land to man and society to ensure efficient adequate land management techniques for the benefit of the greatest number of the members of the society[3]. The then Military Government therefore, set up an eleven-man Land Use Panel with the responsibility to:

- study the various land tenure systems, land use, and land conservation practices in the country in an in-depth manner and recommend steps to be taken to streamline them;

[1] Tunde Otubu, 'E-Government and Land Administration in Nigeria: A Recipe for Lagos State' (*SSRN*, 15 May 2009) 15 <https://ssrn.com/abstract=1405363> accessed 27 May 2021
[2] Omotola JA, *Law and Land Rights: Whither Nigeria* (University of Lagos 1988)
[3] Tunde Otubu, 'Land Reforms and the Future of land use Act in Nigeria' [2008] Nigerian Current Law Reform Review (NIALS) 2007-2010

- study and analyse the implications of a uniform land policy for the country;
- observe the feasibility of a uniform land policy for the entire country, make necessary recommendations, and propose guidelines for implementation; and
- observe and examine steps necessary for controlling future land use and also open and develop new land for the needs of the Government and Nigeria's growing population and make appropriate recommendations.[4]

The eventual result of the duty of the panel is the Land Use Act[5] which was enacted to tackle the problems evident in the customary land holding system. By the provision of the Act, ownership of all land within a state except that vested in the federal government or any of its ministry became vested in the governor of the state who holds the same in trust for the people of the state; ownership, therefore, ceased to be in the family or community. From the commencement of the Act, the right/interest that an individual can acquire over land is called the Right of Occupancy. The right of occupancy is defined as a title to the use and occupation of land" or as the "right to the use and occupation of land". One significant characteristic of the right of occupancy is that the land is held by the state either under an express or implied grant or by the operation of law[6]. Is the right of occupancy a personal or proprietary interest in land? What are the components of the right? What effect does it have on customary land tenure holding, leases and tenancies, mortgage transactions, environmental planning, and sustainable housing? Has the right been able to cater to problems associated with customary land holding which it aimed at combating are some of the questions to be answered in this work.

LAND TENURE SYSTEM INDIGENOUS TO THE PEOPLE

Before the advent of the Land Use Act and by extension the right of occupancy system[7], the indigenous people of Nigeria were governed by the customary land tenure system whose principles showcased the historical credentials rooted in the custom of the different

[4] Oludayo G Amokaye, 'Planning and Compulsory Acquisition Law and Practice in Nigeria' (Concepts Publications Ltd, Lagos 1989) 62; Nnamani A, 'Land Use Act-11 Years After' (1989) 1(2) GRBL 51
[5] Land Use Act 2004 (Nigeria)
[6] Rudolph W James, *Nigerian Land Use Act: Policy and Principles* (University of Ife Press Ltd) 86
[7] *Nkwocha v The Governor of Anambra State* (1984) 1 SCN 634, 65

ethnocultural groups in Nigeria[8]. The customary land tenure system is the system of land ownership practised by ethnic communities under unwritten laws. This customary land tenure system is divided into two principal concepts; the traditional African concept which is prevalent in the south among the majority Yorubas, Ibos, and the other minority ethnic nationalities, and the Islamic concept much applicable in the northern region amongst the Hausa/Fulani which also extends further to other Northern African countries with insignificant exceptions. The difference in the Northern and Southern pre-colonial land policies within Nigeria is an outcome of the different ethnic, cultural, and local administrations. The principles regulating this system of land tenure were uniform with slight variations which were due to ethnocultural differences. Customary Land Tenure Systems are therefore the various principles, norms, and rules that governed transactions in land in various places in Nigeria before the introduction of the Land Use Act of 1978[9] (the Act) which was intended to govern the Nigerian nation as an entity and not the multiple ethnic groups with their different ways of acquiring, enjoying and disposing of land.[10] One principle that is however firmly established in the customary land tenure system is that 'land is an ancestral trust which the living shares with the dead', hence land is not alienable[11] and the court in *Amodu Tijani v Secretary of Southern Nigeria*[12] affirmed this principle when it held that the notion of individual ownership was foreign to native ideas.

