



UNIVERSITY OF UYO LAW JOURNAL

VOLUME 10 (2022)

Published by the Faculty of Law
University of Uyo, Nigeria





UNIVERSITY OF UYO LAW JOURNAL

VOLUME 10 (2022)

Print ISSN: 1119-3573

Published by the Faculty of Law
University of Uyo, Nigeria
facultyoflaw@uniuyo.edu.ng

Citation:

(2022) 10 University of Uyo Law Journal

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EDITORIAL COMMENTS

I am pleased to present Volume 10 of the *University of Uyo Law Journal*. The Editorial Team has worked tirelessly to bring you this issue, comprising ten scholarly papers of nine articles and a statute review. This edition of the journal offers a range of topical and insightful ideas on themes in the fields of international investment arbitration, access to information law, trade dispute and industrial jurisprudence, insurance law, testamentary disposition, pension administration law, taxation law, international criminal law, and legal/constitutional theory. This is in accord with the aim of the *University of Uyo Law Journal* to provide a forum for the widest discussion of subjects on the law and contemporary issues of sub-national, national and global concern.

This edition opens with a paper by Osawe Omosede Andre, which examines the nexus between access to information law and corruption. It argues that corruption impact on access to public information as it works to promote secrecy. As such, any advancement towards opening governments to public scrutiny must foster anti-corruption efforts, which must of necessity validate the demand for openness in government actions and inactions as a right. Thus, the paper notes that a virile public information system will engender transparency that is necessary to expose corrupt acts, as access laws promote public right as well as serve as deterrent to corruption.

The joint paper by Francis Ohiwere Oleghe and Olusesan Oliyide examines the relationship between human rights and international investment arbitration using Weiler's concept of lost siblings. It argues that international investment arbitration (IIA) has elicited so much attention in recent times. So much so that the United Nations Commission on International Trade Law and the International Centre for the Settlement of Investment Disputes have engaged in programmes aimed at reforming the investor-state dispute settlement (ISDS) system, of which IIA is a subset. It makes the point that while the ISDS system has evolved with protection for investors, the experience of host states remains that of misgivings about the system's usefulness, which have resulted in agitations for its reform to give adequate consideration to human rights norms in ISDS cases. The aim of which is to strike a balance between investors' bilateral investment treaty (BIT) rights and their human rights obligations.

The papers by Ogancha Ogbale and John Inaku offer exposés on trade dispute jurisprudence. On the one hand, the former paper examines the constructions of ‘trade disputes’ and ‘state trade disputes’ under Nigerian labour laws and regulations. It argues that the recognition of the concept of state trade disputes under Nigerian labour law contributes in expanding the frontiers of trade disputes in the workplace, which poses recondit challenges for the current constitutional arrangement for labour jurisprudence in Nigeria. It therefore recommends the unbundling of labour, as an item under the Exclusive Legislative List, to pave the way for the involvement of state legislative assemblies if the notion of state trade dispute as conceived by Nigerian labour law is to be properly harnessed. On the other hand, the latter paper examines the impact of the finality of the decision of the Court of Appeal on labour and industrial disputes and how it impacts on the development of labour and industrial jurisprudence in Nigeria, in view of the level of expertise available to the Court of Appeal. It therefore proposes packing the Court of Appeal with judges from the National Industrial Court or, in the alternative, for the establishment of a National Labour Appeal Court, constituted of labour and industrial law experts, to hear appeals from the National Industrial Court of Nigeria.

Kehinde Anifalaje’s paper considers the regulation of compulsory liability insurance in Nigeria as a means of public protection from the risk of death, bodily injury or loss of property. The paper examines the laws regulating compulsory liability insurance in Nigeria and the enforcement of the rights of third parties within the context of the common law rule of privity of contract. It argues that the current tort-based system of compensation coupled with some regulatory challenges patently constitute a hindrance to a timely enforcement of the right of third parties under the contract of insurance, and suggests, among other things, the institutionalisation of a no-fault system of compensation that would guarantee quick and effective compensation of persons, who suffer losses by means of death, bodily injury or loss of property.

