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Public-private partnership and the right to property in Nigeria

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Summary

Governments across the globe are challenged by endemic budget deficits and find it impossible to reduce significantly their infrastructure deficit without the option of calling upon private sector funding. In addition, the public sector is better served to make policy decisions and provide opportunities for the private sector to design, fund, manage, maintain and operate public facilities using a public-private partnership model. To achieve this aim, it is the responsibility of the public authority to make land available for new projects and for the expansion or rehabilitation of existing public facilities. The objective of this article is to examine the process of land expropriation for public-private partnership projects in Nigeria in relation to the right of the citizen to property but who might be affected when such a decision is taken. The article reviews legislation, court decisions and literature on the subject and proffers recommendations.

Key words: *infrastructure; land expropriation; Nigeria; property; public-private partnership; right to property*

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1 Introduction

There is no universal definition of the term ‘public-private partnership’ (PPP). It is, however, a model of public infrastructure procurement distinct from the traditional method by which governments fund infrastructure solely from public budgets or from borrowed funds.¹ A PPP is a collaboration between the public authority and the private sector. In a PPP the private sector is responsible for the design, funding, management and operation of a public facility for the duration of the contract, after which the facility is transferred to the public authority.² A PPP usually is long-term and may last for 30 years. Unlike in a privatisation where government divests its interest in an enterprise, in a PPP the facility is transferred to the private consortium for the duration of the contract. A PPP also is not a service or management contract as it involves the design and the building or rehabilitation of a public facility. The justification for the adoption of the PPP model of procurement is that in the modern era the costs involved in infrastructure procurement as well as budget deficits make it impracticable for the public authority alone to cater for all the infrastructure needs of the population. Furthermore, a PPP provides an opportunity for the public authority to tap into private sector expertise so that the government can concentrate on policy making.³ The obvious advantage of adopting a PPP is that it reduces the burden on the government to provide for the infrastructure needs of the population and at the same time aids in closing the infrastructure gaps in the country.

Given the need to facilitate PPP arrangements the public authority has a responsibility to provide the land for the projects. As a result the government may exercise a compulsory acquisition of private rights in land for the purpose of the public. The problem this article seeks to address is how the government can acquire land for PPPs in Nigeria without violating the right of the citizen to property. The aim of the article, therefore, is to highlight the need to preserve the citizen’s right to property and for parties in a PPP transaction to ensure that the proper procedure is followed in the compulsory acquisition of land for PPP projects.

Furthermore, the article examines how the PPP impacts on the right to property in Nigeria. The purpose of this enquiry is that with the adoption of PPP, the public authority in the country may consider engaging the private sector in the delivery of several infrastructure projects. Where the projects are ‘greenfield’⁴ projects, that is, where

1 D Grimsey & MK Lewis *Public-private partnerships: The worldwide revolution in infrastructure provision and project finance* (2004) 1.

2 A Arimoro ‘An appraisal of the framework for public private partnership in South Africa’ (2018) 13 *European Procurement and Public Private Partnership Law Review* 214.

3 As above.

4 ER Yescombe *Public-private partnerships: Principles of policy and finance* (2007) 249.

the project is an entirely new project, they require the government to expropriate land for the purposes of the project. In some cases, even for 'brownfield'⁵ projects, that is, where the project involves the rehabilitation of an existing facility, there may be a need to expand the project site which may require the expropriation of surrounding property. Where this is the case, how is the right to property in Nigeria affected? The discussion in the article centres on the introduction of the PPP in Nigeria, the procedure for engaging the private sector in PPP arrangements and the attitude of the courts towards land expropriation for public purposes. In the next section, the article discusses PPPs in Nigeria.

2 Public-private partnership in Nigeria

The PPP was introduced to the Nigerian environment shortly after the return to democratic rule in 1999.⁶ The then administration of President Olusegun Obasanjo embarked on a privatisation regime that witnessed the divestment of government's interests in assets in several public-owned enterprises. The rationale for this divestment was based on the fact that private sector involvement in infrastructure is key to the vision to ensure that Nigeria becomes one of the top 20 economies in the world by the year 2020 as expressed in the country's Vision 20:2020 Objective.⁷ The Obasanjo administration passed the Public Enterprises (Privatisation and Commercialisation) Act in 1999. The Act created the National Council on Privatisation (NCoP) and the Bureau of Public Enterprises (BPE) as the supervisory and implementing agencies respectively for privatisation and commercialisation transactions at the national level in the country.⁸ Indeed, some PPP transactions were consummated under that Act which involved divesting government's interests in an already-existing public asset.⁹ The entire privatisation and commercialisation exercise that was superintended by the BPE has been the subject of criticism. Several of the acquired assets have not performed better than when they were under public sector management.¹⁰ There was a lack of understanding between the private sector entities that bought the

5 As above.

6 O Soyaju 'Legal framework for public private partnership in Nigeria' (2013) 34 *De Jure* 816. Some PPP transactions were administered under the privatisation regime.

