NATURE OF LAND OWNERSHIP UNDER THE LAND USE ACT: A RETROSPECTIVE EXAMINATION*

Abstract

Human society world over is heavily dependent on land and its resources because, whether as a factor of production or a store of value and wealth; or the platform upon which homes are built or roads are constructed, it is a veritable tool for human existence and national development and therefore an indispensable part of every society. While it is generally accepted that its scope and nature are not easily discernible, it is also generally accepted, that every legal system has its own meaning given to ownership of land. Since its promulgation on March 29th 1978, the Land Use Act has generated a lot of controversies both in juristic and academic circles; more so, as it brought about many innovations in the use and enjoyment of land. The controversy is even heightened by the fact that the Act does not contain an exhaustive provision for the regulation of land and land rights but allows for the application of common law, customary law and other laws that operated prior to the promulgation of the Act. One seemingly controversial aspect of the Land Use Act is the nature of land right introduced under the Act. It is settled that under the Act, all land comprised in the territory of each state of the federation is nationalised and vested in the Governor of that state who now grants a right of occupancy to the people. However, these provisions of the Act when read in conjunction with other provisions of the Act leaves one in doubt as to the highest or most comprehensive right or relations that may exist in land in favour of the people. It is against the foregoing background that this work undertook an examination of the nature of land ownership under the Act. The work found that the nature of land ownership introduced under the Act is sui generis.

Keywords: Land Ownership, Land Use Act, Nigeria, Examination

1. Introduction

Property generally, is a legal concept which relates to ownership and enjoyment of rights in wealth of any kind. Within the legal framework of ownership and enjoyment of property rights, a boundary exists between public and private powers. Thus, property is not a natural right but a deliberate construction by the State to regulate private and public rights.[1] The legal meaning of property is therefore not limited to items of belonging but also extends to the rights which may, by law, be enjoyed over such belongings. It must be observed however, that the conception of property changes with time and also differs from one jurisdiction to another.[2] Of course land has always been with us; so too have other types of tangible chattel. The enormous variations in the understanding and conception of these items are revealed by the different laws that have regulated them over time as well as the practices which obtained in different jurisdictions and at different times within the same jurisdiction. However, it is generally accepted that property connotes the physical chattel or thing and the interests attached to it as allowed by the State; this definition also applies to proprietary interest in land. The relevance of land as a gift of nature to mankind cannot be over-emphasized.[3] In fact, it would be absolutely right to assert that there would be no human existence without land. This assertion is true predominantly because it is from land that man gets items very essential for his survival such as food, fuel, clothing, shelter, medication and other necessities of life.[4] The relevance of land to man was aptly described by J.A. Omotola when he posited thus;

> Every person requires land for his support, preservation and self-actualization within the general ideas of the society. 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 the remains are cremated, the ashes eventually settle on land. It is therefore crucial to the existence of individual and the society. It is inseparable from the concept of the society. Man has been aptly described as a land animal.[5]

***By Chinedu A. ONAH, LLB, LLM**, BL, Lecturer, Department of Commercial and Property Law, Faculty of Law, Nnamdi Azikiwe University, P.M.B. 5025, Awka, Anambra State, Nigeria. Email: ac.onah@unizik.edu.ng; chineduonah@nigerianbar.ng. Phone Number: +2348064794333.

[1]T Ajala, 'Private Property Right: A Vanishing Concept?' (2003) *22 JPPL*, 79, L S Underkuffler, 'On property: An Essay' (1990) 100 *The Yale Law Journal Vol.*, 127-148 <http://www.scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1098&context=faculty_scholarship> last accessed on 2/03/2022;

[2]F S Philbrick, 'Changing Conceptions of Property in Law' (1938) *University of Pennsylvania Law Review and American Law Register vol. 86 No*. 7 <http://www.jstor.org/stable/3308734?seq=1#page_scan_tab_contents> last accessed on 2/03/2022.

[3]E E Essien, *Law of Credit and Security in Nigeria* (2nd end, Uyo: Toplaw Publishments Ltd, 2012) p. 1; D E Nelson, 'Mortgage of Land as Security under the Land Use Act' (2013) *11 Nig. J.R.*, 137.

[4]P Z Datong 'The Role of the State Government in the Implementation of the Land Use Act' in O Adigun (ed) *The Land Use Act Administration and Policy Implementation* (Lagos: University of Lagos Press, 1991) 64.

[5] J A Omotola, *Law and Land Rights-Whither Nigeria* (Lagos: University of Lagos Press, 1988) 6.