Also advancing the need for improved public protection, Lilian Nwabueze’s paper examines public protection through a change in approach towards better Wills by means of legislative amendment to Wills law to include the use of technological devices in communicating Wills; while and the paper by the duo of Onikosi Adedeji and Ahmed Muhammed-Mikaaeel examines the legal regime for pension administration in Nigeria, which it argues possess inherent lapses, including lack of direct prosecutorial power on the part of relevant agencies, unjust and insensitive

exclusion of the state and local government workers from coverage under the extant pension scheme and non-compliance of the pension scheme to Shari'ah.

The focus then moves to taxation law, in which Uche Jack-Osimiri, Anthony Ekpouido, Rowland Ipoule and Amara Ijeomah comprehensively examine jurisdictional issues that emanate in the administration and practice of tax laws, arising from the jurisdiction of the National Assembly and State Houses of Assembly to exercise legislative power to promulgate tax legislation within the limits conferred by the Constitution. It proposes certain measures to bring about reforms for the smooth administration and practice of tax laws in Nigeria. Glory Okebugwu's paper thereafter examines the investigative and prosecutorial approaches in combating transnational crimes under international law. It argues for a neutral body that will ensure balance of conflicting interests in the investigation and prosecution of transnational crimes, as transnational crimes universally present certain challenges to national criminal justice systems. The paper, therefore, recommends the collective involvement of the international community, as well as the adoption of more proactive investigative approaches with long term control guarantees with human rights considerations.

The paper by Olanrewaju Aladeitan and Adeboro Adamson focuses on the loss of proprietary interest by a private entity on the basis of overriding public purpose in the context of a liberalised and privatised regime, which raises critical legal issue regarding the extent to which the legal framework for the acquisition of land for energy infrastructure development impacts on the rights of a landowner and the correlation to the effective performance of the Nigerian Electricity Supply Industry (NESI). The paper proposes a legal regime that is fair and balanced for operators/investors in sector, as well as for other stakeholders. The final paper, a statute review by Ekokoi Solomon, evaluates the Akwa Ibom State Map Establishment Law 2023. It argues that the AKS map law appears to be inconsistent and out of step with the constitutional provisions on boundary adjustment. This, the paper argues, is in view of the nature of the extant constitutional order, which requires the exercise of legislative power to promote the integrity of the legal/constitutional order.

There is evidently a wealth of good reading, thoughtful analyses and helpful materials in this volume of the journal. In effect, the authors have worked diligently to provide innovative perspectives on the issues covered by their papers, which have sub-national, national and international

concerns. We therefore welcome constructive feedback and suggestions on the issues covered in this edition. If there are any questions, comments or concerns, please do well to contact us at facultyoflaw@uniuyo.edu.ng

With gratitude to members of the Editorial Team and our external reviewers, who volunteered their time and intellect to enhance the quality of the papers selected, I welcome readers to turn the pages of this volume of the journal and embrace the wealth of information and knowledge contained in them.

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Land Acquisition for Energy Infrastructure Development in Nigeria: Legal Challenges and the Way Forward

Olanrewaju Aladeitan and Adebora Adamson***

ABSTRACT

This paper focuses on the loss of proprietary interest especially to a private entity on the basis of overriding public purpose under a supposed liberalised and privatised regime, which raises critical legal issue on the extent to which the legal framework for the acquisition of land for energy infrastructure development impacts on the rights of a landowner and its correlation to the effective performance of the Nigerian Electricity Supply Industry (NESI). The paper notes that while no declaration for the acquisition of land shall be granted without giving to the person having an interest in the land an adequate opportunity to make representation against such a declaration and where a declaration is made, which affects the existing rights of occupancy in respect of the land, the previous holder of the right of occupancy shall be entitled to claim compensation in accordance with the provisions of extant laws. The paper, nevertheless, observes that even though there is an existing legal regime on compensation and resettlement for compulsorily acquired land, the provisions of the legal regime do not appear to be adequate under a private sector driven arrangement, as is currently the case with the Nigerian electricity sector industry. It therefore recommends a legal regime that is fair and balanced for operators/investors in the sector, as well as for other stakeholders.

