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LEGALIZING THE COMMONS - REVISITING NIGERIA'S LAND USE ACT

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ABSTRACT

Nigeria with a population of 88.5 million has vast areas of land much of which apparently could be put into production in order to sustain her agricultural development. But for several decades, suboptimal use of land has characterised Nigerian agriculture. One of the main reasons for this has been the relative inability to obtain and acquire access to land in Nigeria.

From time immemorial in most African communities, various claims to land have raised numerous problems with regard to concepts such as ownership, the land tenure system, development and use of mineral and other resources, land administration, management and control. As a result of these problems, much misunderstanding and misrepresentations have arisen so as to create the situation of irrationality in the use of available land in the rural areas. Such conflicts that have arisen in the past include those between the state and landowners, landlords and tenants, and others who claim to possess certain interests in land.

Conflicts also arise during the process of maintaining and sustaining secure rights by the corporate group, during the process of inheritance and disputations on farm sizes, during the act of litigations and during the process of formulating legislation on land matters.

This paper therefore answers the questions: What is wrong with the Land Use Act? What has been done to improve the situation and what more needs to be done in order to make the act more effective so that more of Nigeria's lands may come into use?

The areas at the cutting edge of change are identified and necessary implications are drawn. The paper concludes with suggestions for achieving even further improvement in implementing and operationalising provisions of the land use act. This may facilitate unfettered access to Nigeria's land resources.

LEGALIZING THE COMMONS - REVISITING NIGERIA'S LAND USE ACT

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INTRODUCTION

In the original conception of the 'commons' Hardin (1968) postulated the ultimate overexploitation or degradation of all resources used in common. He focused attention on over population and his idea gained popularity over the years in relation to overexploitation of resources held and used in common. Other scholars also dwelt on the same issue.

According to Feeny et al (1990), "the essential idea was that resources held in common, such as oceans, rivers, air and parklands are subject to massive degradation". To stress the point, Hardin alluded to a hypothetical situation which spotlighted the divergence between individual and collective rationality'. In that situation, a herdsman adds a few animals to his herd. By doing this, he profits individually. If every herdsman does this, each would graze more animals than the pasture can meaningfully support since each person takes all the profit from the extra animal but bears only a little of the cost involved in overgrazing. The result, as postulated by Hardin is that 'freedom of the commons brings ruin to all (Hardin 1968, p. 1244).

In his parlance, this is the 'tragedy of the commons' and it has become fashionable in the literature. We shall return to it briefly later in the paper. But how can this 'tragedy' be avoided? In order to avert the tragedy, Harding and some others have argued that the commons (resources used in common) can be privatized or kept as public property to which rights to entry and use could be allocated, that is, private enterprise and socialism (control by government).

Before relating the concept to Nigeria, it is germane to present same relevant definitions.

A common property resource (CPR) is defined as a facility that is shared by a community of producers or consumers. In this context, common - property resources include fisheries, wild life, surface and groundwater, range and forests, parks, pastures and public highways. These are usually referred to as a "Commons" or a common property resource.

According to Oakerson (1986)

> "A commons is an economic resource or facility subject to individual use but not to individual possession ..... the total rate of consumption varies with both the number of users and the type of use and, at the same time, use is joint in the sense that several individuals share the same resource or facility".

This definition approximates to the concept of Nigeria's customary tenure system as we shall explain later.

We note two important characteristics of common-property resources; firstly control of access: it may be costly or impossible to control access by potential users. For instance, migratory or 'fugitive' resources such as fish, wild life, range and forest lands constitute problems for the regulation of access. The second basis property of common-property resources is subtractability (Feeny et al, 1990). This property connotes that 'each user is capable of subtracting from the welfare of other users'. Even though there may be some overlapping, there are four categories of property rights under which common property resources may be held. These are open access, private property, communal property and state property.

Open access is characterised by unregulated access, it is free and open to all persons.

Private property rights are usually regulated by the state, they are vested either in an individual, or groups of individuals, They are usually held exclusively and are transferable (Regier and Grima, 1985).