According to custom, the land belongs to the villages, communities, or families with the chief or headman of the community or family as the 'manager' or 'trustee' who holds the land for the use of the whole village, community, or family[13] while the land title is vested in the corporate unit, that is the community, village or family. It is submitted that this is a similar feature to the interest granted by a right of occupancy under the Act.[14]

[8] Imran O Smith, *Practical Approach to Law of Real Property in Nigeria* (Ecowatch Publications) 31
[9] Land Use Act 1978 (Nigeria)
[10] *Ibid*
[11] Harrison A Amankwah, *The Legal Regime of Land Use in Africa: Ghana and Nigeria* (Tasmania Pacific Law press) 1
[12] *Amodu Tijani v Secretary of Southern Nigeria* (1921) AC 399, 405
[13] *Ibid*
[14] *Ibid*

NORTHERN NIGERIA CUSTOMARY LAND TENURE

The customary tenure in northern Nigeria suffered early disruptions by the Fulani jihadists, who took over and claimed lordship over the land after the Islamic conquest. The situation only changed when the country became a colony of Britain. Under the leadership of Lord Lugard, to whom land rights were ceded in 1903, the colonial officials 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. By this law, certain lands in northern Nigeria were designated 'native lands', and management and control were vested in the Minister (later Commissioner) for Lands and Survey to administer for the use and common benefit of the natives[15]. *Section 6* of the Land Tenure Law of 1962 [16]empowered the minister to grant rights of occupancy to natives. For non-natives to occupy and enjoy land the consent and approval of the minister were also required[17]. A non-native is defined by the law as a person whose father was not a member of any tribe indigenous to northern Nigeria[18].

SOUTHERN NIGERIA CUSTOMARY LAND TENURE

Customary land tenure in southern Nigeria which was regulated by customary law had its roots in the traditional conception of land. Traditionally, the land had economic, social, political, and religious significance. The 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[19]. 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

[15] Land Tenure Law 1962
[16] Land Tenure Law 1962, s 6
[17] *Ibid*
[18] *Ibid*
[19] Kenneth Tafira, 'Why Land Evokes such Deep Emotions in Africa' (*The Conversation*, 27 May 2015) <https://theconversation.com/why-land-evokes-such-deep-emotions-in-africa-42125 > accessed 29 February 2020

case of *Okiji v Adejobi*[20]and *Okoiko & Anor. v Esedalue & Anor*.[21] In the leading case of *Amodu Tijani v Secretary of Southern Nigeria*[22], 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 is important to bear in mind to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. The land belongs to the community, the village, or the family, never to the individual.*

THE LAND USE ACT

When it became evident that customary land law as it was could not cater to the changes in respect of the management and administration of land thus necessitating a need to activate the essential role that the law plays as an instrument of social change, the then Federal Military Government set up the Land Use Panel in June 1977 and saddled it with the following responsibilities:

- study the various land tenure systems, land use, and land conservation practices in the country in an in-depth manner and recommend steps to be taken to streamline them;
- study and analyse the implications of a uniform land policy for the country;
- observe the feasibility of a uniform land policy for the entire country, make necessary recommendations, and propose guidelines for implementation; and
- observe and examine steps necessary for controlling future land use and also open and develop new land for the needs of the Government and Nigeria's growing population and make appropriate recommendations[23]

The panel in acting took evidence from various individuals, organisations, and institutions in the country and the end submitted its report to the Military Government. On the 29th day of March 1978, the then-head of the Federal Military Government announced the promulgation of the new statute about all lands in the country which is now known as the Land Use Act. The Act

