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AN ANALYSIS OF THE INTERPLAY BETWEEN THE NIGERIAN CONSTITUTION AND LAND USE ACT, 1978: TRAVESTY OF NIGERIAN FEDERALISM AND CONSTITUTIONALISM?

By

Abubakar Mohammed Bokani, Ph.D*

Department of Private Law, Faculty of Law, Ahmadu Bello University, Zaria-Nigeria

Abstract

The Land Use Act, 1978 (hereinafter referred to as "the Act") vested most lands in each state of the federation in the Governor of each state. To achieve the objectives of the Act, it was promulgated and entrenched in the 1999 Constitution. However, some inconsistencies and contradictions have arisen from the entrenchment of the Act in the Constitution which seems to undermine the federal nature of the Constitution and the supremacy of the Constitution. For instance, the constitution regards the Act as one of the items in the Exclusive Legislative List whereas the provisions of the Act have powers of management of land in urban and rural areas in the Governor and the Local Government respectively. This paper poses the following research question; is the entrenchment of the Act in the Constitution a travesty of Federalism and the Constitution in Nigeria? This paper used the doctrinal method of research to examine the interplay between the Act and the constitution. The objective of this paper was to determine whether the entrenchment of the Act in the Constitution is a travesty of Federalism and Constitutionalism in Nigeria. This paper found that the entrenchment of the Act in the Constitution is an aberration, and absurdity, hence a travesty of the federal nature of the Nigerian State and constitution. It is thus recommended that there is urgent need for the Act to be

expunged from the Constitution to ensure sanctity of the principles of federalism and supremacy of the Constitution.

Keywords: Land, Constitutionalism, Federalism, Entrenchment.

1.1 Introduction

The Land Use Act, 1978[72] is a revolutionary legislation in the area of land holding in Nigeria and the current legal framework governing and regulating land administration and control in Nigeria. Land is generally defined to include not only the surface of the earth and the subsoil, but also all the appurtenances permanently attached to it.[73] Land is much more than the physical soil and other minerals beneath the surface as it also includes 'incorporeal hereditaments' such as easement.[74] In this respect, there are two considerations in the definition of land; the first is natural constituent of land comprised of parts of the earth while the other is artificial which covers developments on the land.[75] Thus, land includes "any building and any other thing attached to the earth or permanently fastened to anything so attached, but it does not include minerals."[76] The permanent feature of land makes it possible for long-time interests or rights to be created over land.[77] However, this definition of land therefore excludes minerals from the provisions of the Act. The Act was enacted to address the problems of uncontrolled speculations in urban land, make land accessible to Nigerians irrespective of gender and to unify land tenure system in Nigeria to ensure equity and justice in land allocation and distribution.[78] However, since the promulgation of the Act more than four decades ago, controversies have continued to trail its interpretation and application, and the story has not changed; the Act continued to generate comments and criticisms from writers.[79] In a bid to protect the Act from unnecessary amendments, the Act was entrenched in the Nigerian

* Senior Lecturer, Department of Private Law, Faculty of Law, ABU, Zaria; ambokani@abu.edu.ng; ambokani8@gmail.com.

72 LUA, Cap L5, Volume 7, LFN, 2004 (herein after referred to as 'the Act').

73 Niki, Tobi, *Cases and Materials on Nigerian Land Law,* (Mabrochi Books, 1992), 8.

74 Diane Chappelle, Land Law, (Pitman Publishing, 1992),5.

75 F.H. Lawson, *Introduction to the Law of Property*. (Clarendon Press, 1958) 20.

76 Interpretation Act, Cap I23, Volume 7, Laws of the Federation of Nigeria, 2004, s 18

77 Roger J. Smith, Property Law, (Fifth Edition, Pearson Education Limited, 2006),6.

78 *Ibrahim v Obaje* [2019]3 NWLR (pt. 1660), 389; 412;paras.F-G.

79 A,M, Madaki, "The Land Use Act 28 Years After Its Enactment: A Critical Assessment. In: S.M.G. Kanam, and Madaki , A.M.(eds) *Contemporary Issues in Nigerian Law, (Department of Private Law, ABU, Zaria 2006),*399.

Constitution.[80] Unfortunately, the entrenchment of the Act in the Constitution has generated controversies over the effect of the incorporation of the Act into the Constitution.

The Nigerian Constitution has unequivocally provided that it is supreme and all authorities and persons shall be bound by its provisions.[81] This provision re-affirms the doctrine of Constitutionalism and it serves as the standard for determining the validity or constitutionality of acts of governments, its agencies or the citizens. Thus, the incorporation of the Act in the Constitution has raised some questions as to the legal basis for the entrenchment of the Act and its implication on the principles of federalism and constitutionalism enshrined in the Constitution. The aim of this paper therefore is to examine the interplay between the Constitution and the Act, and the objective is to determine whether the Nigerian Federalism is made obscure and Constitutionalism undermined due to the entrenchment of the Act in the Constitution.

1.2 Conceptual Clarification of Key Terms

1.2.1 The Concept of Federalism

Different writers have advanced different definitions of federalism. Federalism has thus been defined as the legal relationship and distribution of power between the national and regional governments within a federal system of government.[82] However, Nwabueze defines Federalism as follows:[83]

> Federalism is an arrangement whereby powers of government within a country are shared between a national, country-wide government and a number of regionalized (i.e. territorially localized) governments in such a way that each exists as a government separately and independently from the others operating directly on persons and property within its territorial area, with a will of its own apparatus for the control of its affairs and with an authority in some matters exclusive of all others. Federalism is thus essentially an arrangement between governments, a constitutional device by which powers within a country are shared among two tiers of government, rather than among geographical entities comprising different peoples.