Communal property is the case where the resource is held and controlled by 'an identifiable community of interdependent users'/ The users usually exclude outsiders or strangers and they regulate use by autochthonous members of the local community. Within the latter, rights of use are normally neither exclusive nor transferable (alienated) within it, rights of equal access and use are recognized. Legal recognition may be tacitly given to communal property rights.

With state property, the state exercises exclusive rights to the resource, it makes decisions with respect to access to the resource and nature of exploitation (Feeny et al, 1990).

LAND, LAND USE, LAND TENURE AND COMMUNAL PROPERTY IN NIGERIA

Although in the ordinary sense the word "land" means terra firma as contrasted to a body of water or air, it is known that the word "land" conveys different meanings to different people and different governments.

In a legal conception, the definition is comprehensive enough to include "land of any tenure and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings, and other corporal hereditaments or benefits in, over, or derived from the land" (Amissah, 1991).

It is noted, however, that the person who exercises legal rights over land is not entitled to the wealth within the land sub-surface such as oil and minerals, these are vested in the state.

The Ecologist views land as that part of the biosphere that supports aquatic, aerial and terrestrial ecosystems within a "balanced" environment.

To the Sociologist, land is a communal heritage that should be developed for the welfare of society as a whole. In this context, Marxian theorists maintain that land belongs to the state and that it forms a major part of the state's estate and wealth. The oil companies concern themselves with the wealth that lies at the subterranean part of land, while the small scale farmer perceives the land as that layer of soil which possesses the capability to support and sustain farming.

Economists, however, hold land to be synonymous with natural resources so that land includes "not only water but everything else in the world other than man-made objects and man himself - wild animals, wild plants, wild nature in all its varieties" (Guttenberg, 1983).

Thus, Economists consider land as an economic good with potential productive capacities, hence, land represents the sum total of the natural and man-made resources over which possession of the earth's surface gives control (Barlowe, 1978).

The differing notions and perceptions about land resources appear to find a convergence in the idea that land is a resource that attracts a multifaceted and 'a highly complex array of interests'.

From time immemorial in most African communities, various claims to land have raised numerous problems with regard to concepts such as ownership, the land tenure system, development and use of mineral and other resources, land administration, management and control. As a result of these problems, much misunderstanding and misrepresentations has arisen so as to create the situation of irrationality in the use of available land in the rural areas. Such conflicts that had arisen in the past include those between the state and landowners, landlords and tenants, and others who claim to possess certain interests in land.

Land is Nigeria's major national asset, the basis of the country's technological, social and economic survival. It is estimated that about 75 percent of the population depend upon agriculture for their livelihood (Famorito 1987).

In view of the importance of land to Nigerians, the 'land question' involves a number of crucial issues such as the use to which land is put, the nature and categories, of land users, and the nature of rights exercised.

What constitutes much importance in Nigeria, is the extent of ownership and control of land, that is, the quantum of interests held in land and how products of the land are apportioned. In these considerations, the issues border much on questions of equity in income distribution among both rural and urban populations (Famoriyo, 1987).

Total land area of Nigeria as derived from the side-looking Airborne Radar (SLAR) data acquired for the Nigerian Radar Project (NIRAD) by the Federal Department of Forestry is 89,206,278 hectares or 892,062.78km2. Table 1 showsa general picture of land use and land cover distribution in Nigeria.

Table 1

Land Use and Land Cover in Nigeria

Type of Land Use and land cover	Percentage
Grassland	16.34
Shrub/Woodland/Thicket	32.01
Forestland	5.54
Forestland (Mangrove/Swamp/Riparian)	4.23
Forest Plantation	0.14
Crop plantation	0.17
Farmland (60% intensity)	13.74
Other Extensive Farmland Area	26.68
Water/Rivers, Creeks	0.82
Built-up Area	0.33
Total	100.00

Source: Adeniyi, Peter O (1984).

According to Table 1, nearly one third of Nigeria is covered by shrub/woodland/thicket while 48.35 percent of the country is covered by grassland, shrub, woodland/thicket.