[20] *Okiji v Adejobi* (1960) FSCLR 44, 5
[21] *Okoiko & Anor v Esedalue & Anor* (1974) 3 SCR 15
[22] *Amodu Tijani* (n 12)
[23] MG Yakubu, *Land Law in Nigeria* (Macmillan Education) 199

is an innovative legislation that introduced uniform state ownership known as the Right of Occupancy System and the effective implementation of the system is aimed at accomplishing the following objectives:

- to eradicate the bitter and often physically injurious controversies known to be generated by prior land tenure systems;
- to reorganize and simplify ownership and management of land throughout the country;
- to support each citizen in the realization of the ambition and aspiration of owning the place where he and his family might live securely and peacefully; and
- to aid the government in bringing under control the uses of land nationwide and thereby facilitate planning and zoning programs.[24]

The right of occupancy system, therefore, brought a dramatic change in the land tenure system in the southern part of Nigeria but for the northern part, it brought about only a little change to what was in existence.[25] One such little change is that, unlike the Land Tenure Law, the Act put a ceiling on the number of plots a person is allowed to occupy. Although the Act is an ordinary statute, it became extraordinary by its entrenchment in the constitution of Nigeria; the implication is that if any of the provisions of the Act is inconsistent with that of the constitution; such provision shall be null and void to the extent of its inconsistency[26].

By the provision of the Act, all land within the territory of a state (except those vested in the federal government or any of its agencies)[27] became vested in the governor of the state who holds the same trust for the people of the state[28]. By this provision, ownership of land within a state is vested in the governor of the state who allocates a right known as the "Right of Occupancy" to citizens; a right which vacated other forms of ownership[29].

[24] Ehi P Oshio, 'Indegenous Land Tenure and Nationalisation of Land in Nigeria' (1990) 5(2) JLUEL
[25] *Ibid*
[26] Constitution of the Federal Republic of Nigeria 1999, s 1(3)
[27] Constitution of the Federal Republic of Nigeria 1999, s 49
[28] Constitution of the Federal Republic of Nigeria 1999, s 1
[29] IA Umezulike, *ABC of Contemporary Land Law in Nigeria* (Enugu Snaap Press Nigeria Ltd 2013) 84

THE RIGHT OF OCCUPANCY

The Land Use Act did not define a right of occupancy, thus the courts and legal writers are left to draw inferences as to what the true nature of a right of occupancy is[30]. The Act however defined the two types of right of occupancy which may be granted under the Act. By the provision of the Interpretation section[31], a statutory right of occupancy is one granted by the governor of a state while a customary right of occupancy is that granted by the local government. Deciphering from the language and provisions of the Act, courts, legal luminaries, and writers have described a right of occupancy as a title to the use and occupation of land. In determining the nature of a right of occupancy certain questions have been posed whether the right is a personal right or proprietary interest in land, whether the right fall within the division of property, and whether it is a leasehold interest or a novel interest in land.

CLASSIFICATION OF RIGHT OF OCCUPANCY

The right of occupancy created under the Act is classified into two types namely:

Statutory Right of Occupancy: A statutory right of occupancy is a right approved by the governor of a state under the Act. [32]The governor of a state is by the provision entitled to give the statutory right of occupancy to a person in any part of the state. Statutory right of occupancy can be acquired expressly or by operation of the Act, otherwise known as 'deemed grant'.

Express Grant of Statutory Right of Occupancy: The power of the Governor to give an express grant of a statutory right of occupancy under section 5(1) of the Land Use Act is discretionary. He is in no way bound to make a such grant[33]. The law also prohibits him from granting a statutory right of occupancy or consent to an assignment or subletting of same to anyone below the age of twenty-one except if the person applies for same through his guardian or trustee or where such right devolves on him because of the death of a holder of such right, in which case

[30] *Ibid*
[31] Land Use Act 2004, s 51
[32] Land Use Act 2004, s 5(1)
[33] Land Use Act 2004, s 47; *Nkwocha v Governor of Anambra State & Ors* (1984) 15 NSCC 484; *Lamboye v Ogunsiji* (1990) 6 NWLR 155, 210

he will have the same liabilities and obligations in respect of the right as if he is of age.[34] Actual grant of the statutory right of occupancy must be for a fixed term and may be granted subject to the terms of any contract which may be made by the governor and the holder but not inconsistent with the provisions of the Act.