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[80] CFRN,1999, s 315; Udo Udoma, *History and the Law of the Constitution of Nigeria*, (Malthouse Press Ltd,
1994),391-392.

[81] CFRN, 1999, s1(3)

[82] Bryan A Garner, *Black's Law Dictionary* (Tenth Edition, Thomson, 2014) 729.

[83] B. O, Nwabueze, *Federalism in Nigeria under the Presidential Constitution*, (Sweet & Maxwell, 1983) 1;

The main problem with the above definition of federalism is with the requirements, which are supposedly necessary for the existence of a federation. It has been argued that there are many variations of a federal state that insistence on the existence of all these principles propounded by Nwabueze may have the effect of excluding many states from the class of a true federation.[84] The federal system of government (federalism) is an association of Free states where power is constitutionally shared by the federal, state and local government, and with each tier of government exercising its constitutionally assigned powers and functions.[85] A Federal system of government is one that provides for separate structures of government at the national, state and local government areas and with each tier having its constitutionally assigned powers and duties.

It has thus been submitted that a true federation usually involves the division and limitation of government powers; it implies political pluralism, and decentralized administration as well as decentralized policy decisions.[86] In a nutshell, it is a division of legislative power between the centre on the one hand and the different states on the other hand. It also entails willingness on the part of the centre and the component parts to 'hasten slowly' by means of bargains and compromises in legislative solutions to governmental problems and legislative powers.[87] This elucidation of the principle of federalism has received judicial pronouncement by the Nigerian Supreme Court in *A-G. Federation v. A-G. Lagos State*[88] that "the defining feature of federalism is recognition of the separateness and independence of each government that makes up the federation. In true Federalism powers within the country are shared among two tiers of government."[89]

Federation evolved in different nations for different reasons but they are practiced in nations with large expanse of land and multi ethnic people or diverse religions, historical, political or other differences.[90] The justification for federalism in a country is in the need to protect the minority against the tyranny of the majority for, the conception of democracy is government by people based on the decision of the majority. Though a useful and convenient device, majority rule is very much open to abuse, because of the ever- present danger that the majority may use its power to aggrandize, and thus convert government into one not only by the majority, but for

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[84] K.M, Mowoe, *Constitutional Law in Nigeria*, (Malthouse Press Limited, 2008), 50.
[85] E, Malemi, *The Nigerian Constitutional Law*, (Princeton Publishing Co, 2006), 26.
[86] D.O, Aihe, and P.A, Oluyede, *Cases and Materials on Constitutional Law in Nigeria* (University Press Limited, 1979), 66.
[87] Ibid
[88] (2013) 7 SCNJ 625.
[89] Ibid, 663.
[90] K. M, Mowoe, *Op. Cit*, 52.

the majority.[91] When that happens, the majority rule becomes a form of tyranny, as invidious as the dictatorship of a personal ruler.[92]

The powers of the different tiers of government are spelt out in Legislative Lists in the Nigerian constitution. The Exclusive Legislative List which is for the federal government in Nigeria usually covers items such as Aviation, banks, bills of exchange, Census, Citizenship, Copyright, currency, Customs and Excise, Defence, Diplomatic Relations, Foreign Affairs, Immigration and Emigration, incorporation of business and associations, Insurance, Labour, Slipping, Armed Forces, Communication, Prisons, Railways, Taxation, Trade and Commerce, Weights and measures, wireless broadcasting and so forth.[93] Some matters are reserved on the Concurrent Legislative List in respect of which both the Federal and State governments are free to legislate, provided that where there is conflict of laws, the law of the Federal government usually prevails.[94] Nigeria has adopted from America the doctrine of Repugnancy, and from Australia, the doctrine of covering the field to strengthen the position of the federal government for purposes of legislation.[95] However, the doctrines are applicable to where concurrent legislative powers are validly exercised on the same subject matters.[96]

The functions of a Local Government Council are clearly spelt out in the Constitution of the Federal Republic of Nigeria. Thus, there is clearly a division of powers in the Constitution among different tiers of government, each deriving its powers from the constitution. A Federal country usually has a written and rigid constitution. Federalism is an arrangement that is based on certain principles: Constitutionalism, Political Party System, Judicial System and Revenue and Resource Control.[97] Thus, the Constitution of Nigeria has provided that Nigeria is one indivisible and indissoluble sovereign state to be known by the name of the Federal Republic of Nigeria and that Nigeria shall be a federation consisting of states and Federal Capital Territory.[98] Thus, Federalism offers the opportunity of achieving unity in diversity. The federal system should be organized in a way that favors unity rather than diversity. Unfortunately, the Federal System in Nigeria has proved

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[91] Ben, O, Nwabueze, *Constitutional Law of the Nigerian Republic*, (Sweet & Maxwell, 1964), 145.
[92] Ibid
[93] CFRN,1999, Items 1-68, Second Schedule, Part I, Exclusive Legislative List.
[94] CFRN,1999, s 4(5)
[95] A.A, Olarewaju, "Constitution As Organic Law", in: Azinge, E. and Udombana, N. (eds.) *Drafting Legislation in Nigeria: Constitutional Imperatives,* (Nigerian Institute of Advanced Legal Studies, 2012), 15.
[96] (n,17) at 670; A.G, Fed v. A.G. Lagos State[2013]16 NWLR (pt. 1380),381,paras.C-H.
[97] Eme O. Awa, Issues in Federalism, (Ethiope Publishing Corporation, 1976), 4-5.
[98] CFRN, 1999, s 2(1)

ineffective to achieve the desired unity in diversity by promoting diversity.[99] Prof. Nwabueze noted that political activities were thus concentrated in the regions and this made it more attractive for political actors to remain in the regions.[100] One of the factors responsible for the ineffectiveness of the Nigerian federalism is distributions of powers between Federal government and state government.[101] This entails that matters of local concern to the state should be placed within the legislative competence of the state since this is the purpose of federalism in a plural state.