Forestland which is made up of well-drained dryland makes up 5.54 percent while wet forest land covers 4.23 percent of Nigeria's surface area. All forest land in Nigeria covers 9.91 percent that is, almost 10 percent of the total area.

Sixty percent of the forest lies in the savanna areas of Nigeria. Farmland comprises 40.59 percent of the total area of Nigeria while Table 1 shows that one third of this farmland is is farmed at 60 percent intensity.

It is also shown in Table 1 that while 0.82 percent of the country is covered by water/ rivers and creeks, built up areas cover a relatively small proportion (0.33%) of the total land. The distribution of these land use and land cover areas however varies from state to state in the country.

Customary Tenure

The term 'land tenure' is used to describe the rights and obligations which govern or control the holding, acquisition, use and disposition of land. Whichever form it takes - statutorily or customarily or legally - the land tenure system expresses the institutionalised relationship between the one who 'owns' land and the one wishing to develop it, assuming here that both are separate persons.

In a classic rendition or interpretation of Nigerian customary tenure, by the eminent legal scholar, Elias (1956) wrote:

> "The landholding recognized by African customary law is neither "communal nor "ownership" (in the strict English sense of the term). The term corporate would be an apter description of the systems of landholding, since the relation between the group and the land is invariably complex in that the right of the individual

> members often co-exists with those of the group in the same parcel of land. But the individual members hold definitely ascertainable rights within the comprehensive holding of the group" (pages 164 - 165).

Thus in Nigerian land tenure two kinds of interest were identified; those of the group and those of the individuals, The basis of radical ownerships of land is vested in the group while individuals acquired rights in the ownership of land from the group essentially as a birthright.

The general principles are that under the family arrangements, the head chiefs and all individual members of the family have rights in family land. Land is considered as being 'owned' by past, present and future generations (Famoriyo 1987).

It is necessary to state that the customary or indigenous land holding system has embedded in it the fundamental principles of human rights and individual freedom as basis for the welfare of society and for ensuring security of tenure. As further stated by Amissah (1991), under customary land tenure, "the fundamental title is the absolute or allodial title. All other titles interests or rights in land are derived from the absolute title'.

AFTERMATH OF ATTEMPTS TO MODERNISE LAND USE AND LAND TENURE LEGISLATION

A review of existing literature and research reports over the years reveals evidence of the existence of land tenure problems which include the following:

i Problems of acquisition and compensation: mode of acquisition is laggely through inheritance;

ii ill - defined bounoaries whose configuration had become distorted over time;

iii Inadeouate records of land transactions;

iv Cumbersome nature of the legal and administrative processes that have to be followed during land transactions;

v Problems of land scarcity, population pressure and exhaustion of available family land;

vi Land fragmentation and farm size;

vii Land tenure litigations;

viii Land abuse and land speculation;

ix Possibility of emerging landlessness;

x Inability of most women to gain rights of access to adequate land;

xi Availability of extra land for any purpose constitutes problems within a system where unilateral acts of alienation are forbidden without the knowledge and approval of principal members of the family;

xii Desocialization implies inalienability of land under customary tenure. Some of its consequences include denial of perennial cropping rights to non-members, disallowance of land use in any permanent form to non-members while members experience high initial cost of investment thus limiting their ability to carry out land improvements. The process of desocialization is a component of security of tenure (Famoriyo, 1991).

Because of the existence of these problems, and in order to correct most of the anomalies within the existing land tenure systems in Nigeria and so provide a uniform frame for land use, ownership and control, the Land Use Act (No 6) of 29th March, 1978 which took effect on 1st April, 1978 was passed.

The objectives of the Act were as follows:

1 To promote rapid socio-economic transformation of the country through rational land use;

2 To ensure that state Governments administer the land for the benefit of their people;

3 To bring an end to artificially high land prices as a result of the activities of speculators prevalent in the urban areas;

4 To eliminate a main cause of socio-economic inequality.

5 To accelerate economic development by making it easier for State Governments and their people to gain access to land.

Accordingly, the major objective of the Act in the context of the original decree 6 of 29th March, 1978 was that:

> "all land comprised in the territory of each State in the Federation are hereby vested in the Military Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians"
> (Federal Republic of Nigeria, 1978).