I. INTRODUCTION

Energy is core to a Nation's economy and is extremely critical to the economic, industrial, technological and social improvement of a country. Electricity utilisation has now become one of the indices for measuring the standard of living of a country both in the developed and developing countries, electricity in all is very vital.¹ A study by the Central Intelligence

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Agency² shows that a total of 77 million people, constituting 42 percent of the total Nigerian population do not have access to electricity. Access in urban areas amounts to 86 percent, while rural areas comprised a mere 41.1 percent, making for a population average access of only 59.3 percent. 80 percent of the total installed capacity of 10.52 million kilowatts is derived from fossil fuels and 19 percent of the total installed capacity comes from hydroelectric plants.³ Perhaps, it is against this grim figures, that the World Bank listed Nigeria among the three countries with the largest electricity deficits in the world⁴ and this may not be unconnected to the deficit of energy infrastructures.

Energy infrastructures are the central nervous system of economies, connecting multiple spaces and institutions of energy capture, conversion, transmission, storage, consumption and waste, and play key roles in constituting the body politic.⁵ Energy infrastructure is a vital component of a country's growth and development, and the large scale and capital-intensive investments such as power generation and transmission, roads, ports, and distribution networks. Numerous countries are experiencing transformational growth in energy infrastructure, yet an extraordinary number of others are doing ineffectively. It is no surprise therefore that, securing reliable, affordable and environmentally sustainable energy supplies is one of the grand challenges of the 21st century. Nigeria has extraordinary energy potential, which if suitably bridled, could completely address issues relating to inadequate admittance to power in the country.⁶

The expansion of electricity warrants the expansion of natural gas pipeline network and electricity transmission grid and the location of more generation stations.⁷ The electricity mix will of course continue to use and expand the use of hydrogenation, renewables and will continue to use some

¹ SB Adeyemo, AO Odukwe, 'Energy Conservation as a Viable Pathway towards Energy Stability' (2008) 3(3) *Journal of Engineering and Applied Sciences* 11.

² 'Africa: Nigeria – The World Fact Book, Central Intelligence Agency (25 June 2019 <[https://www.cia.gov/publocations>geos](https://www.cia.gov/publocations/geos)> accessed 20 June 2021.

³ *ibid.*

⁴ N Popoola, 'Nigeria among Top Three Countries with Electricity Deficits – World Bank' *Punch Newspaper* (Lagos, 8 June 2021) 17 <<https://punchng.com>> accessed 8 June 2021.

⁵ A Goldthau, 'Rethinking the Governance of Energy Infrastructure Scale, Decentralization and Polycentrism' (2014) 40 *Energy Research Social Science* 11.

⁶ Y Oke, 'Beyond Power Sector Reforms: The Need for Decentralized Energy Options (DEOPs) for Electricity Governance in Nigeria' (2012) 18(1) *Nigeria Journal of Contemporary Law* 68.

⁷ World Bank, Sustainable Energy for All (SE4ALL) database from the SE4ALL Global Tracking Framework led jointly by the World Bank, International Energy Agency, and the Energy Sector Management Assistance Program.

liquid fuels. Nevertheless, natural gas and associated gas represent the major fuel for the expansion of generation. Gas-powered electricity generation is the most prominent growth market for the commercial development of the gas market.⁸ The demand for energy consumption has increased and this is driven by a variety of factors, including increasing urbanisation and industrialisation. Considering the fact that the first set of energy infrastructures or facilities were built in 1896 when energy generation began in Nigeria such infrastructures or facilities would have depreciated and would require refurbishing or outright rebuilding or updating and further expansion.