7 Soyaju (n 6) 817.

8 A Olor, G Etomi & V Oyedeji 'Public private partnerships' (2017), <https://gettingthedealthrough.com/area/71/jurisdiction/18/public-private-partnerships-nigeria/> (accessed 24 October 2018).

9 As above.

10 DE Arowolo & CS Ologunowa 'Privatisation in Nigeria: A critical analysis of the virtues and vices' (2012) 1 *International Journal of Development and Sustainability* 794.

assets and the public authority as to the goals of the exercise¹¹ and the fact that the federal government of Nigeria privatised assets when the conditions were not right to do so.¹²

The shift towards the PPP after the perceived failure of the privatisation exercise necessitated the passing into law of the Infrastructure Concession Regulatory Commission (Establishment Etc) Act 2005 (ICRC Act). This Act created the Infrastructure Concession Regulatory Commission (ICRC) which came into existence in 2008.¹³ The agency is charged with the responsibility of giving institutional leadership to the successful implementation of a PPP model that would enable private sector participation in infrastructure delivery in the country at the national level. The ICRC Act 2005 is divided into two parts. The first part assigns government ministries, departments and other agencies with the power to enter into a contract with or grant concessions to the private sector for the financing, construction, operation and maintenance of any viable infrastructure. The second part established the ICRC and describes its functions as the regulatory agency. Unfortunately, the Act leaves several gaps including a failure to provide rules on how the procurement of a PPP contract is to be undertaken¹⁴ and the funding of PPP projects.¹⁵ The Act also does not define the term PPP. However, the explanatory memorandum to the Act states:¹⁶

This Act provides for the participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development of projects of the Federal Government through concession or contractual arrangements; and the establishment of the Infrastructure Concession Regulatory Commission to regulate, monitor and supervise the contracts on infrastructure or development projects.

According to the National Policy on Public Private Partnership (NPPPP), the basic scope of the federal government of Nigeria's programme for PPPs is the creation of a new infrastructure, and the expansion and refurbishment of existing assets such as power generation plants and transmission/distribution networks; roads and bridges; ports; airports; railways; inland container depots and logistic hubs; gas and petroleum infrastructure, such as storage depots and distribution pipelines; water supply treatment and distribution

11 E Ujah 'Privatisation blues, the sour tastes of the exercise in Nigeria' *Vanguard* 12 September 2011, www.vanguardngr.com/2011/09/privatisation-blues-the-sour-taste-of-the-exercise-in-nigerian/ (accessed 24 October 2018).

12 E Etieyibo 'The ethics of government privatisation in Nigeria' (2011) 3 *Thought and Practice* 87.

13 Ollor et al (n 8).

14 G Nwangwu 'The legal framework for public-private partnerships (PPPs) in Nigeria: Untangling the complex web' (2012) 7 *European Procurement and Public Private Partnership Law Review* 270.

15 A Arimoro 'Funding of public-private partnership projects under the Nigerian ICRC Act of 2005: Why is the Act silent?' (2015) 40 *Journal of Law, Policy and Globalisation* 69.

16 My emphasis.

systems; solid waste management; educational facilities (for instance, schools, universities); urban transport systems; housing; and healthcare facilities.¹⁷

In addition to the ICRC Act other relevant legislation that regulates PPP transactions in the country at the national level include the Public Procurement Act 2007;¹⁸ the Fiscal Responsibility Act 2007;¹⁹ the Debt Management Office Act 2003;²⁰ and the Utilities Charges Commission Amendment Act 2016.

At the sub-national level, given the fact that Nigeria is a federation of 36 states, a Federal Capital Territory and 774 local governments, state governments that desire to establish a PPP regime within their jurisdictions may enact their own PPP law.²¹ Following from this, some states, including Lagos,²² Rivers,²³ Cross River,²⁴ Ekiti²⁵ and Niger, have enacted their own PPP laws and set up PPP units to administer PPP transactions in their local environments. Of interest to a prospective PPP investor or promoter in Nigeria is the fact that there can be as many legal frameworks for PPP as there are various governments at different tiers, because the various states in the country are allowed to enact local PPP laws. Furthermore, the Second Schedule of the 1999 Constitution of the Federal Republic of Nigeria contains a list of items in the Exclusive Legislative List over which state governments have no jurisdiction. As such, care must be taken to note the constitutional restrictions on state governments on matters such as aviation, federal roads and inland waterways.²⁶ The implication of arranging a PPP in such areas may result in an illegality as the states have no power to embark on projects relating to items in the Exclusive Legislative List.