The intention of the Act was therefore to assert and preserve by law the rights of all Nigerians to the land of Nigeria. In examining to what extent the Act is improving accessibi ity to land in Nigeria, its features may be considered as follows:

(A) The Act abolished the concept of landlordism by vesting ownership af all lands in the trusteeship of the State and all transactions were to be dominated by public and not private interests. This implies that overriding public interest is made superior to that of groups or individuals. Rural users who had hitherto occupied and used land remained undisturbed on their land by the Act. This is the case except when family communal lands fall within the confines of any lands to be compulsorily acquired for public interest.

It has been suggested that a State - Federal Government confrontation might be continually provoked whenever the latter requires land from the states for socio-economic development.

The implication of abolishing landlordism is that no individual could any longer be described as landowner, granting

use rights and collecting rent.

The issue here is how people perceive of the implications. Those who for several generations past have prided themselves in owning land and earning income from it now see themselves as 'losers', deprived of further income.

The presummed 'gainers' are those whose continued use of land had always been made conditional upon payment of 'tribute' or quasi-rent.

(8) The Act provides that Nigerians who desire to use land obtain statutory rights of occupancy for urban lands from the Ministry, and customary rights of occupancy for rural lands through the Local Government Councils.

Essentially, the Act recognises the existence and legitimacy of the customary or traditional land tenure system. Further, it delineates both rural and urban lands.

The building of permanent or semi permanent structures necessitates the need for acquiring a certificate of occupancy. The possibility that rural and agricultural land may be converted to urban or semi-urban land is real whenever large acquisitions of land are made.

(C) Statutory rights of occupancy granted by the Governor pertains to lands within areas designated as 'urban' in a State. An individual is entitled to no more than 0.5 hectare (1.25 acres) of undeveloped land within a State. In the rural areas, customary grants of land are limited to 5,000 hectares for grazing and 500 hectares for agricultural purposes. But there is no limit to the number of such grants or the size of Governor's permission is taken. The provisions of the Act limit an individual's continued interest in undeveloped urban land to half a hectare in any state but no limit was placed upon area of developed land by an individual or upon size of undeveloped land. It is feasible for an individual to have 0.5 hectare of undeveloped land in every one of Nigeria's thirty states and the Federal Capital Territory.

If scrupulously enforced, however, the control over land acquisition could have served as restraint to the ubiquitous land grabber - an essentially urban phenomenon in Nigeria.

Where large hectarages of land are acquired in the rural areas under the Act, however, a great number of families and greater number of individuals are likely to be expropriated. The contention is therefore that it is inequitable to deprive landowners of their legally obtained interests without compensation, more so as the constitution ensures the right to property and consequently renders it unconstitutional to deprive an individual of such without prompt payment of compensation.

(D) The Land Use Allocation Committee set up in the urban areas and the Land Allocation Advisory Committee set up in the rural areas under the Land Use Act constitute the institutional framework for undertaking the management and allocation of occupancy rights, the revocation of such rights when the need arises, as well as settlement of all land disputes.

These powers are however administered by the Committees on behalf of the Governor. It is notable, however, that under the Act, both statutory and customary rights of occupancy are revocable, non fragimentable, non-divisible and non-transferable without relevant authorization.

Statutory rights of occupancy may be revoked (a) if the terms of contract are brokem, (b) if the land is required by Federal, State or Local Government, (c) if the land is required for mineral exploitation or for the laying of telegraphic poles or pipelines.

Customary rights of occupancy may be revoked (a) in case of unauthorised transfer of interests in land inter vivos that is, among living persons, (b) in case the land is required by Federal, State or Local Government for public purposes, and (c) in case land is required for extraction of materials for

building purposes. In these cases, provision is made for payment of compensation. The twin issues of amount of compensation and procedure for paying it continue to hold the abiding interest of resource scholars.

PERFORMANCE

In this section, we consider the issues of what is wrong with the Act, what has been done to improve the situation and what more needs to be done in terms of reform.