1.2.2 The Concept of Constitutionalism

The concept of Constitutionalism is a public law as well as a political science concept. The central theme of constitutionalism is the organization of a state and the people under broad legal framework.[102] The term 'Constitution' is commonly used in atleast two senses. First and broader sense, it is used to describe the whole system of government of a country, and collection of rules which establish and regulate government and its institutions.[103]In the second and narrower sense, it is used to describe a selection of rules which has been embodied in a document.[104] However, it is the doctrine which governs the legitimacy of actions of government.[105] It is sheer contradiction to conceive of a government, whether in a federal or unitary system, without constitution. Such an arrangement is inconceivable. The very nature of a government necessarily implies a Constitution. Thus, the constitution of Nigeria has declared itself to be supreme, and its provision shall have binding force on all authorities and persons in Nigeria.[106] This is a manifestation of rule of law though it is seldom mentioned as such in the Constitution.[107] It has been submitted that the insertion of the provision is a departure from the previous position when each region

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[99] B.O.Nwabueze, Constitutionalism in the Emergent States, (C.Hurst & Company (Publishers) Ltd, 1973), 111.

[100] Ibid,120

[101] Ibid

[102] D, A,Oluwagbami, "Subject to the Constitution". In: Azinge, E. and Udomboma, A.A.(eds.) *Drafting*
Legislation in Nigeria: Constitutional Imperative, (Nigerian Institute of Advanced Legal Studies, 2012) 51.

[103] Wheare, K.C, *Modern Constitution*, (Oxford University Press, 1951),2.

[104] Ibid.

[105] Hilaire Barnett, Constitutional And Administrative Law, (Fourth Edition, Cavendish Publishing, 2002), 5.

[106] Section 1 of the constitution.

[107] B.O, Nwabueze, *Democratization*, (Spectrum Law Publishing, 1993), 217.

had its own constitution.[108] It is also in this respect different from the United States which has no provision asserting the supremacy of the Constitution.[109]

The principle of Constitutionalism means that the constitution as a legal document is the ultimate of all laws and that all laws must conform to it before they can be regarded as valid. In countries with entrenched constitution like Nigeria, India or United States, this concept is of great importance because it is the backbone of the rule of law. The Black's Law Dictionary defines a Constitution as:[110]

> The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be confirmed, organizing the government, and regulating, distributing and limiting the function of its different departments and prescribing the extent and manner of the exercise of sovereign powers.

The definition appears sufficiently wide to cover the field of what a constitution entails or should be. Ranney defined a Constitution as "a whole body of fundamental rules and regulations, whether written or unwritten, whether legal or extra-legal according to which a particular government or state or region or any group of people can operate."[111] Perhaps, a simple definition of 'Constitution' is that it is "organic and fundamental law of a state which establishes the character and conception of its government, lays the basic principles to which its internal life is to be confirmed, organizes the Government and regulates, distributes and limits the functions of the departments, and prescribes the extent and manner of the exercise of these powers and functions".[112] The definition is simple and comprehensive enough as it includes the features of a constitution which make it supreme.

The Nigerian Constitution has thus been described as the fundamental law of the law.[113] Thus, Nigeria has maintained a written constitution as a separate law of the country which is a departure from the British unwritten political and constitutional principle.[114] Although the Nigerian Constitution has delineated the

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[108] J,O, Akande, *The Constitution of the Federal Republic of Nigeria 1979*, (Sweet & Maxwell, 1982), 2.

[109] ibid.

[110] (n, 11) 353.

[111] S.G. Ehindero, *the Constitutional Development of Nigeria 1849-1989*, (Ehindero Nigeria Ltd, 1991), x.

[112] Ibrahim, Isiyaku, 'Supremacy of the Constitution and the Freedom of Religion', *Ahmadu Bello University Journal of Human Rights; Democracy and Good Governance*, (2010) (2)(IV)V, 106.

[113] *Nwokedi v Anambra State Government* [2022] 7 NWLR (pt.1828) 29;65-66;paras.G-C.

[114] (n, 20)

areas of legislative competence of the tiers of government, it has stated the functions of the federal, state, and local governments. It has been argued that due to long-years of military dictatorship in Nigeria, the division of powers between states and federal government has not been respected by the Federal government.[115] A Federal system, being an arrangement between separate, autonomous governments implies a separate, autonomous constitution for each of the governments involved. Thus, a single constitution for all the governments involved, both federal and state, is a manifest contradiction. Unfortunately, this contradiction has become a part of the Nigerian Constitution. Prof. Nwabueze attempted to give a possible explanation for this manifest contradiction when he argued that the federation of Nigeria differs in its origins from the older federations in the United States, Australia and Canada because the Nigerian federalism was formed by a state hitherto under a Unitary Government devolving part of its powers to autonomous regional governments.[116] At the final analysis, the presence of federalism shows that there is a division of powers the scope and extent of which are defined in the Constitution.