Deemed Grant of Statutory Right of Occupancy: For purposes of the application of the provisions of the Act, a distinction is drawn between a grant of a right of occupancy dealt with in Part II (Express Grant) of the Act and existing interests in land, dealt with in Part IV (Deemed Grant) which is declared to be the transitional provisions. The Act adopted a sub-classification of the deemed rights of occupancy based on whether the land is in an urban or non-urban area. Rights to land in an urban area are "deemed statutory rights" while those in non-urban areas are "deemed customary rights".[35]

By the provision of section 34(1) of the Act, all land in urban areas vested in any person whether under customary land holding or otherwise before the commencement of the Act shall, subject to the provisions of the Act, continue to be held by such person as if a statutory right of occupancy had been granted by the governor. For purposes of the section, land in urban areas is classified into "developed" and "undeveloped" land. Developed land is defined by the Act as *The land where there exists any physical improvement like road development service, water, electricity, drainage, building, structure, or such improvement that may enhance the value of the land for industrial, agricultural, or residential purposes.*[36]

All other lands not within the ambit of the above definition fall into the category of undeveloped land. Where the land is developed, it shall continue to be held by the holder, (person in whom it is vested) as if he is a holder of the statutory right of occupancy issued by the governor under the Act.[37] The inference can be drawn from the provision of section 34(4) of the Act that the holder of the land before the commencement of the Act in whom deemed statutory right is vested is the person who had an absolute interest in the land. The holder of a developed deemed

[34] Land Use Act 2004, s 7
[35] *Ibid*
[36] Land Use Act 2004, s 51
[37] Land Use Act 2004, s 34(2)

grant has the option to apply to the governor for an express grant of the statutory right of occupancy. According to R.W. James, where he elects not to apply for an express grant, he will enjoy certain advantages. They include:

- The indefiniteness of duration contrary to express grants which are for a definite term;
- Freedom from terms and conditions found in the express grant[38];
- Any existing strict settlement of such land is not affected by the prohibition against the creation of successive interests of the legal estate;[39]
- The right can be alienated without the necessity of getting the transaction approved by the governor unless;
- the such requirement was a term of the original grant (e.g. a governmental lease); or
- The proposed transferee is an alien; or
- the land is undeveloped.[40]

The requirement of consent is restricted to statutory rights granted by the governor and cases where there has been an improvement on land under the grant of a certificate of occupancy. Where land is undeveloped, the person in whom the land was vested before the commencement of the Act does not enjoy the same ownership rights as that enjoyed by the holder of developed land. He is only entitled to the statutory right of occupancy over one plot or portion of the land not exceeding half of one hectare as if he is a holder of a statutory right of occupancy; all rights formerly vested in him in respect of the excess of the land are extinguished and such excess taken over by the governor who would administer same by the provisions of the Act[41]. Where the holder of the undeveloped land has more than one of such land in different parts of the urban areas of the state, the whole land shall be considered together for the application of the half-hectare rule and the excess taken over by the governor and administered by the provisions

[38] Land Use Act 2004, s 14
[39] Land Use Act 2004, s 24
[40] Land Use Act 2004, s 34(1)
[41] Land Use Act 2004, s 34(5)

of the Act. Once a grant or right exists, it can only be determined by a lawful revocation and not by another grant to a different person.[42]

Customary Right of Occupancy: A customary right of occupancy is defined as the right of a person or community lawfully use or occupy land by customary law and it includes a customary right of occupancy granted by a local government under the Act. The Act empowers the local government to grant a customary right of occupancy over land in non-urban areas[43]. Although the Act did not define a 'non-urban' area, it defined an 'urban area' as an area of a state that the governor of the state designates as such under section 3 of the Act which empowers him to do so by publishing the areas in the State Gazette[44]. By implication, therefore, non-urban areas of a state are areas not designated in the state gazette as urban areas. The local government may make a grant in non-urban areas provided that no previous grant of the same parcel of land has been made by the governor[45]. Like the statutory right of occupancy, there are two ways of acquiring customary right of occupancy, namely: by express and deemed grants.

