JUXTAPOSITION OF THE LAND USE ACT AND THE URBAN AND REGIONAL PLANNING DECREE 1992: A CRITIQUE

By M.A. BANIRE*

INTRODUCTION

The Land Use Decree, which was promulgated in March 1978 is a statute aimed at regulating enjoyment of land rights in Nigeria. Prior to its enactment, Land rights were derivable and regulated by two systems, namely the Colonially inspired laissez faire policy of dualism in the then Southern States of Nigeria, and the inherited policy of "paternalism"[2] under the Land Tenure Law.

However, these systems were characterized by insecurity of title, promotion and advancement of Land Speculation, Prohibitive costs of land, and inaccessibility to land by the governments to meet public purpose.' This therefore inevitably led to the enactment of the Act.

The aim of the Act as encapsulated in its preamble is, quite apart from preserving the rights of all Nigerians to the land of Nigeria, to assure and protect the right of all Nigerians to the use and enjoyment of land. This is coupled with the right to enjov the natural fruits flowing therefrom for the sustenance of themselves and their families.

The Urban and Regional Planning Decree' on the other hand was promulgated in response to the yearnings and clamour of the public, especially the Institute of Town Planners, for the replacement of the moribund and obsolete hitherto existing Town and Country Planning Act.[6]

The Decree is meant to regulate and control the use of land which is recognised as a scarce commodity that need to be rationalised in order to achieve the desired result. Planning Law itself is informed by the need to regulate land development and control along urban and rural regions in a given society.[7]

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* Lecturer, Department of Private and Property Law, University of Lagos.

1. Redesignated as 'Act" by Adaptation Law (Redesignation of Decrees Edict Order, No. of 1980. Now contained in CAP 202, Laws of the Federation 1990 and hereinafter in this paper referred to as "The Act".
2. See R. W. James: Nigerian Land Use Act: Policy and Principles. Unife Press, 1987 edn., P. 1.
3. See Cap. -59, Laws of Northern Nigeria, 1963.
4. See: J. A. Omotola, Law and Land Rights: Whither Nigeria? Unilag Press, 1988, Inaugural Series, p. 1 1.
5. Decree No. 88 of 1992 (Hereinafter referred to as "the Decree",).
6. No. 4 of 1946
7. See A. A. Utuama: Town and Country Planning Law in Nigeria: Evolution and Philosophy. Prof. C.O. Okonkwo (ed). Contemporary Issues in Nigeria Law - Essays in Honour of Judge Bola Ajibola, Taiwo Fakorede, 1992, p. 345.

From the above introduction of the statutes, it would appear that the scope of each statute is well delineated. However, a close scrutiny of some provisions of the Act [8] reveals the Planning Law Implications of the Act, thereby overlapping the frontier of the planning Law.

The questions which then arise are, if the Act contains such copious provisions on planning, why the need for the Decree, or, is it not possible to cover the entire spectrum of planning in the Act, thereby eliminating the proliferation of property statutes? Again, why the substantial reliance of the Decree on the Act?, particularly bearing in mind the controversial and impracticable nature of most of its provisions. These and other questions shall be the focus of this paper. It will be contended that the copious reference of the Decree to the Act is unjustifiable, and can be described as suicidal alliance.

In order to prove this, the paper shall be approached from four perspectives, viz. (1) Critical evaluation of the Act, (2) Incorporation of the Act by the Urban & Regional Planning Decree, 1992. (3) Relationship between the Act and the Decree: and (4) Conclusion and suggestions.

1. CRITICAL EVALUATION OF THE LAND USE ACT

Perhaps our starting point should be the legal basis of the Act. In this regard, whilst much literature including judicial opinions exists to show that by virtue of section 274(5) of the 1979 Constitution as variously amended, the Act remains an existing law,[8] there is divergence of opinion on the supremacy of the statutes over each other in the event of conflict.