1.3 The Division of Powers over Land in Nigerian Constitution

Land is unlike any other property in the multiplicity of its constituent's elements. It comprises not only the ground itself and things growing naturally on it like trees or artificially attached to it like buildings, but also the sub soil down to the center of the earth. It is also capable of accommodating a multiplicity of rights and variety of uses. It is basic as much to human existence as to the existence of government; like an individual, a government has to exist on land.[117]

The indispensability of land to the discharge of the functions of government and the wide- ranging ramifications of its nature have inevitably affected the way power over it is divided between the Federal and State governments under the constitution. The challenge of government in acquiring land for development was a hindrance to economic development. Thus it was conceived that vesting of land in the state government would make it easy for government to access land for development.[118] Consequently, the Constitution recognizes that the Federal and State Government must have power to acquire and hold land for the purposes of their respective functions. The recognition is predicated upon the doctrine that the power

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[115] C.A.J. Chinwo*, Principles and Practice of Constitutional Law in Nigeria*, (Davis Printing and Packaging Co.
Ltd, 2006), 196.

[116] (n, 12) at 62.

[117] (n, 12) at 153.

[118] Olugbemi, Fatula, *Fundamentals of Nigerian Property Law*, (Afribic Press, 2012), 167.

to acquire and own land is incidental to the existence of both government and to the discharge of their functions.[119]

However, the division of power over land seems to be shrouded in controversy because the Constitution has not clearly stated the tier of government that has legislative competence to make laws in respect to land. Prof. Nwabueze noted that whether land is a subject exclusive to the Federal government depends on the interpretation of section 315(6) of the Constitution.[120] He noted further that the question turns on the effect of the provision that the Act shall have effect as if it relates to matters in the Exclusive Legislative List.[121] The power of the National Assembly to make laws is limited to the Exclusive Legislative List and Concurrent List while the Residual List is reserved for the State.[122] Nevertheless, it has been argued that land is neither within the Exclusive Legislative List nor Concurrent Legislative List of the National Assembly.[123] Rather, it is within the Residual List and therefore only the State House of Assembly can legislate on land.[124] Prof. Utuama contended that item 67 of the Exclusive Legislative List in the National Assembly legislative competence over any matter incidental or supplementary to any matter mentioned in the list, and "incidental matters have been defined to include "acquisition and tenure of land.[125] The aim of these supplementary provisions is to give the National Assembly all other powers which are incidental to the main powers conferred on it and which are necessary to enable them exercise these powers.[126] In any case, it seems there is no clear division of legislative power over land as it appears to defy effort to place it in either the Exclusive Legislative List or Residual List.

1.4 Interplay between the Act and the Constitution

It is imperative that a discussion on the interplay between the Act and the Constitution must necessarily start with a consideration of the status of the Act under the Constitution. This is particularly so because the Act is considered as one of the

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[119] Ibid; see also paragraph 2(c) of Part III of the Second schedule to the Constitution.
[120] (n, 12) 169.
[121] ibid.
[122] ibid.
[123] Femi Okunnu, Contemporary State Land Matters in Nigeria (The Case of Lagos State), (Sankore Publishers Ltd., 2003), 22.
[124] Ibid, 24.
[125] CFRN, Supplemental and Interpretation Part II, Second Schedule to the Constitution, s2(c); A.A. Utuama, *Nigerian Law of Real Property*, (Shaneson C.I. Ltd, 1989) 145
[126] L, Brett, *Constitutional Problems of Federalism in Nigeria*, (Ford Foundation of America, 1960),3

items in the Exclusive Legislative List of the Constitution and its provisions have been incorporated into the Constitution.

1.4.1 Status of the Land Use Act under the Constitution

The entrenchment of the Act in the constitution has been the genesis of the controversies surrounding the effect of the entrenchment of the Act in the constitution. One of the controversies that arose from the entrenchment of the Act in the constitution was the constitutional status of the Act. The crux of the controversy was whether the entrenchment of the Act in the Constitution elevated the Act to an integral part of the Constitution, or whether inspite of its entrenchment in the constitution, the Act is merely an existing federal enactment. The provision in section 315(5) of the Constitution that the Act shall continue to apply and have effect in accordance with its tenor and to the like extent as any other provision forming part of this constitution suggests that the Act is incorporated in the constitution as an integral part thereof.

The High Courts at Maiduguri (Borno State) and Ibadan (Oyo state) have indeed asserted that the Act is part of the Constitution.[127] It has been held that the Act is not an existing law but it is part and parcel of the constitution, and it has to be regarded as such to all intents and purposes.[128] The position that the Act is part of the constitution has important consequences one of which is that it is not amenable to adaptation in order to bring its provision into conformity with the constitution, since the power of adaptation is, by the express stipulation of section 315, applicable only to an ordinary law in existence at the commencement of the constitution.