17 Infrastructure Concession Regulatory Commission 'National Policy on Public Private Partnership' (2009) 4.

18 This Act deals with the procurement of goods, works and services.

19 This Act ensures accountability, transparency and prudence of government in preparation of budgets and expenditure frameworks.

20 This law governs all government loans.

21 Each tier of government in Nigeria is allocated responsibilities as prescribed in the Second and Fourth Schedules to the 1999 Constitution of the Federal Republic of Nigeria (as amended). See also secs 4,5 and 8 of the Constitution.

22 The Lagos State government enacted the Lagos State Public Partnership Law 2011 to regulate PPP in the state.

23 The Rivers State Public-Private Participation in Infrastructure Development Law 2009 regulates PPP transactions in Rivers State.

24 The Public Private Partnership Law 2010 applies in Cross River State.

25 In Ekiti State, the Ekiti State Public Private Partnership Law 2011 applies.

26 Refer to n 20.

2.1 Types of public-private partnership in Nigeria

A variety of PPP alternatives are available under the existing legal frameworks in Nigeria.²⁷ The laws make provision for the traditional forms and to some extent allow for innovation where needed.²⁸ Apart from Rivers State where the law is couched to allow for private finance initiative (PFI), which is a model in which the public authority pays the project company for the use of the facility by citizens,²⁹ it is not clear whether a PFI-styled PPP can be arranged under the ICRC Act which specifically mentions only concessions.³⁰ This author is of the view that the concession-type of PPP is envisaged under the ICRC Act because the ICRC Act does not provide for a PFI arrangement and uses only the word 'concession' in the title of the Act and in its provisions.

Under the concession model, there are several types of PPP that may be adopted.³¹ These include the following:

- (i) *Build-Operate-Transfer (BOT)*. In a BOT, the concessionaire³² builds the facility, operates it under the terms of the PPP contract and transfers the facility to the public authority at the end of the tenure of the agreement. This applies specifically to 'greenfield' projects.³³
- (ii) *Rehabilitate-Operate-Transfer (ROT)*. Under the ROT form of PPP arrangement the project company rehabilitates an existing facility, operates it under the terms of the agreement and returns the facility at the end of the contract to the public authority. This kind of arrangement suits 'brownfield' projects.³⁴
- (iii) *Build-Own-Operate-Transfer (BOOT)*. In a BOOT the private sector project company finances, builds, owns and operates a facility and charges user fees for a specified period after which the ownership is transferred to the public authority.³⁵

In the next subsection the article briefly discusses the advantages inherent in PPP arrangements.

27 F Onuobia & OJ Okoro 'Nigeria' in B Werneck & M Saadi (eds) *The Public-private partnership law review* (2018) 178.

28 Onuobia & Okoro (n 27) 179.

29 Yescombe (n 4) 9.

30 In a concession, the members of the public that are the end users of the public facility pay for their use as distinct from PFI-styled PPP.

31 This author is of the firm view that privatisation, service or management contracts are not PPPs and should not be confused with PPP.

32 In this article this term is used interchangeably with 'project company'.

33 Refer to n 4.

34 Refer to n 5.

35 A Arimoro 'An evaluation of the legal framework for public private partnerships in Nigeria' unpublished LLM dissertation, University of Derby, 2014 29, www.researchgate.net/publication/274951436_An_Evaluation_of_the_Legal_Framework_for_Public_Private_Partnerships_in_Nigeria (accessed 24 October 2018).

2.2 Advantages of public-private partnership

Generally, while development issues have become too complex and intertwined, the financial resources to provide for or maintain available infrastructure assets have become scarce for the government alone, hence the need to partner with the private sector.³⁶ The private sector partner may be domestic or foreign.³⁷ There are at least five advantages to adopting PPPs by the federal government of Nigeria. First, a PPP provides an opportunity to improve service delivery by allowing both the private and public sectors to do what they can do best. The government's core business is policy making, while the private sector is a better manager of business activities. Second, by taking advantage of private sector innovation, experience and flexibility, the PPP often can deliver services more cost-effectively than traditional approaches. Third, public sector risk is reduced as it is transferred to a party that can better manage the risk. Fourth, the private sector can generate business, create jobs and impact on the economy; and, fifth, the government can tap into the expertise of the private sector.