Since the Land Use Act came, into force, the trend towards 'statism' in Nigeria appears to have been accentuated. This had led to much introverted outlook so that access to land by non-indigenes of a state had become difficult. The principle of (in)alienability (desocialization) which is a characteristic of Nigeria's customay land tenure has not made it possible to promote fuller utilization of land resources through 'mobility of labour and managerial skill'.

Secondly, in the urban areas of Nigeria, speculations in land still continue.

Thirdly, studies reported by Beckman (1983), Famoriyo (1985), and Umolu (1985) among others show clearly that the Act has been unable to guarantee equality of opportunity for all Nigerian land users even though the advent of the law must be accredited as an innovation created in communal property resources.

In his study of Bakolori dam project, Beckman (1983) showed that where rights to land are stripped, a swift sequence of events must follow if confrontation and severe upheaval are to be avoided.

Also, Famoriyo (1985) established that problems of land tenure which appeared to have been solved only on paper include lack of uniformity in ownership or user right code, limited individual size of holdings, fragmentation and non-contiguity of farms, absence of acceptable or effective administering agency, absentee landlordism and excessive land rents.

Findings, from the study by Umolu (1985) conducted in southwestern Nigeria established that provisions of the Land Use Act of 1978 were enforced in either the state or local government level through the normal process of law. In the case of disputes regarding statutory certificates, the High Courts adjudicated while in cases regarding customary rights of occupancy the Area Courts adjudicated.

He also stated that those who found the Act acceptable were either former tenants or educated farmers who hoped to benefit by some of its provision. It was notable however that some tenants still paid tribute (quasi rent) to their landlords despite the fact that the Act had sought to abolish the concept of landlordsim - tenancy. Such tenants were still forbidden from planting permanent crops.

In quoting the words of the researcher Umolu (1985),

> "As fat as making assurance, protection and preservation in the public interest the right of all Nigerians to use and enjoy land in Nigeria in sufficient quantity is concerned, this study shows that both the Land Use and Advisory Committees and Land Use and Allocation Committees have not made much impact. .....The issue of land acquisition remained unresolved in spite of the Land Use Act".

We can therefore infer from all the above that the Act has been unable to guarantee equality of opportunity for all Nigerian land users in all social classes or categories.

Further, the land tenure situation, even after the passing of the Act, is still neither stable nor equitable. Notably recently, the Federal Government of Nigeria through the Law Reform Commission undertook amendments to the Land Use Act. According to an eminent Nigerian jurist; Justice

Obaseki (1991),

> "There is an insurmountable barrier to the poor in the area of acquisition of land under the Land Use Act. There is a growing feeling among the poor man who is a co-owner of the land in Nigeria with other Nigerians that the Land Use Act was enacted to drive them from the use, and enjoyment of land".

This 'growing feeling' is certainly felt among small holder farmers and the urban poor. Some of the recommendations made at Law Reform Commission workshop on amending the Land Use Act (No. 6) of 1978 included the following:

1. Assistance of Local Governments, by Federal and State governments to establish facilities for land administration and for keeping land transaction record.
2. Reconstitution of the land Use and Allocation Committees and the Land Allocation Advisory Committees respectively to include lawyers, estate surveyors, town planners and representatives of land users.
3. Procedure for obtaining certificates of occupancy should be set out while a period of 2-3 months be laid down within which the certificates must be issued otherwise the applicant may apply for a court order.
4. Payment should be made not only for unexhausted improvements but also for the loss of land, for disturbance and for inconvenience.

Policy makers who drew up the Land Use Act appear to have been as well-intentioned as the government that initiated the action. This is so in view of the objectives of socio-economic development associated with the Act. These objectives however, seem to have been circumvented by Nigerians.

Consequently, expectations - to be met from provisions of the Act have not been fully met.