However, the view that the Act remains an ordinary statute is greatly supported by Prof. Nwabueze who advanced reasons in support. First, if the Act is part of the constitution, it would have been unnecessary to have said that "nothing in this constitution shall invalidate" it, for the constitution cannot invalidate part of itself. Secondly, the direction in section 315(6) of the Constitution that the Act shall continue to have effect as a "federal enactment" is inconsistent with its being part of the constitution.[129] While it was en by the federal military Government as a way of bestowing the formal quality of law upon it, the constitution is not a 'federal enactment'. A Federal enactment is a law made by or deemed to be made by the National Assembly. The National Assembly is a creation of the constitution, and is

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[127] *Umar Ali & Co. Nigeria Ltd v Commissioner for Lands and Survey & Other*, Suit No. BOM/82/81 of 4/3/1982;

Aina & Co. Limited v. Commissioner for Lands and Housing & Others, Suit No. 1/439/81 of 24/5/82, High Court,

Ibadan; Tobi, N. (1992) Cases and Materials on Nigerian Land Law. Mabrochi Books, Lagos, p.179.

[128] *Aina v Commissioner for Lands and Housing, Oyo State* (1983) 4 N.C.L.R. 571

[129] (n, 12) at 157.

subject to its overriding supremacy. It would therefore be absurd to speak of the federal enactment, implying that it is to be deemed to have been made by its own creation. On the contrary, the Constitution is the organic and supreme law of the land, made and enacted by the people, through the Constituent Assembly and the Supreme Military Council, for the purpose of promoting the good government and welfare of all persons in the country.[130] Thirdly, as much as it is the constitution that establishes the Exclusive Legislative List, it is meaningless and contradictory to say that a provision forming part of the constitution shall have effect as if it related to matters on the Exclusive Legislative List.

Similarly, Prof. Smith argued that the effect of section 315(5)(d) of the Constitution is not to make the Act a part of the Constitution but to make an ordinary statute extra ordinary by entrenching it in the Constitution.[131] Therefore, it is not surprising that divergent opinions have been expressed on the issue as to whether the Act is an integral part of the constitution. However, with the decision of the Supreme Court in *Nkwocha v. Governor of Anambra State,*[132] the controversy seemed to have been laid to rest. In *Nkwocha's case,* the Supreme Court was of the position that the Act is not an integral part of the Constitution.

Thus, the significance of the *Nkwocha's* case lies in its putting to rest the controversies which surround the constitutional status of the Act under the constitution. Thus, the case has settled the controversy in favor of those who despite entrenchment of the Act perceived the Act as an existing legislation of the Federal Government. But unlike other existing legislations, the Supreme Court highlighted the special and extra-ordinary status of the Act against the backdrop of not being open to repeal or amendments, except by the strict compliance with the procedure stipulated for constitutional amendment.[133] The implication of the Supreme Court's decision in *Nkwocha's* case to the effect that the Act is not an integral part of the constitution is that the provisions of the Act which conflict with the Constitution are rendered invalid to the extent of their inconsistencies.[134]

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[130] Preamble to the Constitution.

[131] Imran Oluwole Smith, *Practical Approach to Law of Real Property in Nigeria*, (Revised ed, Ecowatch Publications limited, 2013), 473.

[132] (1984) 5 SC 362 at p. 363.

[133] T, Osipitan, 'The Land Use Act and the 1979 Constitution: Conflicts and Resolutions,' *Justice: Journal of Contemporary Legal Issues*, (1991) (2)(3), 50.

[134] Ibid, 53; Yusuf, Aboki, 'Jurisdiction: The New Jurisdiction of Customary Courts in Land Matters', in: Jamo,M.N. and Madaki,A.M. (eds) *Administration of Justice in the Customary Courts in Nigeria: Problems and Prospects*, (Department of Private Law, Ahmadu Bello University, 2008), 162.

Despite the fact that the law according to the decision of the Supreme Court is that the Act is not an integral part of the constitution, it appears that by section 315(5) of the Constitution, it is absolutely difficult for the Act to be amended without following the same procedure for the amendment of the Constitution. It thus seemed absurd for the Supreme Court in *Nkwocha's* case to state in one breath that the Act is not an integral part of the Constitution, and in another breath to state that the Act can only be amended in accordance with the procedure stipulated for amendment of the Constitution. If the Act is not an integral part of the Constitution, why is it treated as part of the Constitution when it comes to its amendment? It is for this reason that it is becoming a herculean task to amend or carry out any reform of the Act. The reason why the Act is a problem rather than a solution is because the Act has become like a vehicle without a reverse gear; in the sense that all numerous mistakes made by the draftsman of the Act are still with us after four decades of its promulgation to guide the land tenure system in Nigeria.[135]

1.4.2 The Act as an item in the Exclusive Legislative List

Another fall out of the interplay between the Act and the Constitution is the inclusion of the Act as an item in the Exclusive Legislative List. The implication of the inclusion of the Act in the Exclusive Legislative List for the principle of Nigerian federalism becomes obvious upon a consideration of sub-section (6) of section 315 of the constitution. If the Act is to continue to have effect as a federal enactment and is treated as related to matters in the Exclusive Legislative List, the absurdity created by the entrenchment of the Act in the constitution is revealed. One pertinent question is, 'do all lands in Nigeria belong to the Federal government?' Although the Act is entrenched in the constitution, its vest most lands in the Governors of the states, and not the federal government.[136] The only lands vested in the federal government are those already held by the federal government before the commencement of the Act.

Therefore, Section 49 of the Act provides that the only lands under the control of the federal government are the lands that were under its control before the commencement of the Act. This position is supported by the provisions of sections 1 and 28 of the Act which vest control and management of lands comprised in a state on the governor of that state and empowers the governor to revoke land on presidential declaration or other purposes for the federation. It is mandatory for the Governor to revoke a right of occupancy in the event of presidential declaration that

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[135] Owolabi, Kolawole Aderemi, 'Why Does a Therapy Become a Pathology?' *University of Ibadan Law Journal*,
(2011) (1)(1), 278.