There is the view that where there is a conflict, the provisions of the Act shall prevail over that of the Constitution since it has been recognised as an extra-ordinary statute of special nature.[10]

A contrary view has however been expressed that should there be conflict, the provisions of the Constitution shall prevail over that of the Act.[11] Although the Supreme Court had the opportunity in Nkwocha V. Governor of Anambra State [12] and Governor of Kaduna State V. Dada[13] to pronounce on the issue, the court preferred not to on the ground that it is merely academic. That the approach of the Supreme Court is simply evasive have been rightly proved by T. A. I. Osipitan [14] when he demonstrated the practical significance of the

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8. See Sections 1,2,3, 10,21,22,26,28 etc. of the Act. Also See A. A. Utuama: Planning Law Implications in the Land Use Act 1978 (1984) Vols. 1 & 2 J.P.P.L; p.45.

9 See F. O. Adeoye. "The Land Use Act 1978 and the 1979 Constitution: The question of Supremacy"(1988/89) *Vol 10 & 11, J.P.P.L., p.33. Oluyede,"A decade of statutory* monster: The Land Use Act" in New mensions in Nigerian Law, 1989, N. I.A.L. S., p. 126. Otunba Bola Adewunini V. Ogunbowale 10/115/81 of 28/5/84 or J. A. Omotola: Cases on Land Use Act, Unilag Press, 1985 edn., p.4, (obiter).

10. See J. A. Omotola: Law and Land Rights: Whither Nigeria?. (Supra) Adenekan Ademola J. C. A- (as he then was) in LSDPC V. Foreign Finance Corp. (1987) NWLR, pt. 50, p. 413 at 445. See also, R.W. James: Land Use Act,policies & Principles Unife Press 1987.

11. See Kanada v Kaduna State Gov. & Anor (1986) 4NWLR (pt.35) C.A

12. (1984) 6 S.C. 362.

13. (1986) 4 NWLR (pt. 38) 687 at p. 6931(1989)9 S. C. 1.

14. The Land Use Act and the 1979 Constitution (1990/91) Vols. 13, 14 & 15, J.P.P.L,, p.67.

issue. Whilst the present writer agrees with his further analysis that the conflict is resolvable against the symbiotic nature of the relationship; the point must be stressed that the issue is far from being settled. The best we have had so far is Esho. J. S. C. (as he then was) obiter in Nkwocha's case to the effect that although the Land Use Act is not an integral part of the constitution, it is an ordinary statute that became extraordinary by virtue of its entrenchment in the constitution. Hence, it is submitted that since the legal validity of the provisions in the event of conflict with the constitution is still in doubt, it is not worth the foundation of any serious statute.

Another area deserving our attention is the jurisdiction of the Act. While it applies throughout the federation, it does not affect all lands in the country. This is so because while it vests all lands in the territory of each state in the Governor[15] (presently Military Administrator), it exempts land in possession of the federal Government or any of its agencies.[16]

Two interesting provisions here are Sections 28(4) of the Act and Section 50(2) of the Act. Whereas the former is to the effect that where the federal Government requires any land in the territory of the State, a notice should be issued out by the Head of the federal Government; or any person so authorised on its behalf, the provision woefully fails to state to whom the notice should be served, the State Governor or the direct holder. However, the latter provision invests the Head of the Federal Government with the same powers as exercisable by the Governor of a State in respect of lands under Section 49 of the Act. The implication of the foregoing provision is that the Federal Government cannot directly access State land except through the State.

Hence, it is absurd to base a national statute like the Decree which requires unfettered accessibility to land for its success on a law that requires the co-operation of the Governor of a state for the operation. While disagreement or reluctance may be uncommon in a military dispensation; it is to be expected to rear up its head in a civilian regime, particularly where political lineage differs between the two arms. Again, it is uncertain if the Governor also needs to be satisfied of the public purpose for which the federal government requires the land, before proceeding to revoke the interest of the holder. Thus, it is unthinkable that a statute of such a magnitude or ambivalence will form the substratum of an ambitious statute like the Decree.