Notwithstanding the existing laws and institutional framework for energy infrastructure development as established by the reform introduced in the energy sector, electricity deficit still persists in Nigeria. The role of law in the promotion of energy infrastructure development and the role that infrastructure plays in directing both energy process and development indicate that there are shortcomings that impede the realisation of energy infrastructure development in Nigeria. Despite power policy initiatives in promoting power sector reforms, efficient electricity supply has not been successful in Nigeria. The main problem against safe and efficient electricity supply in Nigeria is inadequate infrastructure, poor history of corporate governance and inadequate pricing structure to support the economics of power generation, transmission and end-user distribution. The reform in the energy sector, though slow, will gradually yield fruits and with time the country will achieve appreciable development in electricity if, apart from an adequate regulatory framework, there is synergy between the Nigerian government and the private investors in electric power sector.

Land is an integral part of any infrastructure project and therefore energy infrastructure development requires land acquisition and access rights. Energy infrastructure development project encompasses construction of gas processing plant, the laying of pipe from the field to the processing plant, the building of gas processing plant, the laying of transport pipeline from the processing plant to the thermal plant producing electricity, construction of high ways and rail routes along the pipelines. These activities require land and will have adverse effects on property owners such as the displacement of farmers from their farmlands, destruction of buildings and relocation, destruction of social fabric of local

⁸ The Presidency, *National Council of Privatization, National Electric Power Policy* (March 2001).

cultures, key habitants for native biodiversity and natural resources upon which their existence depends. It is a known fact that land is a basic natural resource that supports most human activities and it is from it that most other economic resources are derived. The use of land in energy infrastructure development includes the laying of high voltage transmission lines, transmission towers, substations, etc. By reason of the importance of land, it must therefore be judiciously and efficiently managed sustainably for the use and good of all. Energy infrastructure development provides opportunities for economic growth but such developments pose risks to those with legitimate land rights. Land requirements and land tenures have implications on energy projects utilizing the following energy sources: geothermal, natural gas, hydroelectric, wind and solar.

Energy infrastructure development has negative economic impacts such as reduced resource rights and loss of livelihoods which are felt by the local communities that own, occupy or use the land on which projects are situated. Those with rights to the land can find themselves displaced and impoverished when their land is claimed by the government, acquired through expropriation by the government or lost through negotiation that reflects an imbalance of power between the local people and the project developer. Although local communities or landowners could benefit from energy infrastructure development through leasing arrangements, co investment strategies and/or other benefit-sharing agreements, such arrangements are rare.

The fundamentals of land acquisition for infrastructure development impact on economic growth and as such imperative to the improvement on quality of life. The term infrastructure generally conjures up the notion of physical resource systems made by humans for public consumption.⁹ It refers to the technical structures that support a society, such as roads, water supply, sewers, electrical national grids, telecommunications, and so forth, and can be defined as ‘the physical components of interrelated systems providing commodities and services essential to enable, sustain, or enhance societal living conditions.’¹⁰ Acquisition of land is necessary for energy infrastructure development and may be compulsorily acquired in the interest of public good. The theory of infrastructure-led development argues that investments in infrastructure development contribute to socio-

⁹ BA Garner (ed), *Black’s Law Dictionary* (7th edn, West Group 1999) 784.

¹⁰ JE Fulmer, ‘What in the World is Infrastructure?’ (July/August 2009) *Infrastructure Investor* 30, 32.

economic growth and environmental protection at both local and global levels.¹¹

The linkages between Land acquisition for energy infrastructure development and economic growth are multiple and complex. Not only does infrastructure affect production and consumption directly, it also creates many direct and indirect externalities. The demand for energy and its value creation is essential for infrastructure development. Three key insights emerge from this demand-side, value creation-focused analysis. First, infrastructure resources are fundamental resources that generate value when used as inputs into a wide range of productive processes. Second, the outputs from these processes are often public and nonmarket goods that generate positive externalities that benefit society. Third, managing infrastructure resources in an openly accessible manner may be socially desirable when it facilitates these downstream activities. The theory of Infrastructure-led development brings to bear the acquisition of land for energy infrastructure development.