EFFECT OF THE CONCEPT OF RIGHT OF OCCUPANCY ON OTHER FORMS OF RIGHT OVER LAND

Having shown that the status of the right of occupancy under the Act is novel and can be easily differentiated from other forms of right over land, it is foreseeable therefore that the concept of "Right of Occupancy" as enshrined in the Land Use Act would have certain consequential effects on other forms of right over land. We shall therefore discuss the consequential effects of the provisions of the Land Use Act on other forms of right over land.

Effect of the Concept of Right of Occupancy on Customary Land System

The land Use Act was intended to solve the socio-economic problems associated with the customary land tenure system and establish a uniform land policy to cater to the needs of the society but in trying to achieve this, its provisions have altered some of the rules of indigenous

[42] *Dantsoho v Mohammed* (2003) 6 NWLR 817, 457; *Ibrahim v Mohammed* (2003) 6 NWLR 817, 615
[43] Land Use Act 2004, s 6
[44] Land Use Act 2004, s 5(1)
[45] *Ibid*; Land Use Act 2004, s 6(1)

land tenure system; although preserving the system to an extent. The concept of family property is by the provision of section 24 of the Act recognized and by the provision of section 34(4) customary pledge is also recognized. According to Umezulike however, to suggest that the customary right of occupancy is regulated by the customary law must mean that it is exempted from all statutory controls under the Act. It can safely be said therefore that the customary land tenure system has been supplanted by a publicly regulated regime, which vests absolute ownership and management of land and its resources in the government while allowing the customary land tenure to co-exist.[46]

RIGHT OF OCCUPANCY AND COMMUNAL AND FAMILY OWNERSHIP AND MANAGEMENT OF LAND

Some of the sections of the Act recognize communal and family ownership of land.[47] The inference is drawn therefore that the Act recognizes that the right of occupancy in land can be owned by a community or family. The Supreme Court in *Chief S.U. Ojeme & Ors v Alhaji Momodu II & Ors*[48] recognized such rights but the issue is: can a village leader exercise customary law control over communal land without regard to the governor or local government having legitimate authority under the Act to manage and control such land? There is therefore an overlapping and conflicting jurisdiction. Will the allocation of land by a leader to a person involve an alienation of the right of occupancy for which the consent of the governor or local government is required by the Act? The definition by the Act of customary right of occupancy is the right of a person or community lawfully using or occupying land by customary law and an occupier as a person lawfully occupying land under customary law and using same by the rules of customary[49] law suggests that the law which must govern the enjoyment of the customary right of occupancy is the customary law of the area the land is situated but other provisions of the Act negate this. It is no doubt inconsistent to say that a right is enjoyed by customary law and yet permits such a right to be granted by the local government which is a

[46] Oludayo Amokaye, *The Implementation of Land Use Act and Land Rights in Nigeria. Essays on African Land Law* (R Home ed, PULP 2011)
[47] Land Use Act 2004, s 29(3)
[48] *Chief SU Ojeme & Ors v Alhaji Momodu II & Ors* 1 SCNLR (1983) 188
[49] Land Use Act 2004, s 51

statutory body. Jide Olakanmi & Co.[50], has argued that the solution to this anomaly lies in removing the local government from the scheme and accepting that this type of right is to continue to be dealt with by the Obas, Obis, chiefs, and heads of family as before the Act.[51] It is submitted with respect, that the suggestion of the learned writer if followed will be inconsistent with the purport of the Act and the vesting of all land within the territory of a state in the government of that state. It is rather suggested that to preserve the purport of the Act, the word 'customary' should not be used in describing the right.