[136] LUA, s 1; *G.C.M Ltd v travellers Palace Hotel* [2019]6 NWLR (pt. 1669), 507, 541, paras.B-C.

the land is required for public purpose.[137] Although the position presumes that there is a co-orporation between the state and Federal Government, some projects have been stalled because politics sometimes determines the extent of such co-orporation.[138] It does not seem to be the intention of the draftsmen that the Federal Government should go to the state government 'cap in hand' to beg for land. The question has been asked that if the Federal Government goes cap in hand begging for lands from the Governor when it requires land for public purpose, what is the rationale for inserting the Act in the Exclusive Legislative List of the Constitution?[139] Similarly, Prof. James asked the question whether Federal government can compel the state government to revoke the land as required for public purpose.[140] Prof. James argued that the duty to make certain land available to Federal government arises from the provisions of the Constitution which requires that executive powers of the State Government shall be exercised in a manner that does not impede the executive powers of the Federation.[141] More also, Prof. Smith submitted further that the trust created in section 1 of the Act imposed on the Governor is for benefit of all Nigerians and thus preference should be given to federal government.[142]

However, it seems the designation of the Act as a federal enactment can only mean that it is to be deemed to be a law made by the National Assembly. It therefore comes within the meaning of section 5(1) of the constitution which vests in the President power to execute all laws made by the National Assembly. The implication is that the President by virtue of the authority vested in the President by section 5 (1) of the Constitution to execute "all laws made by the National Assembly" is the person entitled to execute the Act either personally or through the Vice President, a Federal Minister or other officer in the Federal Public Service.[143] It should perhaps be emphasized that the power to execute all laws made by the National Assembly is conferred on the President by virtue of section 5 of the Constitution, and does not need to be conferred specifically by the law to be executed. However, lands in the state are vested in the Governors who exercise control over such land but the President has only little role to play under the Act.[144] Thus, it seems to be a

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[137] LUA,s 28(4)

[138] Uwakwe, Abugu, *Land Use and Reform in Nigeria: Law and Practice,* (Immaculate Prints, 2012), 144.

[139] Bokani, Abubakar Mohammed, 'An Analysis of the Power of Revocation under Section 28 of the Land Use Act, 1978', *The Journal of Property Law and Contemporary Issues*, (2017) (3)(1),149.

[140] RW James, *Nigerian Land Use Act: Policy and Principles*, (University of Ife Press Ltd, 1987), 82.

[141] Ibid

[142] Ibid

[143] (n, 12) 163

[144] *Orianzi v AG Rivers State* [2017]6 NWLR (pt.1561) 224,272,para.F.

misnomer to consider the Act as a federal enactment when most lands in the state are vested in the Governor, and not the President and the Governor is responsible for management of the lands in the state. It was rightly held by Eso, Jsc in *Nkwocha v. Governor of Anambra State* [145] that in spite of the fact that the Act is declared to be an exclusive federal enactment by the constitution, the Act remains under the exclusive authority of the state Governor.

Furthermore, another implication that flows from the provision of section 315 (6) of the Constitution that the Act shall have effect as a Federal enactment is that in the absence of express constitutional authorization, functions or duties cannot be conferred or imposed on the state government by the Act. The structure of each tier of Government within a federal system, which is the very essence of federalism does not contemplate that.[146] It can be stated that the entrenchment of the Act in the Constitution involves such subordination of state government to the federal government as cannot be reconciled with true federalism. Such an arrangement undermines the legislative powers of the Houses of Assembly of the states. It can be argued that the federal military government may be taken to be aware that the execution of all federal enactments is vested in the president by section 5(1) of the constitution and that a federal enactment cannot, in the absence of constitutional authorization, empower state government executives to execute its provision. This will be akin to conferring function or responsibility on the states thereby undermining the fundamental principles of federalism. In the light of this, it can be submitted that the federal military government intended to remove the Act from the exclusive authority of the state governments. This is perhaps the only reason as there could have been no other reason for the provision of section 315(6) of the constitution.

Prof. Smith asked, 'since land as a legislative item is not normally a matter within the legislative competence of the federal government but a residual matter within the exclusive legislative competence of the state, could it be that the Act is unconstitutional, being a federal enactment?[147] Prof. Smith submitted that logically it could be, since the National Assembly has no legislative competence to legislate on land being an item on the residual list.[148] However, prof Smith stated that this apparent quagmire has been obviated by section 315(6) of the constitution which provides that the Act shall continue to have effect as federal enactment and as if they related to matters in the Exclusive Legislative List; Section 315(6) has therefore clarified any doubt as to the validity of the Act notwithstanding the general status of

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145 (*Supra*)
146 (n, 12) at 164.
147 (n, 69), 473-474.
148 Ibid, 474.

land as a residual matter.[149] Having already, through its entrenchment in the constitution, put the Act beyond the powers of the state government to amend or repeal, the federal governments could have had no other reason for subsequently declaring that the Act shall have effect as a federal enactment except to take its execution away from the state governments, and lodge it with the federal government.