In the light of the foregoing, it is crystal clear that the life of man and that of the society revolve around land and its resources. The relevance of land to man as highlighted above notwithstanding, it is unfortunate that land and issues connected therewith have been a subject of controversy among persons of different strata in the society; and also between the government and private persons.[6] Primary among the reasons for this controversy is the fact that the nature and scope of land and more especially, the interests incidental thereto are not easily discernible. Its meaning differs as between jurisdictions and may also differ within a jurisdiction depending on the legal regime to which the land is subject.[7] Moreover, even where the legal conception of land is substantially conterminous in all those systems, the incidents and rights that accrue to a land owner differ among the different regimes.

It is generally accepted that the predominant land tenure system in Nigeria prior to the promulgation of the Land Use Act[8] was the Customary/Islamic land tenure system.[9] Although with regard to customary land tenure system, the applicable rules of customs varied from one part of the country to another. The basic rule under customary land law is that land belonged to the villages, towns, communities and families with individuals enjoying a mere right of use or usufruct. Such family or community lands were supervised, managed and administered by the communal or family heads. The customary land tenure system as it applied before 1978 is aptly described as one undermining effective control of land by the government as well as use and availability of land for public purposes. This hardship predominantly necessitated the promulgation of the Land Use Act. The Land Use Act, 1978 was enacted to address the plethora of problems that attended the pre-existing land tenure system and provide a more viable option to land administration in Nigeria. This salient fact is borne out of the preamble to the Act which provides thus:

> Whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law and whereas it is also in the public interest that the rights of all Nigerian to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves and their families be assured protected and preserved.

The above lofty ideas notwithstanding, it seems that the promulgation of the Land Use Act has, in over b4 decades of its promulgation, attended the current Nigerian land law regime with a plethora of controversies and problems. The basic innovation of the Act is the 'nationalization' of all land in Nigeria which is the manifest purpose of the Act as evidenced in Section 1 thereof vesting all land comprised in the territory of each state of the federation in the Governor to be held in trust and administered for the common benefit of all Nigerians.[10] Furthermore, the Act, by this and other provisions, abolished the right to private ownership of land and in its stead, introduced the right of occupancy the nature and scope of which have been subject of controversy till date. The above controversy is even heightened by the fact that the Act does not contain an exhaustive provision for the regulation of land and land rights but allows for the application of common law, customary law and other laws that operated prior to the promulgation of the Act. It is against the foregoing background that this work undertakes an examination of the nature of land ownership under the Act.

2. Legal Conception of Land

It has rightly been asserted that in traditional African jurisprudence, land, like air and water is conceived as the free gift of Almighty God to humanity. Human beings are therefore at best, only entitled to the use and occupation of land.[11] Consequently, it is generally perceived that land belongs to the ancestors, the living and even generations unborn and it is therefore accorded great respect.[12] It is pertinent to emphasize at this stage that the legal conception of land differs from its ordinary meaning and also varies with the different types of *corpus juris.* Generally, at common law, land covers the earth's surface, i.e. the top soil, things attached to land and the subsoil.[13] Land has

---

[6] These include individuals, families, communities, corporations etc not owned by the government.

[7] A perfect example of the difference in the conception of land within a jurisdiction exist in Nigeria where statutory law, common law and customary law all regulate land tenure. The legal conception of land varies with each such particular system of law.

[8] Cap L5 Vol. 8, Laws of the Federation of Nigeria, 2004, formerly Land Use Decree of 1978.

[9] Customary Land Tenure System applied mostly in southern part of the country whilst the Islamic Land Tenure System applied in the northern part.

[10] 'Nigerians' as used here connotes that every citizen of Nigeria irrespective of his state is a beneficial owner of land in every part of the country.

[11] I A Umezulike, *ABC of Contemporary Land Law in Nigeria,* (Enugu: Snapp Press Nig. Ltd, 2013) pp. 5-6.

[12] S N C Obi, *The Ibo Law of Property* (London: Buttersworth, 1963) p.30.

[13] *The New Lexicon Webster Dictionary* (USA: Lexicon Publications Inc, 1987) Vol. 1, p. 553; I O Smith, *Practical Approach to Law of Real Property in Nigeria* (1st edn, Lagos: Ecowatch Publications Ltd, 1999) p.5; W J Stewart, *Collins Dictionary of Law* (3rd edn, Great Britain: Davidson Pre-press Graphics Ltd, 2006, p. 258; L B Cruzon, *Dictionary of Law*

also been defined to include the airspace above the soil based on the application of the maxim c*uius est solum eius est usque ad coelum.*[14] This definition appears to have been adopted by the interpretation Act[15] which defined land as including any building, and any other thing attached to the earth or permanently fastened to anything so attached but does not include minerals.[16] It has been observed however, that the word 'includes' as adopted by this definition does not help in construing the extent of this definition; for although it suggests that other things may be land which are not included in the definition what those other things are remain a moot point.[17] A perhaps more comprehensive definition of land is that found in the Property and Conveying Law[18] which provides that lands includes the earth's surface and everything attached to the earth otherwise known as fixtures and all chattel real. It also includes incorporeal rights like the right of way and other easements as well as profits enjoyed by one person over the land and building to another.[19] This definition, though an improvement on the provision of section 18 of the Interpretations Act, is nevertheless faulty as it fails to recognize the space below and above the earth's surface as a constituent of land.