2.3 How do public-private partnerships work?

In the event that the public authority identifies the need to develop a new or to update an existing facility the government may leverage the cooperation of the private sector. Here, the government may select a consortium of private sector enterprises, which includes a developer, a general contractor and a facility manager. While the public sector maintains ownership of the facility, the responsibility for the design, construction, financing and ongoing operations is transferred to and managed by the consortium. During the duration of the contract the government or users of the facility pay for the use of the facility.³⁸

Typically, the public authority selects PPP partners through a fair competitive bidding process. The agency sponsoring the project will invite the private sector to submit proposals³⁹ detailing plans for meeting service delivery needs. The proposals are then subjected to evaluation to ensure that they deliver value for money for taxpayers and protect the interests of the public.⁴⁰ The public authority then grants the right to a private company that wins the bid to develop

36 Arimoro (n 35) 26.

37 As above.

38 As above.

39 Eg, Asset & Resource Management Co Ltd (ARM) emerged winner of the competitive bid for the Lekki-Epe Toll Road Concession Project and incorporated the LCC as a special purpose vehicle to execute the project with the preferred concession method for the project being a BOT which is a globally established model. See J Ehonwa 'Important facts about the Lekki-Epe expressway' *Connect Nigeria* 16 April 2013, <https://connectnigeria.com/articles/2013/04/important-facts-about-the-lekki-epe-expressway/> (accessed 24 October 2018).

40 Partnerships British Columbia 'An introduction to public private partnerships' (2003), <http://www.partnershipsbcc.ca/pdf/An%20Introduction%20to%20P3%20-June03.pdf> (accessed 24 October 2018).

and operate the project. It is the responsibility of the private company to obtain financing for the project as well as procure the design and going ahead with construction. In addition it maintains and operates the facility during the duration of the concession. It therefore behoves the project company to secure sufficient resources to meet these obligations.⁴¹

2.4 The duty of the state to ensure development versus the right to property

In this part of the article the duty of the state to ensure the economic well-being of citizens in relation to the right of citizens to own property is examined. Section 16 of the 1999 Constitution of the Federal Republic of Nigeria deals with socio-economic rights. It is a given that in order for the state to deliver services for the public good, the government is required to make policies and to embark on actions geared towards achieving this objective.⁴² It is argued that Nigeria's Land Use Act 1978 was passed in order to give the government sufficient powers over the acquisition, transfer or assignment of interest in land.⁴³ The Act aims to enable economic development by allowing the government to have control over land by abrogating absolute ownership or freehold interest by the community, families or an individual.⁴⁴ This position of the law in Nigeria was restated in *Savannah Bank v Ajilo*.⁴⁵

The above notwithstanding, there is a need for a balance. While the compulsory acquisition of land by the public authority for public purposes is to benefit the citizens of that state, it is pertinent that the state protects the right to own property. To do this the state must ensure adequate compensation where land is acquired compulsorily.⁴⁶ Thus, while the state has a responsibility to improve the well-being of citizens, it must not be at the cost of depriving other citizens of their rights.

41 For the Lekki-Epe Project, the LCC in 2008 received the full commitment for the cost of the construction phase of the project, securing an N50 billion long-term financing package with several blue-chip local and international financial institutions on terms regarded as ground-breaking in the Nigerian financial environment. The financiers include Stanbic IBTC, First Bank of Nigeria (FBN) and Africa Infrastructure Investment Managers.

42 I Ogunniran 'Enforceability of socio-economic rights: Seeing Nigeria through the eyes of other jurisdictions' (2010) 1 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 63.

43 ME Nwocha 'Impact of the Nigerian Land Use Act on economic development in the country' (2016) 8 *Acta Universitatis Danubius. Administratio*, <http://journals.univ-danubius.ro/index.php/administratio/article/view/3976/3876> (accessed 27 October 2019).

44 As above.

45 (1987) 1 NWLR (Pt 413).

46 *The Administrators of the Estate of General Sani Abacha v Eke-spiff & 3 Others* (2009) 37 NSCQR 364.