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15. See Section 1 of the Act: Nkwocha V, Governor of Anambra State (Supra): Salami v. Oke (1987) 4 NWLR (pt.63), p. 1 at 32, See also J. A. Omotola", Does the Land Use Act expropriate?" Vol.3, 1986 J.P.P.L., p. 1.

16. S. 49 of the Act.

Furthermore, whist the Governor is the exclusive allocating authority for express grants of lands in urban area[17] though usually acting through his constituted land use and allocation committee, with regard to express grants in non-urban area, the power of allocation is shared between the Governor and the concerned Local Government. Moreover, whereas the grant by the local government in the circumstance is customary right of occupancy,[18] the Governor's grant is statutory right of occupancy.[19] This necessarily implies that the exercise of the Governor's power in this regard must have been preceded by the designation of such area as urban area under Section 3 of the Act. If this is so, and in fact, is the only logical reasoning possible,[20] it is then arguable that where such a condition precedent have not been fulfilled, any purported grant of a statutory right of occupancy by the Governor over lands in non-urban area shall be null and void.

It is notable that massive designation of the entire area of a state as urban area have however been denounced by Professor J. A. Omotola.[21] As shall later be revealed, such an approach is inimical to planning as observed by the erudite scholar referred to above, and indeed, unlawful.

Another worrisome area of the Act is its effect on existing interests. Though it is indisputable that with the advent of the Act, the era of absolute ownership has gone. However, it is erroneous to canvass that there is expropriation of these existing interests; or put differently, that there is nationalization of all lands in the federation.[22]

However, in subsequent statements of their Lordships, it will appear that they concede the preservation of these existing interests by the Act.[23]

In fact, according to Obaseki, J.S.C. (as he then was),

> "Of immense interest to every Nigerian in the Land Use Act 1978 are the Transitional Provisions in Part VI of the Act (i.e. Sections 34, 35, 36, 37 and 39). These sections have

17. See Section 5 of the Act.
18. See Section 6 of the Act.
19. See again Section 5 of the Act.
20. See Dantubu v. Adene (1987)I NWLR (pt.65) 314 (C.A.). AZI v. Registered Trustees Evangelical Church (1991) 6 N.W.L.R. pt. 195, p. 1 1 1. Chiroma v. Suwa (1986) I N.W.L.R. (Pt.19),751.. C.P. Saude v. Abdullahi (I989)4N.W.L.R- (pt. 116) 387, Debup Kolo (1993)12 S.C.N.J., p5. See Gen. Professor G. Ezejiofor "Interpreting Section 5 of the Land Use Act," 1994, Vols. 19, 20 & 21, J.P.P.L. 27. See also M.A. Banire: Positive Planning par excellence" (infra).
21 See Prof. J. A. Omotola's, address at the opening of the National Workshop on Town & Regional Planning Decree,,1992 held between 22nd and 24th Feb., 1996, at Unilag Guest Houses Conference Hall organised by the Department of Private & Property Law, University of Lagos.
22 See Bello JSC Foreword to M.G. Yakubu Land Law in Nigeria 1985, Abu Press, Esho, J. SC in Nkwocha v. Governor of Anambra State (Supra). Obaseki J.SC "The Judicial Impression of the Nigerian Law of Property: A need for Reform" red at 26th Annual Conference of Nigerian Association of Law Teachers on 26th March, 1988. Ogundare J. (as he then was) in Tijani Akinloye v. Chief Oyejide Suit No. HCJ/9A/83 of 17/9/87. See J. A. Omotola: Cases on Land Use Act (supra), p. 146,

helped in no small way to cushion off the heavy impacts the Act would have had on the life of every man and woman in Nigeria. It is doubtful whether the imposition of the harsh conditions, implied and expressed, a certificate of occupancy may contain would not have excited people who cannot reconcile themselves with the idea of becoming a rent paying tenant on their own land to a cause of action which may amount to general disaffection and civil disobedience. Sections 34 and 36 give to those in whom land is vested before the coming into operation special treatment to sooth their nerves and showed consideration for their being the persons in whom the land was vested".[24]

Notwithstanding this concession however, the conclusion is inextricable that the impact of the Act on existing interest is yet to be resolved as it shall be unfolded under the discussion of consent provisions of the Act. The implication of this being the unsettled nature of land rights under the Act.