The Act vests control and management of urban and rural lands in the state governor and the local government respectively.[150] Therefore, the question begging for answer is, does administration of land in rural areas also fit into the Exclusive Legislative List? Similarly, Olanipekun asked, "by the entrenchment of the Land Use Act in the Constitution, is it being implied or suggested that the customs and traditions of all the over 250 ethnic nationalities in Nigeria relating to devolution of landed properties are entrenched in the constitution, via section 24 of the Land Use Act, and by extension, have become part of the items in the Exclusive Legislative List?[151]As if answering the foregoing questions, Prof. Nwabueze submitted that it seems clear that the intention is to bring under the Exclusive Legislative List, not the entire subject matter of land, but only some aspects that are actually covered by the Act.[152] More so, it may be argued that even if land is not included in the Exclusive Legislative List, certain powers can nevertheless be exercised by the Federal Government which are incidental to the discharge of the duties and functions in the Exclusive Legislative List. Thus, without control over land, the federal government may not be able to execute certain programmes which depend on land for their realization.

There are criticisms that have been leveled against the Act which range from ambiguity of the provisions to obvious contradictions of the various provisions of the Act against another. The Act also gives the Governor wide powers that may be abused, and often is, abused. For instance, the power of revocation which is supposed to be used judiciously for public interest is being used to revoke strategically located from Nigerians and thereafter given to friends, family members and political stalwarts for patronage.[153] Again the onerous provisions regarding consent and

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[149] Ibid

[150] M.O, Olorunmola, *Exclusive Digests on Nigerian Land Law: Cases, Laws and Principles,* Lawstars Integrated Services Ltd, 2012), 104.

[151] Wale Olanipekun, 'Constitutionality of an Unconstitutional Act: The Unconstitutional Entrenchment of the Land

Use Act in the Nigerian Constitution' in Amos Agbe Utuama (ed) *Critical Issues in Nigerian Property Law*

(Malthouse Press Ltd, 2016) 166.

[152] (n,12),170

[153] *Kyari v Alkali* (2001) 11 NWLR (part 724) 412.

administrative bottlenecks have also made it very difficult even for Nigerians with money to get allocation from the government, let alone those who purchase from individuals. The preamble and some provisions of the Act are laudable but the practical implementation of the Act, particularly in making land available to all Nigerians leaves much to be desired.

1.5 Judicial Powers of the Court and Ouster Clause in the Land Use Act

There has been controversy over the provisions of section 47(2) of the Land Use Act with the duty of compensation by the Governor. The provision of section 47(2) of the Act are clear in ousting the jurisdiction of the courts to inquire into any question concerning or relating to the amount or adequacy of any compensation payable under the Act.[154] Prior to the Act, the Land Tenure Law[155] and Public Lands Acquisition Act provided for payment of compensation for land and unexhausted improvements. However, the Act recognized payment of compensation for unexhausted improvements but does not provide for payment of compensation for the bare land.[156] It is worthy to note section 30 of the Act provides that any dispute in respect of compensation under the Act has to be referred to the Land Use and Allocation Committee of the State whose decision is considered as final.[157] This provision is considered as ouster clause that deprives the court of the jurisdiction to entertain action concerning payment of compensation of land.[158] The provision of the Act seems to deny the aggrieved person right of fair hearing which is a fundamental principle of natural justice. In this context, natural Justice is defined as "fair and proper administration of law".[159] Ultra vires and Natural justice are recognized as the grounds the courts use to review a particular executive or legislative act or process before declaring it null, and void.[160]

The courts can review administrative actions on a number of grounds such as *ultra vires* and fair hearing in order to ensure that the executive complies with the

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[154] Adefi MD Olong, *Land Law in Nigeria*, (Second edition, Malthouse Press Ltd,2011) 136

[155] Land Tenure Law, 1962

[156] Dorothy E. Nelson, 'Mortgage of Land as Security under the Land Use Act 1978', [2013](11) *The Nigerian Juridical Review*,154

[157] LUA, s 47(2)

[158] Chinedu A. Onah, 'Legal Regime for Revocation of Right of Occupancy under the Land Use Act: A Comparative Study of Selected Jurisdictions',[2022](6)(2)*African Journal of law and Human Rights,*101

[159] (n, 11) 995

[160] Kabir M. Danladi, *Outline of Administrative Law and Practice in Nigeria*, (ABU Press Ltd,2012)115

provisions of the law, or to ensure that justice is done.[161]In this regard, the courts normally presume that a law authorising the exercise of certain powers intend that such powers should be exercised in conformity with principles of natural justice. The doctrine of ultra vires is based on the premise that the recipient of a statutory power can only do those things that are authorized by the statute to be done or which are reasonably incidental to the exercise of statutory power.[162] Therefore, where the Governor violates any provisions of the Constitution, the act can be considered *ultra vires* because the courts normally presume that the legislature never intends to violate the Constitution.[163]

The right to immovable property is guaranteed by section 43 of the Constitution. It has been submitted that no provision of section 44(1) of the Constitution which guarantees the right to compensation for compulsory acquisition of property is inviolable.[164] Thus, the interpretation of sections 39(1), 5(2) and 34(5)(6) of the Land Use Act are caught by section 44 of the Constitution and ought to be declared unconstitutional.[165] Thus, in *Messrs Singoz & Co. v. U.M.Co. Ltd*,[166] the Supreme Court has held any acquisition of land which is not in accordance with a law containing provisions for payment of compensation is not acquisition at all in the eyes of the law.