It is the position of this work that the definition of land, to be sufficiently descriptive and definitive, must recognize all the different interest that exist on land as well as all the different parts of the earth that forms part of it. Land is not just the corporeal hereditament i.e. the physical part of the earth's surface but also includes also the incorporeal hereditaments, i.e. the intangible rights and interests over the land such as easements profits etc.[20] As Peter Butt succinctly puts it;

> In its legal significance, 'land' is not restricted to the earth's surface but extends below and above the surface. Nor is it confined to solids, but may encompass within its bounds such things as gases and liquids. A definition of 'land' along the lines of 'a mass of physical matter occupying space' also is not sufficient, for an owner of land may remove part or all of that physical matter, as by digging up and carrying away the soil, but would nevertheless retain as part of his 'land' the space that remains.[21]

The constituents of land as manifest from the above discourse are as follows: (i) the earth surface; (ii) subjacent things of a physical nature; (iii) everything attached to the earth's surface; (iv) the airspace above the soil; (v) incorporeal rights.

3. The Concept Land Ownership

The law of real property regulates rights and interests in land in varying degrees usually denoted by the word 'title'. Though employed in various ways, title is generally used to denote or describe either the manner in which a right to real property is acquired or the quantum of interest or right which can be held in a property. It has been described as connoting the existence of facts from which the right of ownership and possession could be inferred, limitations being in terms of time[22]. As rightly and succinctly posited by Sir Fredrick Pollock; the law of real property is, in the first place, the systematic expression of degrees of control, use and enjoyment of property recognized and protected by law.[23] Title may be absolute or restricted. When it is absolute, it is synonymous with ownership but when it is restricted, the person is entitled to occupational or possessory rights but not ownership; it may also be a mere right to use Ownership is of both legal and social significance; hence it has become the

---

(5th edn, London: Pitman Publishing, 1998) p. 213; W P Statsky, *West Legal Thesaurus/Dictionary* (Special Deluxe Edn, St Paul Minnesota: West Publishing Co., 1986) p. 446.

[14]This literally translates to 'the person who owns the soil owns up to the sky'. However, this maxim is no longer true in the present day as International Law and Common Law has qualified this apparently limitless entitlement especially with regard to the right to the outer space. The right to airspace above the soil now extends only to such height as is necessary for the ordinary use and enjoyment of the land and structures upon it. See *Berneistein v Skyviews and General Ltd* (1978) Q.B. 479 Per Lord Griffiths; *Corbett v Hill* (1870) LR 9 Eq 671 at 673; *Wandsworth Board of Works v United Telephone Co*. (1884) 13 QBD 904 at 915; C Harpum *et al*, *Megary & Wade The Law of Real Property* (6 edn; London: Sweet & Maxwell, 2000) p. 57. The remaining airspace is owned by the State. See *Nicaragua v United States* (1986) ICJ Rep. 14 at 128 or (1986) 76 ILR 1; *Benin v Niger* (2005) ICJ Rep. 90 at 142. See also R Jennings & A Watts (eds) *Oppenheim's International Law* (9th edn, England: Oxford University Press, 2008) p. 625.

[15] CAP I 23 LFN 2004.

[16] Interpretation Act s. 18.

[17] I O Smith, *op cit*, p.6.

[18] Laws of Western Nigeria Cap 100, 1959.

[19] Property and Conveyance Law s. 2

[20] D Chappelle, *Land Law* (6th edn, England: Pearson Education Ltd, 2004) p. 24.

[21] P Butt, *Land Law* (2nd Edn, Australia: Law Book Co. of Australasia, 1988) p. 9.