WHAT NEEDS TO BE DONE

It needs to be reiterated here that the bureaucratic machinery or major instrumentation set up to achieve the goals of the Land Use Act throughout Nigeria consisted of Committees at the Uroan and rural levels. But these Committees have been slow to take off and had become politicised so that certain groups had felt irked by its partisan operations. Since the political powers of the state, and the productive powers of the Nigerian economy are crucial to the success of the Land Use Act, both Federal and State Governments should clearly demonstrate complete commitment to the provisions of the Act in order to make it more effective.

Secondly, operationalising the working of the Act needs to be devoid of excessive bureaucracy so that one does not need to wait for as much as 2 years to obtain a certificate of occupancy. Essentially, there is need for speedy, timely, effective and 'socially equitable land acquisition procedures' Complex procedures may produce embarrassing results.

Thirdly, there is need to avoid clash of interests among functional agencies such as Ministry of Agriculture and the Land Use Committees. In this context, local governments should be fully involved and should work with ministries and Land Use committees.

Fourthly, the need to provide a complete inventory of available land in different locations in Nigeria is still one that is deeply felt. So also it is necessary both to control the rate at which lands are taken from agriculture into other sectors and the rate at which lands are being acquired compulsorily by the State.

Fifthly, it has been pointed out by some petroleum industry authorities in Nigeria that the Land Use Act which aimed at abolishing 'the socially dangerous habit of land

speculation among individuals' could mean that states become land speculators (Achimu (1994). In further making this point, Achimu (1994) argued that licences and leases were valuable to the industry only in the sense that these represented declaration of radical title to land by Government which thus provides some legitimacy and 'a general umbrella' under which a land user may acquire lands for operation. According to this authority,

> "Licences and Leases do not contain any specific authorization to use any part of the lands covered".

This was because whenever the operator was faced with the issue of land acquisition, he (the operator) would have to shelve both the licence or lease and subject himself to "the incidents and all the complications of the land tenure system which is applicaule in the area of operation". Oil industry sources explained that whenever they have had to acquire lands since the passing of the Act, they had tried to satisfy 'the reasonable claims of both private interest holders and of State authorities'. The oil industry's problems in relation to the expressed provisions of the Land Use Act therefore requires attention.

Sixthly, there is need for a rigorous definition and consensual understanding of certain concepts in the Act. Thes concepts include "ri hts of occupancy", "overriding public interest", compensations, and so on.

Finally, the need for a comprehensive survey of all available land in Nigeria coupled with provision of conservation measures, demand some compelling attention.

CONCLUDING COMMENTS

This paper has dealt with a sensitive issue in Nigerian agriculture, that is, the use, disposition and alienation of land rights under the customary tenure systems. The many features of the Act were discussed.

The Land Use Act so far confirms what Renner (1949) opi , that 'the law does not cause economic development'.

In the Nigerian case, most of the stated objectives of the Act were being subverted and the rural people were not seen as feeling the impact of the Act since they still acquired rural lands through agelong practices.

Further, goals of development may also be endangered through conflicts between interests of small farmers and other people. In this case, small scale agriculture competes unequally with capitalist farm production for land, labourers and other means of production.

Although one has no qualms in discussing customary land tenure in the context of common property resources, the following comment of Agarwal (1990) generates much thought:

> "Native wisdom had managed state property as community property. The community managed the common property resources, used them for survival, and invested in them for upkeep and maintenance. Common property resources consisted of the most fragile of the rural environmental resources - forests, grasslands, small water harvesting systems like ponds, tanks and stream diversion channels. As soon as these assets became state property, the state began to use them for its own ends, e.g forests.

> Where the assets were too small or spread out for the state to exploit, they were neglected, e.g ponds and tanks. This was the truth behind what has mistakenly come to be known as the tragedy of the commons" (Page 5).

These comments provoke much thought in relation to state actions when radicalizing ownership of land as in Nigeria, they raise issues regarding public legitimisation (through an Act) and respect for private interest. When such acts of public legitimisation fail to reconcile conflicting interests in a common property, resource, is the failure considered as a 'tragedy' of the commons? If so, does the State not bear a large burden of guilt? The position of this paper tends to agree with Agarwal's (1990) conclusion although much empirical verification would still be needed with reference to Nigeria's Land Use Act.

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