II. LAWS REGULATING LAND ACQUISITION FOR ENERGY INFRASTRUCTURE DEVELOPMENT

A. The Electric Power Sector Reform Act

Prior to the current reform, the commercialisation and privatisation regime¹² had listed the National Electric Power Authority (NEPA) as one of the state enterprises to be commercialized. The reform introduced in the Nigeria electricity sector now specifically targets privatizing the sector to create a level playing field for profit-oriented commercial ventures in the generation, transmission and distribution of electricity. The Power Sector reform was embarked upon in March 2005 due to inadequate supply of electricity, high demands, and issues with bills. The main goal of the reform is to accomplish full deregulation of the Nigerian Electricity Supply Industry (NESI) in two years after its implementation. The objectives include making electricity generation and supply better and available to the customers, making the sector investor-friendly and dismantling NEPA's monopoly. This was achieved through the passage of Electric Power Sector Reform Act (EPSRA).

The EPSRA establishes NERC as the major regulatory body to provide for the licensing and regulation of the generation, transmission, and

¹¹ P Agenor, 'A Theory of Infrastructure-led Development' (2010) *Journal of Economic Dynamics and Control* 34.

¹² Public Enterprises (Privatization and Commercialization) Act Cap 38 LFN 2004.

distribution of electricity in the power sector. Section 96 of EPSRA empowers NERC to make regulations which in the opinion of NERC are necessary or convenient to be prescribed for carrying out or giving effect to EPSRA. NERC in performing this function has established several policies and regulations to regulate the energy sector. One of such regulations is the Acquisition of Land and Access Rights for Electricity Project Regulation 2012 (Regulation 2012) with the objectives of providing a legal and regulatory framework for the acquisition of land and access rights for electricity projects in Nigeria. Making provisions for the payment of compensation and resettlement of person affected by the acquisition of their land for the establishment of electricity projects and the monitoring and evaluation of project designs of licenses to ensure compliance with environmental standards. The regulation applies to projects related to the generation, transmission and distribution of electricity¹³

B. Acquisition of Land and Access Rights for Electricity Project Regulation 2012

The need for land acquisition and access right informed the passage of Acquisition of Land and Access Rights for Electricity Project Regulation in 2012 (Regulation 2012). Regulation 2012 provides for the general procedure for the acquisition of land and access rights. Under Regulation 2012 a Licensee shall prior to embarking on any electricity project upon any land not owned by it, notify the landowner of its intention to enter upon the land for the purpose of the electricity project and obtain 'free prior informed consent' of the landowner. The Regulation further states that in acquiring any land for the purpose of the electricity project, the Licensee shall comply with the provisions of applicable State or Federal laws.

Before a licensee embarks on or undertakes an electricity project he must enter an agreement in writing with the owner or occupier of the land. However, Regulation 2012 in recognition of the power of the State also emphasized that where voluntary acquisition is not feasible, NERC may as far as practicable exempt a licensee from complying with the provision of the regulation¹⁴ before he embarks or undertakes an electricity project without agreement in writing with the owner or occupier of the land.¹⁵ It is clear therefore that State and Federal laws are major considerations in

¹³ Acquisition of Land and Access Rights for Electricity Projects Regulation 2012, regulation 2.

¹⁴ *ibid*, regulation 3 (3).

¹⁵ *ibid*, regulation 3(2).

energy infrastructure development especially as the Land Use Act vests ownership of land on the Governor of the State.

Regulation 2012 provides that a licensee shall, prior to acquiring land for the purpose of the electricity project, submit a project design to the Commission for evaluation. This is to ensure that any adverse environmental impact that can result in the course of project implementation is reduced or minimized and that Project Affected Persons ('PAPs') are consulted for the purpose of participation in the planning, implementation and monitoring of the acquisition and resettlement. However, where the project cannot be sited anywhere else aside from the land which is the subject of the acquisition and the PAP has withheld or refused to give the licensee free prior informed consent to acquire the land voluntarily and after the NERC has evaluated the application by the licensee, and is convinced that the land is necessary for the project, NERC may make declaration for the acquisition of the land.