[22] *Ogunleye v Oni* [1990] 2 NWLR (Pt. 135) 754

[23] F Pollock, *Jurisprudence and Legal Essay* (London: Macmillan, 1961) p. 93.

focus of governmental policy.[24] Ownership consists of an innumerable number of claims, liberties, power and immunities with regard to the thing owned.[25] Such rights are conceived as not separately existing but merged in one general right of ownership.[26]

The most complete of relations that may exist in land is that expressed in the notion of ownership. It connotes a complete and total control which a person can exercise over land. It is that interest in land that is superior to every other interest existing in land and from which every other interest gets their validity. In the words of A. J. Smith, 'what is special about ownership is that it is the ultimate right to use (and abuse) the object or right in question'.[27] The Supreme Court in succinct pontification of the nature of ownership stated thus:

> It connotes a complete and total right over a property. The owner of the property is not subject to the right of another person. Because he is the owner, he has the full and final right of alienation or disposition of the property and he exercises his right of alienation or disposition without seeking the consent of another party because as a matter of law and fact, there is no other party's right over the property that is higher than that of his.... The owner of the property can use it for any purpose, material, immaterial, substantial, non-substantial, valuable, invaluable, beneficial or even for purposes detrimental to his personal or proprietary interest. In so far as the property is his and inheres in him, nobody can say anything. The property begins with him and ends with him. Unless, he transfers his ownership to another person he remain the allordial owner.[28]

In the light of the above exposition by the Supreme Court, it would be right to posit that ownership connotes the totality of rights and powers exercisable by a person over a property. These rights include, the right to income from it in money, in kind or in services and the power of management including that of alienation.[29] According to Garner, 'ownership is a legal relationship between a person capable of owning and an object capable of being owned'.[30] The most comprehensive way a person can demonstrate that he is the owner of a thing is if he can alienate it to anyone he likes without any limitation or restriction. The real essence of ownership lies therefore in the power of alienation without interference. Apart from alienation, the power of management connotes the right to control and defend the enjoyment of the property, aimed particularly against unauthorized interference. Ownership therefore comprises the fullest amplitude of right of enjoyment, management and disposal over a property. Thus Prof. I. O. Smith has submitted that when the right of a person to possess, use and dispose of land is not subject to or restricted by the superior right of another person, the right of ownership is said to be vested in him.[31] It is pertinent to emphasize however, that the owner of a property is not necessarily the person who, at any given time, has the whole power of use and disposal since in most cases, there may be no such person, it suffices if the person has the residue of all such powers.[32] Ownership therefore connotes the right to possession, mediate or immediate. An important and widely agreed feature of ownership is that there is some individual or collective whose decisions with respect to a thing others are bound to accept as final.[33] Ownership, therefore carves out a sphere of exclusive jurisdiction with respect to a thing in which one's choices are not subject to the choices of others.[34] This represents the concept of ownership of property in absolute terms; but it should be noted that this absolutistic view of property ownership is utopian and has been criticized.[35] The specific incidents

---

[24]R W M Dias, *Dias on jurisprudence* (5th edn, London: Butterworth, 1985) chapter 14, p. 292.

[25] *Ibid*; A N Saha, *Mitra's Legal and Commercial Dictionary* (New Delhi, India: Eastern Law House, 1990) p. 532.

[26] Ibid; Halsbury Laws Of England, 13th edn, Vol. 29, p. 371.

[27] A J Smith, *Property Law* (4th edn, England: Pearson Education Ltd, 2003) p. 6.

[28] *Abraham v Olorunfunmi* [1991] INWLR (Pt. 165) 53.

[29]L M Qin, 'Reform of Land System in China' (1994) *Singapore Journal of Legal Studies* 495-520; C O Olawoye, *Title to land in Nigeria* (Lagos: Evans Brothers Ltd, 1974) p. 1; L K Agbosu. 'The Land Use Act and the State of Nigerian Land Law' (1988) *Journal of African Law, Vol. 32, No.1*, 5. See generally, J Waldron, *The right to private property* (Oxford: Clarendon Press, 1988).

'[30] J F Garner, 'Ownership and the Common Law' (1976) *JPEL* p. 403

[31] I O Smith, *op cit,* p. 14.

[32] F Pollock, *op cit,* p. 98.

[33]See generally, L Katz, 'The Concept of Ownership and the Relativity of Title' (2011) *2(1) Jurisprudence* 191–203. also, available on <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1957119> accessed 2/04/2022. See also, L Katz, 'Ownership and Social Solidarity: A Kantian Alternative' *(2011) 17(2) Legal Theory,* 121; B Mcfarlane, *The Structure of Property Law* (London: Hart Publishing, 2008) pp 5-14.

[34] A Ripstein. *Force and Freedom: Kant's Legal and Political Philosophy* (London: Harvard University Press, 2009)244-245.