As a nexus to the above, the extent of right possessed by the individual holders under the Act is still controversial. From the provision of Section 8 of the Act, it will appear that, apart from the statutory right of occupancy expressly granted by the Governor that has limited duration all other rights of occupancy including the deemed ones can safely be said to have indefinite duration.

This lies in the fact that deemed grants are meant to be transitional. But for virtually twenty years, no time frame has been apportioned to these interests. What then is the probability that they will ever have? The same thing applies to liability to pay rent under the Act.[25]

As indicated earlier, the consent provisions of the Act ' more than any other provision, generated the most serious problems of interpretation.

Generally, it will appear settled that where the holder of a right of occupancy, either statutory or customary is transferring his interest, the consent of the Governor is required to validate the transaction.[27]
However, it is being contested that where the transfer relates to a right of occupancy which is deemed granted and exists over developed land within an urban area of the state, the requirement of Governor's consent is unnecessary.[28]

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23 See Ogundare JCA (as he then was) in Kasali v. Lawal (1986) NWLR pt. 28, p.286. Obaseki, J.SC in Salami v. Oke (Supra) Kawu J.SC in Salami v.-Oke (supra).

24. See Obaseki, J. SC in the lecture titled the Judicial Impression of the Nigerian Law of Property: Any need for reform?" delivered at the 26th Annual Conference of the Nigerian Association of Law Teachers, 28th March, 1988.

25. See Section 5(1) 6 of the Act.

26. See Sections, 21, 22, 23 & 34 of the Act.

27 See Sections 21, 22, 23, 34 (7) of the Act. Also, See Savannah Bank Ltd, V. Abel Ajilo & Anor. (1989)I 1 NWLR, pt. 97, p-30.

28. See Section 34(2) of the Act. See Yemi Banire, "The limit of Consent Provision: A Review of Savannah Bank V. Ajilo." Vol. 18, 1998, "Lawyer" (page 18), J.A. Omotola: Law & Land Rights: Whither Nigeria? (supra, p.16.)

But assuming without conceding [29] that the Governor's consent on the strength of Ajilo's Case is required for the transfer of all types of right of occupancy, the adjunct question is, at what point in time must the consent be obtained?, and, whose duty is it to procure the consent?.

Going by the provision of Section 26 of the Act and Ajilo's case, it will seem that the consent is required immediately an interest or right over land is being transferred, and that the burden of seeking such is on that person who stands to gain the transfer. But by the provision of Section 22 (2) of the Act, the transfer either in form of assignment or sublease must have been completed, as that will constitute the instrument upon which the endorsement will be made. Hence, it is submitted that if this is the position, the procurement of consent can be at any stage prior to enforcement. The importance of this issue is underscored by the need to establish valid and subsisting land rights before embarking on any planning. Since this is yet to be resolved, no credible statute supposed to be aligned with the Act.

Finally, this discussion will be incomplete without considering the revocation power under the Act. This is vested in the Head of the Federal Government, the State Governor and the Local Government.[30] However while the revocation power of the Federal Government is limited to lands vested in it and its Agencies, the State Governor's power extend over all that land in the territory of the State except the foregoing. The Local Government's Power is however curtailed by the exceptions under Section 6(3) a - d. Of the Act. [31] It is interesting to note that while it can be said that the exercise of the power of revocation is not without guide in case of federal or state revocation, the local govemment's power is left blank. All that seems required is for the local government to jump on any land in its area of jurisdiction in the name of public purpose. It is needless to demonstrate the inherent dangers of this approach, especially in a civilian regime. In fact, it is a veritable tool of intimidation, victimisation and oppression. Inevitably therefore, it will have negative impact on planning law since land rights will then become unascertainable and unreliable.