Although the Governor's power to make grant of statutory right of occupancy cannot be challenged in any court notwithstanding provision to the contrary in any law including the Constitution, it has been settled that section 47 of the Land Use Act is inconsistent with the Jurisdiction of the State High Court to determine and hear matters generally under the Constitution and it is thus void.[167] The courts have the constitutional role and powers by virtue of section 6 of the Constitution to nullify any legislation that is not in consonance with the Constitution.[168] Consequently, an action can be commenced at the High Court by a person whose proprietary interest on land has been expropriated by the state for purpose of re-allocation to another individual, and the High Court will have jurisdiction to entertain and hear the matter

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[161] P A, Oluyede*, Nigerian Administrative Law*, (University Press Plc, 1988)381

[162] Adefi M Olong, *Administrative Law in Nigeria*, (Malthouse House Press Ltd, Lagos, 2009)72.

[163] M C Okany, *Nigerian Administrative Law*, (African First Publishers Ltd, 2007) 150

[164] *Aderonpe v Eleran* [2019]4 NWLR pt. 1661, 141,159,para D-F

[165] Chris C. Wigwe, *Land Use Act and Land Management*, (Mountcrest University Press, 2016)221

[166] [2022]18 MWLR (pt. 1862) 203, 240-242.

[167] Imran Oluwole Smith, *Practical Approach to Law of Real Property in Nigeria*, (Revised Ecowatch Publications
Ltd, 2013) 478

[168] Olaniyi Olayinka, 'Judicial Review of Ouster Clause I the 1999 Constitution: Lessons for Nigeria', *NAUJILJ*
[2018] (9) (1),140.

pursuant to the provisions of the Constitution.[169]For this reason, the Supreme has held that section 47(2) of the Act is inconsistent with the Constitution by virtue of section 1(3) of the Constitution.[170]

Finally, there seems to be controversy over the courts with jurisdiction to entertain land matters under the Land Use Act. Section 39 of the Act vest exclusive jurisdiction on the High Court in respect of a statutory right of occupancy granted by the governor or deemed to be granted by him while section 41 of the Act has confers jurisdiction on Area court or customary court in respect of customary right of occupancy granted by a Local government. Although it is established that that the State High Courts have exclusive jurisdiction over land covered by statutory right of occupancy, the Act does not provide for jurisdiction of the Federal High Court in similar matters. Thus, does it mean that the Federal High Court has no jurisdiction to entertain land matters? This question may be answered in the affirmative considering the provisions of the Act which defines High Court as 'the High Court of the State concerned'.[171] More so, the Constitution does not seem to confer such jurisdiction on the Federal High Court.[172] However, it has been argued that the Federal High Court has exclusive jurisdiction in respect of land matters involving the Federal government or any of its in line with the decision of the Supreme Court in *NEPA v Edegbero*[173] where the Federal government or any of its agencies is a party to suit.[174] Thus, the Supreme Court has held that there is nothing in subsection (r) or proviso to 251(1) of the Constitution excluding actions concerning the decisions or actions of the Federal Government agencies relating to land or actions for damages as compensation for compulsory acquisition of land from the jurisdiction conferred on the Federal High Court. [175] the Court further affirmed that the jurisdiction given to the Federal High Court by section 251(1)(r) is to entertain any action challenging the validity of any executive or administrative action by the Federal government or its agencies, and it does not exclude any action challenging executive or administrative action or decision relating to land from its application.[176] Therefore, The Federal High Court also has jurisdiction over land involving action for declaration or injunction affecting the validity of any executive or administrative action of the

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[169] CFRN,s 272(1)
[170] *Controller- Gen, Prisons V Elema* (2021)12 NWLR (pt.1790, 234),261, paras.E-F
[171] LUA, s 51
[172] CFRN, s 251 (1)(a-s)
[173] [2002]18 NWLR (pt 798), 79
[174] A Ishaq, 'Jurisdiction of the Federal High Court on Title to Land: A Judicial Myth or Reality', *Ahmadu Bello University Law Journa*l [2015](20-35) ,66
[175] (n,99) 253-254.
[176] ibid.

Federal government or any of its agencies. Notwithstanding the foregoing, it is doubtful whether the Federal High Court has exclusive jurisdiction in land matters involving the Federal government or any of its agencies although the State High Court has exclusive jurisdiction over covered by statutory right of occupancy granted by the state.

1.6 Conclusion

The Act was enacted and entrenched in the Constitution to ensure that governments at all levels are given control over lands in the country. However, the Act vests most lands in the territory of each state in the Governor to the detriment of the federal government. However, since the inception of the Act about four decades ago, some questions have remained unanswered in respect of the interplay between the Act and the Constitution such as the justification for the entrenchment of the Act in the constitution, and the effect of the entrenchment on the federal nature of the constitution.

It is the finding of this paper that the entrenchment of the Act in the constitution which regards the Act as an item on the Exclusive List is contradictory of the provisions of the Act which vest control of land in the State Governor of each state. More so, the description of the Act as a federal enactment and item in the Exclusive Legislative List smacks of confusion and absurdity in the division of powers between the state government and the federal government. Thus, it is not certain what tier of government has legislative competence to make legislation in respect of land use and management in Nigeria. The result is that the entrenchment of the Act in the Constitution has undermined the supremacy of the Constitution, and the principles of federalism embedded in the constitution thereby constituting a travesty of the whole idea of federalism and Constitutionalism.

It is thus recommended that the Nigerian Constitution be amended by deleting section 315(5) of the Constitution so that the Act can be expunged from the Constitution because its entrenchment in the Constitution negates the federal principles enshrined in the Constitution. More so, the Act should be removed from the Exclusive Legislative List and inserted in the Concurrent List to ensure a robust and effective Federal system of government, and easy amendment of the Act when the need arises without following stringent procedures laid down for amendment of the Constitution.