[35]C Ilegbune, 'Land Ownership Structure under the Land Use Act' (2003) *Vol. 23 JPPL*, 25. IO Smith, 'Power to Make Town Planning Laws in a Federation: The Nigerian Experience' (2004) *24 JPPL*, 23.

of ownership have been highlighted by different scholars.[36] In trying to explain the nature of ownership, Honoré [37] sets out an account of what he conceived to be the standard incidents of ownership. Through a review and analysis of the jurisprudence in property, he arrived at a set of 11 rights, duties and other elements which, taken together, explains the concept of ownership viz; the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the right of transmissibility, the right of absence of term, the duty to prevent harm, liability to execution and the incident of residuarity

It must be observed that the above postulations as to the true meaning and incidents is of ownership of land is true and important in its detail, only in theory.[38] In theory, the powers and right of ownership are absolute, that is, free and unlimited. This absolutistic view of ownership appears to have significantly declined in recent years in view of the 'instrumentalists' view that individual property rights should be allocated in whatever way that best promotes the societal goal.[39] In practice however, the State in the exercise of it protective and supervisory jurisdiction over all things within the State usually impose restriction on the exercise of the owner's right for the general wellbeing of the society. This is predominantly predicated on the fact that during the first half of the 20th century, the reformers enacted into law their conviction that private power was a chief enemy of society.[40] Property was thus subjected to reasonable limitations in the interest of the society. The regulatory agencies, federal and state alike, were strongly concerned with the furtherance of this reform. In sustaining this major inclination against private property, the old idea that property and liberty were one was rejected in the belief that there must be power to regulate and limit private rights.[41] Thus by the doctrine of tenure that operated in England, the radical title to, or allordial ownership of all land in England is vested in the Crown.[42] This inclination against private property rights seems also to have influenced the provision of Section 1 of the Land Use Act. It must be emphasized, albeit briefly, that the holder of right of occupancy introduced under the Act does not enjoy all the incidents of ownership highlighted above. The knowledge is very important for a better understanding and appreciation of the exposition that would follow in subsequent chapters. The absolutist conception of ownership as described above has its full significance in the Pre-Act land tenure especially when one views such ownership from the perspective of the family or community. Thus it has been judicially established that in its application to Nigeria, the fee simple title did not have any of the restrictive trapping of feudalism and conferred a full and allordial ownership to the holders.[43]

It is important to highlight, at this point, that every legal system has its own meaning given to ownership. In England for instance, all land belongs to the crown as the absolute owner. Thus, the citizens who occupy land do so for a period granted by the crown. The right to use and occupy land is known as estate enjoyed on the land which may be finite or infinite. This doctrine of estate has transformed into ownership with all the incidents of that concept as regulated by the crown. The implication of this doctrine therefore is that although a subject in England cannot own the physical land, he does own an estate in it. His ownership of estate, however extensive, cannot be allordial, the allordial title being vested in the crown.[44]

Prior to the promulgation of the Land Use Act, there existed at least six sources of ownership of land thus: communal ownership, family ownership, individual ownership, State ownership, ownership by corporate bodies and ownership by the stool or Chieftaincy Office. It is pertinent to highlight finally, that a claim for ownership of

[36]Professor Paton proposed four of these incidents. See, GW Paton & DP Derham, *A Textbook of Jurisprudence* (4th edn, London: Oxford University Press, 1973,) p. 517; Professor John Salmond proposed five; See, J Salmond & P J Fitzgerald, *Jurisprudence* (12th edn, London: Sweet & Maxwell, 1966), p 246-249. Prof. Garner reduced these incidents to three which are the right to possess and enjoy, right to alienate and the right to destroy. See, J F Garner, 'Ownership and the Common Law' *op cit.*

[37]A M Honoré, *Ownership; Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987) p.161–192 cited in J Waldron, *The right to private property* (Oxford: Clarendon Press, 1988) p. 336. See also I A Umezulike, *op cit*, p. 19.

[38] C Ilegbunam, *art cit*, 25.

[39] A Bell & G Parchomovsky, 'A Theory of Property' (2005) C*ornell Law Review, Vol. 90,* 531.

[40] T Ajala, 'Private Property Right: A Vanishing Concept' (2003) *Vol. 22 JPPL*, 79.

[41] *Ibid*; Philbrick, *op cit.*

[42] R Megarry & D J Hayton (eds), *Manual of the Law of Real Property* (6th edn, London: Stevens Publishing, 1982) pp 28-29.

[43]*Kabiawu v Lawal* (1965) 1 All NLR 329; B Nwabueze, *op cit,* p. 84; C O Olawoye, *Title to Land in Nigeria* (Lagos: Evans Brothers, 1974) pp. 17 – 18.