Before taking leave of this segment, it is important to stress that if these controversial areas are removed from the Act, nothing significant can be said to remain. Hence the Act from the above theoretical evaluation and practical operation can be described as a failure.

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29. Especially in view of the latest cases such as Awojugbagbe Light Industries - v - Chinukwe (1995) 4 N.W.L.R. (Pt. 390) 379. S.C.; See also A.G. Federation -v- Sode (1986) 2 N.W.L.R. (Pt. 24) 568 C.A.; N.B.N. -v- Adedeji_(1989) N.W.L.R. (Pt. 96), p.212.

30. See Sections 50(2),, 28 and 6(3) of the Act respectively.

31. These are land within an area declared to be an urban area pursuant to section 3 of the Act. Lands which are subject of a statutory rights of occupancy. Land within any area compulsorily acquired by the Government of the federation or of the State concerned; And Lands which formed the subject of any laws relating to minerals or mineral oils.

1. INCORPORATION OF THE ACT BY THE URBAN AND REGIONAL PLANNING DECREE: 1992

In this segment we intend to adumbrate the provisions of the Decree as it relates to the Act.

The first and foremost provision of the Decree in this respect is that which forbids the granting of a development permit with conditions that conflict with that existing in a certificate of occupancy or a customary right of occupancy.[32] The import of which is that conditions of Development which may be in a permit must not be seen to be contradicting those contained in the Certificate of Occupancy.

The Decree also provides that compensation will become non-payable if the right of occupancy of the land on which a development was to take place has been cancelled or revoked on the ground that the applicant did not comply with the requirements of the Land Use Act.[33]

In a related manner, the Decree also provide that:

> "Where it appears to the Commission, the Board or authority that it is necessary to obtain any land in connection with planned urban or rural development in accordance with the Policies and proposals of any approved plan, any right of occupancy subsisting on that land shall be revoked on the recommendation of the authority".[34]

The mode of revocation is however to be in accordance with the relevant provisions of the Land Use Act. [35]

In consonance with the usual practice of compulsory acquisition of land, the Decree provides for payment of compensation in accordance with the relevant provisions of the Land Use Act.[36]

From the foregoing, it can be seen that the provisions of the Act is expected to align with that of the Decree for the survival. Having said this, our next engagement shall be to discuss the relationship between the provisions of the Decree and those of the Act.

II. RELATIONSHIP BETWEEN THE ACT AND THE DECREE

Our task in this armbit is to determine whether the relationship between the above provisions of the Act and that of the Decree is symbiotic, antagonistic or independent. As indicated earlier, the Act is a statute that is

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32. See Sections 36 of the Decree.
33. See Section 43(2) b of the Decree. For instance, as specified under section 10 of the Act. See also Sections 28(2) and 28(5) of the Act.
34. See Section 75(1) of the Decree.
35. See Sections 75(2) of the Decree.
36. Section 76(1) of the Decree.

primarily concerned with the settlement of land rights, while the Decree is meant to regulate and control the use of land which has been agreed upon to be a scarce commodity. However, in order to achieve an effective planning, or put differently, for any planning law to succeed, there must exist a statute which has effectively settled the land rights existing in the society. Therefore in Nigeria, the existing land rights of the people which is regulated by the Act, need to have been settled before effective planning can be accomplished.[37]

From our initial discussion of the Act, we have been able to demonstrate that the nature of individual or corporate land rights in Nigeria as of today is free from being settled. This, coupled with the assertion that the status of the Act itself is still controversial, abundantly shows that land rights in Nigeria is still largely unascertainable. This in addition is probably responsible for the influx of land litigation in recent times, relative to the pre-land use Act era as observed by Obaseki, J. SC (as he then was) about (10) years ago.[38] The rational behind this is explainable by the fact that prior to the Act, the issue of contesting revocation of right of occupancy was absent, nor was there cases arising out of improper, irregular or fraudulent grant of a right of occupancy over another person's land. All this cases have added to the erstwhile traditional points of land disputes.