2.5 Expropriation of land for public-private partnership projects

The term 'expropriation' has been defined as 'the power of government to acquire legally-recognised tenure rights without the willing consent of the tenure holder, in order to serve a public purpose or otherwise benefit society'.⁴⁷ It may occur that private land is compulsorily acquired by the government for the purposes of a PPP project. When the government exercises the power to acquire private land without the willing consent of the owner the process is called by a variety of names, including expropriation, takings and compulsory purchase.⁴⁸ It is noted that despite being a core and necessary power within the scope of government, land expropriation always is mired in controversy both in theory and in practice.⁴⁹

Generally, the government may compulsorily acquire a property for a 'public purpose'. The term 'public purpose' is subject to different definitions. For the purpose of this article, 'public purpose' refers to the acquisition of land by the government for one or more of the following reasons:⁵⁰

- (i) transportation use including roads, canals, highways, railways, bridges, wharves and airports;
- (ii) public buildings including schools, libraries, hospitals, factories and public housing;
- (iii) public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs;
- (iv) public parks, playgrounds, gardens, sports facilities and cemeteries; and
- (v) defence purposes.

The principal legislation that governs land in Nigeria is the Land Use Act 1978.⁵¹ The Act vests all the land in the governor of a state in the following words:

- 1 Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation is vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

2(1) As from the commencement of this Act –

47 NK Tagliarino et al 'Compensation for expropriated community farmland in Nigeria: An in-depth analysis of the laws and practices related to land expropriation for the Lekki Free Trade Zone in Lagos' (2018) *Land* 5 DOI.10.3390/land7010023.

48 JM Lindsay 'Compulsory acquisition of land and compensation in infrastructure projects' (2012) 1 *PPP Insights* 1.

49 Nwocha (n 43).

50 As above.

51 Cap 202 Laws of the Federation of Nigeria 1990.

- (a) all land in urban areas shall be under the control and management of the Governor of each state; and
- (b) all other lands shall, subject to this Act, be under the control and management of the Local Government, within the area of jurisdiction of which the land is situated.

Furthermore, the Act gives the governor the power to revoke a right of occupancy for an overriding public interest.⁵² The term 'overriding public interest' is defined by the Act as follows:

- (a) the requirement of the land by the Government of the State or by a Local Government in either case for the public purpose within the State, or the requirement of the land by the government of the Federation for the purposes of the Federation;
- (b) the requirement of the land for mining purpose or oil pipelines or for any purpose connected therewith;
- (c) the requirement of the land for the extraction of building materials;
- (d) the alienation by the occupier by sale, assignment, mortgage, transfer of possession, sublease, bequest or otherwise of the right of occupancy without the requisite consent or approval.

Where the government compulsorily acquires land for the overriding public interest, the Act provides that the holder and the occupier of the land shall be entitled to compensation for the value at the date of the revocation of their unexhausted improvements.⁵³ However, where the right of occupancy is revoked for mining purposes, the holder and occupier shall be entitled to compensation under the appropriate provisions of the Minerals Act or the Minerals Oil Act or any legislation replacing the same.⁵⁴ Furthermore, if there is a dispute regarding the amount of compensation calculated under section 29 of the Act, the dispute is to be referred to the appropriate Land Use and Allocation Committee.⁵⁵ In order to examine the provisions of the Land Use Act mentioned above it will help to consider background to the Act itself. First, the Land Use Act has been analysed as being based on Islamic principles where land is held by the state in sacred trust for the people.⁵⁶ Under Islamic law the emir (or governor) personifies the state and has unfettered power over all the land in the emirate.⁵⁷ In Nigeria the state governors are placed in the position of these emirs with all powers in a secular environment. Hence, a study revealed that the Act was more prone to abuse in the Christian south than in the Muslim north of Nigeria.⁵⁸ It has been averred that governors in Nigeria have abused the powers conferred on them under section 1 of

52 Sec 28 Land Use Act 1978.

53 Sec 29(1) Land Use Act 1978.

54 Sec 29(2) Land Use Act 1978.

55 Sec 30 Land Use Act 1978.

56 P Onukwuli 'The broad powers of state governors under the Land Use Act 1978 and land governance in Nigeria' (2018) Paper delivered at the Annual World Bank Conference on Land and Poverty, Washington DC, 19-23 March 2018. See also Qur'an 6:165.