A landowner who is aggrieved by the declaration may make representations to NERC restating his refusal to give consent to the acquisition with reasons. The NERC may request for further information or invite and consider submissions from the Commissioner of Lands of the State where the land is situated.¹⁶ NERC shall not make any declaration without considering representations made by the landowner against the declaration, and for this purpose, the NERC may hold such inquiry on the matter as considered necessary.

Regulation 2012 states the eligibility criteria for appraisal and payment of compensation at the time of assessment of a claim to possession by a person of a legal, traditional or customary right in the land recognised under the laws of Nigeria.¹⁷ It is remarkable to note that it also considers person in occupation of having a means of livelihood on the land or assets.¹⁸ There may be multiple layers of rights held by any number of rights holders. A privately-owned parcel of land may be subject to leaseholds, mortgages, rights of way for utilities or transportation, concessions, rights of traditional or other uses, rights to forest products, etc. Ownership of land, trees, buildings and other improvements may all be separately held. Each of these separate interests may represent a significant loss to its holder if the parcel of land is acquired by government and the right is terminated.

¹⁶ *ibid*, regulation 4 (11).

¹⁷ *ibid*, regulation 6.

¹⁸ *ibid*, regulation 6(c).

Compensation and payment are determined by first considering the market value of the land or assets. Prior to acquiring the land, the licensee shall obtain an estimate of the fair market value of the land. It is also the responsibility of the licensee to carry out the enumeration of the assets on the land, including economic trees and crops and assets in conjunction with an appraiser approved by the NERC.¹⁹ When the payment has been made, the licensee will then notify NERC and evidence of payment shall be filed with NERC.

C. The Land Use Act

The acquisition of land is crucial to energy projects and the introduction of the Land Use Act (LUA) which was enacted in 1978 substantially altered the regime of land use and management in Nigeria. LUA vests all lands in Nigeria in the Governor of a State. Although Sections 34 and 36 of LUA preserve pre-existing customary interests in land to an extent as a deemed grant. However, the legal strength or significance of such interests is only accommodated in LUA to a limited degree. Given judicial pronouncements on these provisions, for example, in the celebrated case of *Nkwocha v The Governor of Anambra State*,²⁰ the Supreme Court of Nigeria declared that the vesting of ownership of land in the state governors leaves the individuals with an interest in land, which is a 'right of occupancy.' Notwithstanding this decision, the Supreme Court has subsequently redefined 'right of occupancy' with specificity in *Salami v. Oke* as a form of legally recognisable 'possessory right' in land.²¹

Therefore, LUA remains the reference statute and basis of land use and management in Nigeria including when such lands are required for the purpose of electricity generation, transmission and distribution. To all intent and purposes, LUA retains overall administration for land use and management in the Governor of a State and its provisions remain the reference points in cases where lands are required for public/electricity purposes. The LUA stipulates two different rights of occupancy which are; statutory right of occupancy and customary right of occupancy. Both are of two classifications. The first is statutory right of occupancy given by the state governor and ²² the second is the customary right of occupancy given by the local government²³. In both cases, there exist an actual grant and

¹⁹ *ibid*, regulation 7(3).

²⁰ [1984] SCNLR 634 (Eso JSC).

²¹ [1987] 4 NWLR (Pt 63) 1 (Obaseki, JSC).

²² Land Use Act, s 5(1)(a).

²³ *ibid*, s 6(1)(a).

deemed grant. An actual grant is given by the governor of a state or by a local government, while a deemed grant comes by the operation of law.²⁴

The rights granted under LUA are not absolute as they are revocable. LUA expressly laid down the procedure for a valid revocation and where the revocation is for a public purpose (as against penal revocation under Section 28(5) of LUA, the holder or possessor or the occupier would be compensated for the value of the land for unexhausted improvements under any relevant legislation.