[44]R Megarry & D J Hayton (eds), *lo cit.*

land may be established in any of five ways laid down by the Supreme Court in *Idundun v Okumagba,*[45] whether or not the claimant have been issued a certificate of occupancy in respect of the land, viz:

1. By traditional evidence in the form of traditional history.
2. By production of document of title duly authenticated in the sense that their due execution must be established unless they are produced from proper custody in circumstance giving rise to a presumption in favour of due execution. in the case of documents twenty years old at the date of production.
3. Acts of persons claiming the land such as selling, leasing, or renting out the land, provided that the act extends over sufficient length of time and are so numerous and positive enough as to warrant the inference that the person is the true owner.
4. Acts of long possession and enjoyment of land
5. Proof of ownership of connected or adjacent land, in circumstances rendering it probable that the owner of the adjacent or connected land would, in addition to owning the connected or adjacent land, be the owner of the land in dispute.

4. Ownership of Land under the Land Use Act

As noted above, the State usually imposes restrictions on the exercise of an owner's right for the general wellbeing of the society. It is against this background that ownership of land under the present Nigerian land law regime must be viewed in the light of a right of occupancy introduced under the Land Use Act with the attendant incidents.[46] It has been observed, and rightly so, that any discourse as to the nature of the right of occupancy introduced under the Act must be preceded with an appreciation of the fact that the Land Use Act nationalised all land in Nigeria and thus the traditional form of ownership that hitherto existed, both under common law and customary law have been abolished, vacated and extinguished at the commencement of the Act.[47] Currently in Nigeria, by virtue of Section 1 of the Land Use Act[48] all land in the territory of each state is vested in the Governor of the state who grants right of occupancy to individuals and corporate bodies. The implication of the above provision therefore, is that the only right available to an individual in Nigeria, under the current land law regime, is the right of occupancy. Another implication of this observation is that former private owners became automatically divested of their title which was converted to a mere right of occupancy.[49] It is crystal clear from the incidents of the right as contained or manifest in the Act especially the provisions relating to consent, revocation and compensation, that the right of occupancy is less, in the quantum of right conferred than absolute ownership and therefore does not amount, in strict legal sense, to ownership right over land. As aptly stated by I. A. Umezulike, 'it is eventually and inextricably a right to use and occupy land, a kind of usufructuary right'.[50] The nature of a right of occupancy introduced under the Act has been a subject of controversy among the court, text writers and commentators. Uwakwe Abugu has likened the right of occupancy to ownership of land.[51] This position proceeds from the definition of ownership by the Oxford Dictionary of Law thus 'the exclusive right to use, possess and dispose of property, subject only to the right of person having a superior interest and to any restriction of owners rights imposed by agreement with or by act of third parties or by operation of law.' He argues that since the right of holder of a right of occupancy fits into this definition of ownership that such a person can be said to possess a right synonymous to the ownership.[52] This work posits however, that since the Act vests ownership of all land in the Governor, the right of occupancy as introduced by the Act merely creates a tenurial relationship between the Governor of the state as the 'landlord' and the holder or occupier of the right as the 'tenant'. Thus the holder holds in consequence, an interest which is less than the Governor's ownership marked by various subordinating incidents viz:

a. The right may be revoked for plethora of reasons.[53]
b. The governor can enter the land for inspection without the consent of the holder.[54]
c. The right cannot be alienated without the consent of the Governor.[55]
d. Refusal of consent by the Governor is free from judicial sanction[56].

[45] *Supra*.

[46] I O Smith, *op cit,* p. 46

[47] I A Umezulike, *op cit,* p. 84.

[48] Cap L5 L.F.N. 2004.

[49]See generally Land Use Act ss. 1, 34 & 36; *Salami v Oke* (1987) 9-11 Sc 43; *Nkwocha v Governor of Anambra State (supra). S*ee also O A Fatula, *Fundamentals of Nigerian Real Property Law* (2nd edn, Ibadan: Afribic Press, 2012) p175..

[50] I A Umezulike, *op cit,* p. 85.

[51] U Abugum, *Principles of the Land Use Act, 1978* (Kaduna: Joyce Graphic Printers and Publishers, 2008), p. 47.