57 Cap 202 Laws of the Federation of Nigeria 1990 (n 51).

58 As above.

the Land Use Act. For example, in Enugu State the procedure for land acquisition by the state has been abused where land compulsorily acquired for burial grounds, zoological gardens, polo fields and cricket grounds has been converted to residential use by the state governor.⁵⁹

It is a given that the public authority may compulsorily acquire land in the public interest, but at what point does it vitiate the right to property? In *Olatunji v Military Governor of Oyo State*⁶⁰ the Court of Appeal, per Salami JCA (as he then was) stated:⁶¹

The appellant can legitimately protest the acquisition if the purpose for which the land was being acquired was not within the confines of the definition of public purpose as defined in section 50 of the Act. The acquiring authority failed to state the public purpose for which the property was acquired. He kept it up his sleeve. In this connection Waddington J said in the case of *Chief Commissioner, Eastern Province v Ononye* 17 NLR 142 at 143 thus: 'The notice merely states "for public purposes" and I find it difficult to understand why the particular public purpose is not stated. When the matter comes into court it has to be admitted that there is no public purpose involved at all; and the impression is liable to be conveyed, no doubt erroneously, that there was something ulterior in the failure to make the purpose public.'

In addition, the Court held that the holder of land compulsorily acquired by the public authority is entitled to know the ground(s) for the government's acquisition of a citizen's interest in the land. The learned Justice of the Court of Appeal stated further:⁶²

The appellant is not entitled to speculate or fish for the ground or grounds for acquiring his interest in the property in dispute. The best he would do in the circumstance is to lie patiently in waiting until the acquiring authority manifest[s] its true intention. Before manifestation of the acquiring authority's intention he is helpless not only himself would be helpless the court to which he has constitutional access to would equally be left in complete helplessness.

From the decisions of the Nigerian courts, it is settled that the limitation of the right to property *vis-à-vis* compulsory acquisition of property by the public authority applies to where the land is required for a known public interest and for the payment of reasonable compensation.⁶³ Thus, in *National Universities Commission v Oluwo*⁶⁴ the Court of Appeal held that where land has been expropriated by the public authority, the person whose land has been so acquired is entitled to reasonable compensation. In the same vein, the Nigerian

59 As above.

60 (1994) LPELR 14116.

61 Land Use Act 1978 (n 55).

62 Paras B-G Land Use Act 1978 (n 55).

63 O Odima 'Nigeria: Legal and regulatory requirements for the compulsory acquisition of land in Nigeria' *Mondaq* 13 May 2016, www.mondaq.com/Nigeria/x/490868/real+estate/Legal+And+Regulatory+Requirements+For+The+Compulsory+Acquisition+Of+Land+In+Nigeria (accessed 25 October 2018).

64 [2001] 3 NWLR (Pt 699) 90.

Supreme Court restated the importance of the proper procedure for land expropriation. It held in *Goldmark (Nigeria) Ltd v Ibafon Co Ltd*:⁶⁵

The court has always emphasised that government has the right to compulsorily acquire property on payment of compensation. There is no argument about such constitutional power. There are statutes that provide for the procedure of acquiring property by the government. Government is expected to comply with those statutes which it has enacted. Where government disobeys its own statute by not complying with the laid down procedure for acquisition of property, it is the duty of the courts to intervene between the government and the private citizen.⁶⁶

From the foregoing it is safe to say that where the public authority in Nigeria seeks to obtain land for the purposes of a PPP project, the project itself must conform to the 'overriding public interest' criterion. In addition, the proper method for compulsory land acquisition for the project as laid out in the *Goldmark* case above must be adhered to.

In the next part of the article the right to property is examined.

3 Right to property

The right to property may refer to the legal and political environment, intellectual property or physical property rights. In this article reference is made to physical property rights. The right to property is enshrined in international law. Article 17 of the Universal Declaration of Human Rights 1948 (Universal Declaration) provides that '[e]veryone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.'

According to *Webster's new encyclopaedic dictionary* a right is defined as

something to which one has a just claim: as (a) the power or privilege to which one is justly entitled; (b) the interest that one has in a piece of property; the property interest possessed under law or custom and agreement in an intangible thing; something that one may claim as due.⁶⁷

'Property' is defined as '(a) something owned or possessed; specifically a piece or real estate; (b) the exclusive right to possess, enjoy, and dispose of a thing; ownership: (c) something to which a person or business has a legal title'.⁶⁸

The right to property refers to the power or a legitimate right vested in the owner of a means of production, called the property, to use, enjoy and live by them, and legal procedures are taken against

65 [2012] 10 NWLR (Pt 1308) 291.

66 *Olatunji* (n 60).

67 *Webster's new encyclopaedic dictionary* (2002) 1582.

68 *Webster's new encyclopaedic dictionary* (n 67) 1467.

those that forcefully claim or destroy such property.⁶⁹ In this part this article discusses the right to property.