Another effect of the provision of the Act is that the family heads and community chiefs who are entitled to grant family and community land respectively have been divested of their powers as the governor and local government is by the Act the entities recognized as having the power of administration and management of land. In practice however, especially where land is situated in an urban area, the transferor of land must first comply with the rule of customary law and obtain the necessary consent from the family or community before seeking and obtaining the governor's consent.

THE POSITION OF THE CUSTOMARY OWNER VIS-A-VIS THE POSITION OF THE CUSTOMARY TENANT

The customary tenancy is created where the landowner grants to another person at customary law, a right of occupation and use of land in return for payment of tribute. Customary tenants are grantees of land under a customary land holding system and they hold interests that are determinable but may also be enjoyed in perpetuity subject to good behaviour.[52] Upon the enactment of the Act, all customary land owners, usually family or community now have limited right in the land known as 'right of occupancy', they having been divested of radical title in the land. According to I.O. Smith, their position is now "that of a tenant subject to the administrative control of the governor or the local government". One of the incidences of the right of occupancy granted him is that his possession is no longer exclusive. The position of a customary tenant

[50] *Land Law Readings and Cases* (Law Lords Publication) 43
[51] *Ibid*
[52] *Aghenghen v Waghoreghor* (1974) 1 SC 1, 8

however remains unaltered, although he now has an overlord who is superior to his former overlord. The tenant, having only occupational rights in the land is still subject to the incidence of his tenancy[53].

RIGHT OF OCCUPANCY AND CUSTOMARY PLEDGE

By the provision of section 34(4) of the Act, the right of a pledgor to a statutory right of occupancy about pledged land situated in an urban area is recognized.[54] The section also protects the pledgee's interest in such land making any right of occupancy on the land subject to it. A pledgee in possession may create and reap the improvements on land so far as the debt remains unpaid but he is not the owner of the land; the pledgor retains the customary right to redeem the land and all the improvements thereon upon settling the debt owed[55] and the pledgee's right to occupation and use determines upon payment of a debt even where he has been registered as one with customary right of occupancy over the land. Again it is with due respect submitted that where the half-hectare rule applies, the pledgor having lost the excess to the governor does not have any legal right over such excess.

Effect of the Concept of Right of Occupancy on Leases and Tenancies

The combined effect of sections 1 and 5 of the Act is to effect that every land within the territory of a state, having been vested in the governor of the state; the governor becomes the legal landlord of all such land. The previous landlord of land becomes a tenant to the governor at the commencement of the Act; having only a right of occupancy, statutory or customary over land. In other words, the governor takes over the previous owner's legal title while the previous owner now has an interest lesser than that of the governor about the land. It will therefore be

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[53] This according to I.O. Smith is because there is nothing in the provision of the Act expressly expriopriating the customary right of use and control of land nor that the right to payment of tribute, reversion and forfeiture. In fact, the Supreme Court has consistently refused to align itself with the Court of Appeal decision in Kasali v Lawal (1986) 3NWLR (pt. 28) p. 308 when it stated in Ogunola v Eiyekole & ors (1990) 4NWLR (pt. 146) 632 that it is a misstatement of law to say that the Land Use Act abolished the remedies or reliefs of forfeiture available whenever the tenant disputes the title of the overlord or alienates without the landlord's consent the whole or part of the parcel of land let out to him by the landlord under customary law

[54] Where the land is in a non-urban area and is used for agricultural purposes before the commencement of the Act, the pledge in occupation and possession s the person entitled to right of occupancy over the land.