[52] *Ibid*

[53] Land Use Act s. 28

[54] Land Use Act s. 14

[55] Land Use Act ss. 21, 22, 26

[56] Land Use Act s. 23

e. No compensation is payable for the revocation of the right to the land *per se*.[57]
f. Alienation of customary right of occupancy subject of deemed grant is restricted.[58]

It is manifest in the light of the foregoing that the right is not synonymous with ownership as it lacks the wide incidents generally attaching to ownership. This position is also supported by Hon. Justice Balogun when he posited thus:

> I think that system does away with the concept of ownership or fee simple or absolute ownership as far as the holder of the right of occupancy is concerned. All right of occupancy are subject to revocation by the grantor. The holder of right of occupancy under the Act is strictly speaking not a free-holder nor a lease holder, but he is a mere licensee.[59]

The right of occupancy has also been likened to a lease. In *Majiyagbe v Attorney General*[60] the court in considering a statutory right of occupancy under the Land and Native Right Ordinance of 1916 which was later re-enacted as the Land Tenure Law 1962 of Northern Nigeria held the view that a right of occupancy was "in substance a lease". This view was reiterated by the Supreme Court of Nigeria in *Savannah Bank (Nig) Ltd v Ajilo*[61] as follows:

> To the extent that it can only be granted for a specific term (see Section 8 of the Act), it has the semblance of a lease. Also to the extent that a holder has sole right and absolute possession of all improvement on the land during the term of a statutory right of occupancy he does not enjoy more right than a lease at common law....[62]

The court went further to state that the status of a right of occupancy as a lease is not limited to right of occupancy actually granted by the governor but extends to deemed grant. In the words of the court: 'When therefore, Section 34(2) of the Act converted the interest held by an owner of a statutory right of occupancy, the Act reduces him to the position of a tenant subject to the control of the state through the Governor.'[63] However, 2 years after the decision in *Ajilo's case*, the Supreme Court pointed out in *Osho v Foreign Finance Corporation*[64] that the interest in a lease in land is not exactly the same as that of right of occupancy as the latter enjoys a larger interest than the holder of a lease although the two interests enjoy a common denominator, which is term of years.[65] It must be observed however, that the Supreme Court in making the foregoing proposition did not make any reference to its earlier pronouncement in the *Ajilo's case.*[66] The implication being that the nature of a right of occupancy is a matter of conjecture and susceptible to plethora of interpretations; while leaving the presumption that a right of occupancy has the nature of a lease without sound and certain judicial foundation. It must be emphasized that a right of occupancy is not a lease as has been held in plethora of cases[67] and suggested by several law text writers.[68] It is trite that deemed statutory right of occupancy may be for an indefinite period. However, a lease is always for a term certain[69] except there is a proviso enabling one or either party to determine the lease earlier, upon service of adequate notice.[70] The Governor also has the right to enter into the land subject of a right of occupancy for inspection;[71] unlike in lease where the lessee has exclusive possession. Moreso, while alienating such land by a holder, the Governor's consent must be obtained[72] unlike in a lease relationship where, in the absence of an express term to the contrary, the lessee has an unfettered right to assign his interest.[73] In the light of the foregoing, we submit that a statutory right of occupancy is, at least, in the above respects, radically different from a lease. Thus, it would be wrong to assert that the two concepts are the same. In relation to the Supreme Court's assertion

[57] Land Use Act s. 29
[58] Land Use Act s. 36(5)
[59] A L Balogun, 'The Right of Occupancy and the Land Use Act' a paper delivered at the Faculty of Law, University of Lagos 1982.
[60] (1957) NRNLR 158. See also *Director of Lands and Mines v Sohanl* (1952) 1 TLR 631.
[61] [1987] 2 NWLR (Pt. 57) 421.
[62] *Supra* at p. 328.
[63] *Supra.*
[64] [1991] 4 NWLR (Pt. 184) 157.
[65] *Supra* at 192.
[66] *Supra.*
[67] *Savanna Bank v Ajilo (supra)*; *Director of Lands and Mines v Sohan L (supra)*
[68] M O Onwuamaegbu, *Nigerian Law of Landlord and Tenant,* (London: Sweet & Maxwell, 1966) P. 216; TO Elias, *op cit,* p. 284.
[69] Y Y Dadem, *Property Law Practice in Nigeria* (Jos: Jos University Press, 2009) 78-79; O Odubunmi, 'Unmasking the Legal Complexities in the Termination of fixed and Periodic Tenancies' (2016) 7GRBPL No 1, 74.
[70] W Woodfall *et al, Woodfall's Law of Landlord and Tenant* (25th edn, London: Sweet and Maxwell) p.1064.
[71] Land Use Act ss. 11 & 14.
[72] Land Use Act ss. 21, 22, 26.
[73] *Wada v Byrne* (1973) CCHCJ 59. See also A Odor & F Oniekoro, *Source Book on Drafting-Property Law and Practice in Nigeria* (Enugu: Snaap Press Limited, 2011) p. 308.