A property right is considered the definite and inalienable right to control and use property. This right may be exercised by an individual (natural or artificial), a community or by a group of individuals. The right to property also includes the right for the owner to delegate the right to use the resources, the right to sell, rent or otherwise alienate his interest in the property.⁷⁰

Property rights refer to the rules that determine who gets what and who must compensate whom if damages occur. The 1999 Constitution of the Federal Republic of Nigeria (as amended) enshrines the right to property as can be gleaned from section 44(1) which provides that no movable property or interest in an immovable property is to be taken possession of compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things, (a) requires the prompt payment of compensation therefor; and (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

While conceding that the right to property is limited in Nigeria to the extent that the public authority may expropriate land for overriding public interest, it is important to note that the remedy here is reasonable compensation. However, it is submitted that the intention of the law is not to acquire land compulsorily from one person and give it to another private person. In this case, it must be understood that even though in a PPP the ownership of the facility is transferred to the private sector partner for the duration of the contract, ownership ultimately reverts to the public authority and, as such, a PPP should not be considered as a case where private land is acquired compulsorily and handed over to a private entity.

3.1 Evolution of property ownership in the Nigerian context

Economists believe that the evolution of property ownership is based on the foundation of natural rights.⁷¹ The natural owner is the entity 'who has produced an article, or who, by a constructively equivalent expenditure of productive force, has found and appropriated an object'.⁷²

Arguably, the right to property is the oldest 'real' right. This was before the definition of other concepts such as 'right' or 'real' (as

69 CM Sibani & E Asis 'The right to property in Nigeria: A reflection on the legal and Biblical laws' (2016) 28 *Idea* 234.

70 O Adebimpe 'Property rights in Nigeria: An untapped tool for economic growth' (2017), www.studentsforliberty.org/2017/09/15/property-rights-nigeria-untapped-tool-economic-growth/ (accessed 25 October 2018).

71 Goldmark (n 65).

72 Goldmark 235.

distinct to 'personal').⁷³ It is noted that controversies regarding property are as old as humanity itself.⁷⁴

From time immemorial, through the era of agriculture to the modern era of industrial development, real property (or land) has remained the most valuable asset in the life of man and in his development. The land is regarded as a source of wealth to those who have it.⁷⁵ As such, the rationale behind the enactment of the Land Use Act is to make land available to all citizens and to ensure that land is acquired and put to proper use for the development of the country.

Before the passing of the Land Use Act there were three main sources of land law in Nigeria, namely, customary law, received English law,⁷⁶ Islamic law and local legislation. Before 1978 there was a duality of land use systems in the country. The southern part operated mostly in terms of the customary law while principles of Islamic law applied in the north.

Given the fact that Nigeria's Land Use Act has its origin in Islamic law, it is not out of place to consider how Islamic jurisprudence treats the concept of land. According to Sayin et al from an Islamic point of view the land is God's creation and, as such, land ownership originally resides in God.⁷⁷ Therefore, since everything belongs to the Creator and private ownership is permitted and encouraged, the property must be protected as it is recognised as a means for fulfilling the needs of the faithful.⁷⁸ In Islamic jurisprudence limits on property rights can apply where there is a need to satisfy basic communal needs. However, according to Islam the right to property is not a natural right. It is a right that derives from the individual accepting to perform certain obligations based on divine commandments.⁷⁹

The Land Use Act can be traced to the Land Tenure Law passed by the Parliament of Northern Nigeria in 1962. Under the Land Tenure Law the land was vested in the governor who was to hold the land in trust for the citizens. The governor granted only rights of occupancy as against outright ownership.⁸⁰ The Land Use Act 1978 was promulgated initially as a decree by the General Olusegun Obasanjo administration before the advent of civil rule in 1979. The Act entered into force on 29 March 1978 as the country's land policy document.

73 In the modern era, there is a distinction between 'real' and 'personal' property.

74 Y Sayin et al 'Land law and limits on the right to property: Historical, comparative and international analysis' (2017) *European Property Law Journal* DOI 10.1515/eplj-2017-0002.

75 B Oseni 'Summary of the Land Use Decree No 6 of 1978 in Nigeria' (2012), <http://nigeriaenvironment.blogspot.com/2012/11/summary-of-land-use-act-decree-no-6-of.html> (accessed 25 October 2018).