[55] *Okoiko v Esedalue & Anr* (1974) 3 SC 24

wrong to continue to ascribe the title 'landlord' to him; he can only at best be described as a holder of a right of occupancy. This means that the continued use of the phrase "landlord" to refer to persons with a statutory right of occupancy over land after the commencement of the Act is strictly, legally, and contextually wrong and inconsistent with the intendment of the Act. It is submitted that where the owner of a building or previous owner of the land is referred to as landlord in any legal proceeding, an objection to such on grounds of irregularity or defect may succeed. The Act having described the previous owner of the land as a holder of the right of occupancy, it is suggested that such persons be simply referred to as 'holder'. By the intendment of the Act, those deriving interest from the holder are not tenants but occupiers of the holder's interest.

Effect of the Concept of Right of Occupancy on Mortgages

Although the Act did not make specific provisions for the creation of mortgages, reference is made to mortgages in certain sections of the Act suggesting that the Act takes cognizance of existing mortgages and allows for the creation of mortgages after the commencement of the Act. All mortgages must however conform with the general intendment of the Act. Though nothing has changed about the mode of creation of mortgages, the characteristics of the right of occupancy under the Act have certain effects on mortgages and the form of interest created under it. According to P.E. Oshio, it may not be appropriate to talk of conveyance of land subject to a mortgage but of 'assignment', 'sub-grant', or 'sub-undergrant' of the right of occupancy interest in land. Also, the literal interpretation of some of the provisions of the Act would constitute obstacles to the easy creation and enforcement of mortgages.

EXTINCTION OF A RIGHT OF OCCUPANCY; SUBJECT TO A MORTGAGE

By the provision of the half-hectare rule in respect of undeveloped land in an urban area, a mortgage transaction may be adversely affected. For example where a large piece of land has been the subject of the mortgage before the commencement of the Act, and the area where the land is situated is designated "urban"; the mortgagor automatically loses the excess of half a hectare to the governor thereby making the mortgagee forfeit his interest in such excess.

Where there is revocation of a right of occupancy subject to a mortgage in circumstances where compensation does not accrue, the mortgagee may suffer total loss; especially if the mortgagor is indigent and has nothing upon which a judgment of the court to pay based on his covenant may operate. Even where compensation is payable, the mortgagee may still lose out as the Act provides that only the holder of a right of occupancy or the occupier thereof is entitled to compensation and a mortgagee is not in the contemplation of the Act a 'holder' or 'occupier' of a right of occupancy. He can only fall within the definition of an occupier if he is in actual occupation of the land. The Supreme Court has however held that the correct position of law is that any person who can trace his title to the person who was entitled to the land immediately before the vesting in the governor stands for entitlement to compensation in the shoes of that person. Concerning the apex court, it is submitted that the Land Use Act provision on the person entitled to compensation is clear and unambiguous, the court, therefore, lacks the power to input into the law what the law did not intend. The Act stated specifically that modification of existing laws, laws governing mortgages inclusive must conform to the Act. It has been argued however that the court in giving effect to the definition of a "holder" may decide that the mortgagor as the holder of a right of occupancy is entitled to compensation but upon trust for the mortgagee to the extent of the outstanding mortgage debt. It should be noted that in modern-day practice, the governor in publishing notice of revocation asks all interested persons in the land, subject to revocation to put forward claims for compensation. Another means of salvaging the adverse effect revocation can have on a mortgagee is to have expressly stated in the mortgage deed that in the event of revocation, the mortgagee shall have recourse to compensation payable in satisfaction of the mortgage debt and that where compensation is not enough to settle debt however, the mortgagee may have to explore other legal means to have the debt liquidated.

Effect of the Concept of Right of Occupancy on Estate

As has been said earlier, the Land Use Act converted all unlimited rights in land to rights of occupancy, meaning that freehold interest or absolute ownership of land is no longer known to

our jurisprudence on land.[56] According to I.O. Smith,[57] the quantum of interest enjoyed on land is what is referred to in English law as estate; the holder of a right of occupancy under the Act is, therefore, an estate holder.[58] It has been argued however that if ownership is vested in the governor, it cannot remain in the individual, consequently, all forms of the estate will merge in the governor, that by the provision of the Act, no individual can grant any right or interest in the land beyond the statutory right of occupancy. It should be noted also that although a holder of a deemed grant of a right of occupancy is not obliged to obtain a certificate of occupancy and become an actual grant holder of a right of occupancy, he enjoys this right only as long as the land remains vested in him, to fragment the land, he must obtain the requisite consent.