in *Osho v Foreign Finance Corp*[74] that a right of occupancy confers greater interest than a lease; this work posits, with the greatest respect, that this assertion may not be entirely true. A right of occupancy, though a proprietary interest, may not be a greater than a Lease because of the plethora of limitations placed on the right. Firstly, it is revocable without the consent of the holder. Secondly, the holder does not enjoy exclusive possession. Thirdly, it is not alienable unless with the consent of the governor. However, a lease on the other hand, cannot be revoked except as contained expressly in the lease agreement. Moreso, a lessee enjoys exclusive possession. Furthermore, a lessee may alienate his interest in the land without consent unless there is an agreement to the contrary.[75] It is based on the foregoing that this work submits that the right of occupancy introduced under the Act does not, in all cases, confer a superior title than a lease. In fact, if there is any existing type interest which we can compare to a right of occupancy, in terms of the quantum of right which it confers, it should be a licence. Licence is gotten from the Latin word 'licentia' which means 'freedom' or 'liberty'.[76] It is a personal privilege in the form of authority or permission granted to a person to enter and use a premises or perform some acts which would otherwise be wrongful or amount to trespass;[77] which is similar to the right granted to individuals by the Governor. The law never intended a lease and right of occupancy to be the same or used interchangeably or even complementary. This led Professor A. Okuniga to warn thus:

> Hence one must be wary: first against rashly inferring that a statutory right of occupancy is a leasehold interest simply because there are references to the granting of sub-lease or sub-under-lease. The Act is no doubt sufficiently confusing in its provisions in this regard, but that does not entitle one to adopt the humpy-dumpy type of definition. The lease is a concept of English law and has its own characteristic and incidents unknown to our own indigenous system of land holding. The right of occupancy does share with the English leasehold the quality of certainty of duration but that is about all that is invariably common to both.[78]

This study subscribes to the above exposition except for the fact that its concluding part failed to highlight the lack of term for right of occupancy subject of deemed grant. This is moreso as 3 major areas of differences or distinction between the right of occupancy and a lease has been identified viz; revocability, exclusive possession and inalienability.[79]

5. Conclusion

It is in the light of the foregoing exposition that we conclude that it would be difficult to make a sweeping statement, consigning a right of occupancy to any particular type of land holding or interest in land that existed before the Act. Rather it would be safe to conclude, as Uwakwe Abugu has observed,[80] that the concept is meant to confer a docket of interests in land which is outside the contemplation of all previous methods of land holding for the purpose of achieving the peculiar objectives of the Act. Perhaps this may have influenced the position held by the court in *Nathu v Officer*[81] when it held, referring to right of occupancy under the 1916 Land Ordinance, thus: 'The intention of the Land Ordinance was to establish an entirely new interest on land, similar to leases in some respect but different in others. The ordinance was intended to be a complete code regulating the respective rights of the crown and the occupier....' Omotola was also in support of this view when he said that a right of occupancy is 'a new form of right not coming within any form of right known to property law.[82] The learned professor of law went on to argue that right of occupancy has been seen as being greater and superior to a mere personal right though less than a proprietary right and therefore, *sue generis.*[83] Thus, the learned author concludes that a right of occupancy cannot be a lease though it may have the semblance of a lease.[84] It is crystal clear from the above expositions that there was a clear intention to move the system away from the pre-existing English land tenure system and to make it conform as much as possible to our customary land tenure system, while at the same time achieving some objectives inconsistent therewith; thus making the right *sui generis.* It must however be observed that in view of the fact that the rights and interest conferred by the right of occupancy is not as elaborate as those conferred by the traditional conception of ownership, it cannot be equated with ownership.

---

[74] *Supra*

[75] *Wada v Byrne* (*supra).*

[76] B G Brunsvold & D P O Reilly, *Drafting Patent License Agreements* (4th edn, USA: DNA Books, 2001) p. 4.

[77]*Mobil Oil Nig. Ltd v Johnson* (1961) 1 All NLR 93. T Y Oloko & O S Oyekunle, 'Real and Intellectual Property Transactions: Reflections on Common Threads' (2008) 6(1) LASU LJ, 180; H T Tiffany & B Jones, *The Law of Real Property* (3rd edn, Chicago: Callaghan & Co, 1939) p. 829; G W Brown, *Legal Terminology* (3rd edn, USA: Prentice Hall Inc, 1998) p. 343.

[78]A A O Okuniga 'The Land Use Act 1978 and Private Ownership of Land in Nigeria' A paper delivered at the Law Teachers Conference at the University of Ife in 1979.

[79] B O Nwabueze, 'The Land Use Act and Bank Securities, *art cit,* 20.

[80] U Abugu, *op cit,* p. 52.

[81] (1966) EA 941.

[82] J A Omotola, *Essays on the Land Use Act 1978* (Lagos: University of Lagos Press, 1984) p. 15.

[83] *Ibid.*

[84] *Ibid,* p. 19