Now focussing on the express impact of the Act recognised by the Decree, one realises from the provision of Section 36 of the Decree that it will appear that the Decree intends to forge a symbolic relationship between it and the Act. For emphasis sake, the section provides:

> "The conditions attached to the grant of a development permit by a control Department shall not conflict with the conditions attached to a grant of a certificate of occupancy or a customary right of occupancy."

The import of the above is that a control Department must avoid stating contrary conditions in a development permit to that expressed in the Certificate of right of occupancy covering the land in question. For example, if the right of occupancy granted is for agricultural purpose, a development permit must not alter same to be residential or industrial. The above is easily adhered to where the certificate of occupancy in question is express. The problem may however arise where such right of occupancy is deemed granted under Sections 34 and 36 of the Act, in which case, the holder of such may have obtained a Development permit before applying for a certificate of occupancy, if at all, he ever applies for it. At least, there is no mandatory provision in the Act to that effect.

The question therefore is, how does a control Department know the conditions to be attached, at least, it is a fact that such are never uniform. A land existing today for agricultural purposes may tomorrow be redesignated a residential allotment under the Act. What then happens to any conflict arising therefrom?, which of the conditions shall be taken to override the other?. It is

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37 See M. A- Banire. "Positive Planning par Excellence under the Urban & Regional Planning Decree 1992" Paper presented at the 1 st National Workshop on the Nigerian Urban & Regional Planning Decree, 1992 held at Unflag Guest Houses Conference Centre between 22nd - 24th February, 1996.

38. See Obaseki J.SC in his lecture earlier referred to in footnote 24 where he asserted that land litigation has not diminished in spite of the land use Act.

the failure of the draftsman to recognise the existence of deemed grants that has resulted in this omission which is of grave consequence. That deemed grants exist is recognised by his Lordship Obaseki, J. SC (as he then was) when he observed:

> "Persons who have title to their parcels of land vested in them before the Land Use Act came into force are "deemed" to be holders of rights of occupancy - statutory rights of occupancy for those in urban areas. See Section 34(2), (3) and (5) and customary rights of occupancy for those in non-urban areas. See Section 36(2) (3) and (4).[39]

Thus, it is submitted that while the Decree strive to maintain a symbiotic relationship in this regard, the misapprehension of the existence of the deemed grants is capable of engendering antagonistic relationship, in which event, the question of supremacy surfaces. When this thus rears its ugly head, in accordance with rule of interpretation, the later in time of the conditions would be taken to override the previous. Undoubtedly, where such later conditions are stringent, it may adversely affect innocent holders and developers of deemed grants who must have probably expended so much on such developments. In order to cushion or protect their interests therefore, it is suggested that the enforcement of such later conditions should be frustrated by the Courts by means of the doctrine of estoppel, once it is obvious that it will be prejudicial to the interests of the innocent developer. In saying this, one is not unaware of the negative planning implications this might have, but it is a better of the evil options.

Therefore, before taking leave of this area, it is urged that reconsideration of the point is foremost and urgent.

The nexus between the import of Section 43(2) b of the Decree and the Act is tenuous. The provision reads:

> **"No Compensation shall be payable under this section if.**
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> **(a) ....**
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> **(b) The right of occupancy of the land on which a development was to take place has been cancelled or revoked on the ground that the applicant did not comply with the requirements of the Land Use Act"**

There are myriads of problems capable of arising from the provision. For example, the problem of ascertaining the requirements of the Act. This can be as contained in the Act, it can be as decided by case law [40] and it may be

39. See Lecture "The Judicial Impression of the Nigerian Law of Property: Any need for Reform? (Supra). See also, J. A. Omotola: Essays on Land Use Act, Unilag Press, 1980. Ist edn., p. 27.
40. See Savannah Bank Ltd. V. Ajilo (supra). N.B.N.V. Adedeji (1989) 1 N.W.L.R. (Pt. 96) p.212, etc