Effect of the Concept of Right of Occupancy on Planning

The land is to be used for only the purpose for which a right of occupancy is granted; any use inconsistent with that for which it is granted is a breach upon which the right may be revoked[59] and the land forfeited to the state. The forfeiture clause is used to balance societal interest with that of the individual; this is the reason the interest of the society, environmental control inclusive is contained as conditions and terms in a certificate of occupancy. Where individual interest is at work in the form of non-compliance, the governor can exercise his power of forfeiture and re-enter the property for development control and environmental protection.[60] In a nutshell, unlike the case with former holders of the freehold interest in the land who were not under any obligation to carry out planned development of their property, thereby resulting in the development of slumps, inefficient management of infrastructural facilities, and chaotic development, careful planning and orderly development of the property is now given priority.

As laudable as the provisions of the Act in respect of the right of occupancy vis-à-vis environmental planning and control is, it is overwhelming that there is a fundamental lacuna in the Act that water down the effect the express terms in a certificate of occupancy would

[56] Dzungwe v Gbitshe (1985) LPELR (SC) 225/1984
[57] IO Smith (n 8)
[58] *Ibid*
[59] Land Use Act 2004, s 11
[60] *Ibid*

ordinarily have had on environmental planning and control. The certificate of occupancy is the only document evidencing the express terms and conditions of a grant of a right of occupancy. This means that where there is no certificate of occupancy in respect of a property, there would be no document binding the holder of the right in respect of the express conditions contained in a certificate of occupancy[61]; in effect, the aim of physical and environmental planning and control is placed at risk. Although the governor may act on the authority of some other provisions of the Act to get deemed holders of the right of occupancy to comply with the express terms provided in a certificate of occupancy[62], it is submitted that compliance in respect of certain terms cannot be achieved without the enactment of subsidiary legislation to help give effect to the provisions of the Act.[63]

CONCLUSION

Although the right of occupancy system was intended to be a uniform system intended to eliminate the bitter and often injurious controversies known to be generated by prior land tenure systems, assists each citizen to realize the ambition and aspiration of owning the place where they can live securely and peacefully with their families and enabling the government to bring under control the use of land and facilitate planning and zoning programs for a better state, it has failed in several ways. The truth is that no modern society can progress economically without a high degree of certainty in land tenure and the imposition by law or equity of prescriptive titles to ensure that there is the closure of land disputes[64]

The Indigenous Land Tenure System operative in Nigeria, especially in the then Southern States where ownership of land was abruptly distorted by the introduction of the concept of Right of Occupancy vide the Land Use Act, 1978, which no doubt was borne as a result of the fact that the indigenous systems could no longer cater for socio-economic developments associated with land and ease of management and administration of land clamoured for at the material time; Right of Occupancy system was therefore intended to be a uniform system intended to eliminate

[61] Land Use Act 2004, s 34; Land Use Act 2004, s 36
[62] Land Use Act 2004, s 1
[63] Land Use Act 2004, s 46
[64] *Awure v Iledu* (2008) FWLR 402, 7657

the bitter and often injurious controversies known to be generated by prior land tenure systems, assist each citizen to realize the ambition and aspiration of owning the place where they can live securely and peacefully with their families and enabling the government to bring under control the use of land and facilitate planning and zoning programs for a better state. This work has therefore examined the indigenous land tenure system on one hand and the right of occupancy on the other. The nature of both land holding systems, classification of the right of occupancy, its effect on other forms of right over land, and an appraisal of the success or otherwise of the concept exposing certain areas where the concept is wanting and not satisfying the objective of its invention.