76 Comprising the common law, equity and statutes of general application.

77 Suratul Ali Imran 3:15; Suratul al-Isra 17:100; Suratul al-Fajr 89:20; Suratul al-'Aadiyat 100:8.

78 Sayin (n 68).

79 As above.

80 Oseni (n 69).

The effect of the Act is that land ownership in the country has been nationalised. However, this effect does not negate the right to property as stipulated in the 1999 Constitution (as amended). It is worth noting that no individual in Nigeria can hold a freehold interest in land.⁸¹ Individuals are granted only a right of occupancy for a maximum holding period of 99 years, subject to the payment of ground rent. In reality what landowners sell in Nigeria is a leasehold and not a freehold.⁸² Simply put, under the law in Nigeria the real owner of all land is the state. For all urban land one's statutory right to the land is for the period of the lease (for example, 49 or 99 years). The state can decide to terminate the lease in the public interest.

3.2 Land availability for public-private partnerships

In this part land availability for PPP is discussed. As already noted, the government may exercise its power to acquire land compulsorily in the overriding public interest. In many cases the land where the project is to be sited for a PPP project may already be available, for example stations in a rail project or depots in a light rail one. However, where the project requires the compulsory acquisition of land, for example for the dualisation of a public road, the public authority bears the risk of acquiring the land.⁸³ This factor is referred to as land acquisition risk.⁸⁴

For the prospective PPP investor in Nigeria it is important to note that the law requires that where land is acquired compulsorily for public purposes, the purpose must be defined and made clear. In addition, reasonable compensation has to be paid to the landowner. While it is the responsibility of the public authority to ensure that this is done, the private sector entity in a PPP arrangement needs to ensure that the public authority has performed its obligations so as not to embark on a project that suffers under disputes with landowners, whether as a community or in their individual capacities. Thus, land acquisition constitutes a critical area that PPP investors must consider before entering into PPP transaction deals in the country. This is more the case because land matters arguably form the bulk of adjudicated cases in Nigerian courts.⁸⁵

The next part of the article presents the conclusion and recommendations.

81 Sec 1 Land Use Act 1978.

82 NB Udoekanem, DO Adoga & VO Onwumere 'Land ownership in Nigeria: Historical development, current issues and future expectations' (2014) 4 *Journal of Environmental and Earth Science* 186.

83 APMG International 'Land availability and acquisition' (2018), <https://ppp-certification.com/ppp-certification-guide/111-land-availability-and-acquisition> (accessed 25 October 2018).

84 As above.

85 K Agary 'Land ownership in Nigeria (1)' *Punch* 17 July 2016, <https://punchng.com/land-ownership-nigeria-1/> (accessed 25 October 2018).

4 Conclusion

Due to the huge deficit in infrastructure in Nigeria and the need to bridge this gap, government at the national and subnational level continues to explore collaborating with the private sector to meet the infrastructure needs of the population. More successful PPP relationships would transform into more projects around the country. In the same vein, the public authority requires land for such projects. In turn, it would lead to the government compulsorily acquiring land from the population in the public interest. Given the attachment of Africans to their landed property, this article examines the effect of such acquisitions *vis-à-vis* the right to property, especially as land is regarded as everything a family in the African setting stands for. It is considered that when one is deprived of his or her land, it amounts to 'robbing them of their personhood, being and identity, in other words their full humanity'.⁸⁶

It is noted in the article that the right to property is a fundamental right enshrined in chapter IV of the 1999 Constitution of the Federal Republic of Nigeria (as amended). It is the duty of the state to ensure that this right is protected. However, it is imperative to note that the right is limited to the extent that land may be taken compulsorily from its owner in Nigeria for the overriding public interest.

It has been established in the country's jurisprudence that the overriding public interest for which a land is taken by the government must be known and defined. Furthermore, land must not be acquired from one individual and be given to another private person, as it amounts to an abuse of the law vesting land in the person of the governor of a state. In this article the PPP is distinguished from a taking by the government for a handover to a private party. Although the ownership of a PPP facility is a private entity during the duration of a PPP contract, ultimate ownership resides in the government that initiated the project.

Following from the findings in this article, the author makes the following recommendations. It is recommended that a prospective investor in a PPP in Nigeria critically considers the land ownership risk. Furthermore, even though this risk is borne by the public authority, before closing a PPP deal the parties must ensure that the proper procedure is followed. A failure to follow due procedure may lead to protracted land disputes and community resentment of a project, no matter how well-intentioned it is. Second, the state must ensure that the right of the citizen to property is respected and where it has to be curtailed reasonable compensation is paid. In the opinion of this author reasonable compensation must be the fair market value at the time of acquisition.

86 K Tafira 'Why land evokes such deep emotions in Africa' *The Conversation* 27 May 2015, <https://theconversation.com/why-land-evokes-such-deep-emotions-in-africa-42125> (accessed 27 October 2019).