One issue that arises for consideration after a valid revocation of right of occupancy is compensation for the possessor or holder of the right. Compensation is payable under LUA if the revocation is for public purpose or for mining of building materials.²⁵ The laws in Nigeria do not make provision for the adequacy of compensation for land compulsorily acquired for public purpose and resettlement of the victims of such compulsory acquisition and this has most often resulted in litigation which consequently hinders energy infrastructure development. The Constitution of the Federal Republic of Nigeria 1999 provides that every Nigerian citizen shall have the right to acquire and own immovable property anywhere in Nigeria, subject to the provisions of the Constitution.²⁶ The Constitution further provides that no interest in an immovable property shall be acquired or be taken possession of compulsorily without payment of compensation. The Constitution provides:

No movable property or any interest in an immovable property shall be taken compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purpose prescribed by 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 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.²⁷

The above provision of the Constitution does not provide for the adequacy of compensation. The constitutions of other jurisdictions not only provide for adequate compensation but also such compensation must be fair. Other

²⁴ *Savannah Bank (Nig) Ltd. v Ajilo* [1989] 1 NWLR (Pt 97) 254.

²⁵ Land Use Act, s 29(1).

²⁶ Cap C23 LFN 2004 (CFRN 1999 or Constitution) s 43.

²⁷ *ibid*, s 44(1).

jurisdictions also provide in their grundnorm that where the compulsory acquisition of land by the government results in displacement of occupants, the government shall resettle those affected on another suitable land that will ensure economic sustainability and with due regard to their social and cultural value.

Specifically, the Constitution of Ghana²⁸ requires that where the compulsory acquisition of land by the state results in the displacement of occupants, the state shall resettle those affected on another land that will ensure economic sustainability and with due regard to their social and cultural values.²⁹ All these are lacking in the Nigerian laws and these make land acquisition for energy infrastructure development a serious challenge. The legal basis for land acquisition in Nigeria is LUA which provides that all land in Nigeria is vested in the Governor of each state to be held in trust for the use and common benefit of all people. The administration of urban land is directly under the control and management of the Governor, whereas non-urban land is under the control and management of the Local Government authority except in the Federal Capital Territory (FCT), Abuja where all land in the FCT is vested in the Minister of FCT. The Governor or Minister of FCT has the right to grant statutory rights of occupancy to land. Local Government has the right to grant customary rights of occupancy.

Since LUA gives to the State Governor ownership of land comprised in each State, compensation for land acquisition is restricted to structures, installations, and improvement on the land, not the land itself. However, LUA does require the State or Local Government to provide alternative land for affected people who will lose farmland, residential (commercial/industrial) plots. PHCN was carrying out full resettlement programs for hydro-power projects, but not so for transmission lines, substations, and distribution subprojects. Alternative land has not been provided to people who lost land for tower base construction, or who were relocated to clear the right of way. Cash compensation has always been paid on a case-by-case basis, to people who lost buildings, developed plots in order to make way for such projects. Alternatives were not provided except where States Governments chose to re-allocate the plots.

²⁸ Republic of Ghana Constitution 1992 (as amended) art 20(3).

²⁹ WO Larbi, 'Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies' (9 September 2008) <<http://www.fao.org>> accessed 21 January 2023.

Nigeria Energy Infrastructure Project (NEIP) has the following impacts on the population: loss of land, economic trees/crops, fishing and hunting resources and cultural assets (e.g., burial sites, places of worship) in addition to impacts on the natural environment (water and air pollution, loss of habitat, fragmentation of habitats) etc. It was on this note that the defunct PHCN through its Environment, Resettlement and Social Unit (ERSU) established Resettlement Policy Framework (RPF) as a mitigation tool for NEIP with the aim of addressing and mitigating the relocation of population as a result of NEIP, their loss of assets, income, or revenue. RPF lays out the overall policies and procedures for identifying and providing compensation, assistance, or both to people whose assets, income, or standard of living are harmed by electricity project activities.

The EPSRA in providing panacea for the lapses inherent in LUA with respect to compensation and resettlement provides that if a licensee, who has been given a right of occupancy over land ceases to require the land for the purpose of the licensed activity, then the licensee shall offer the land to the previous holder of the right of occupancy for repurchase at an amount equivalent to the amount of compensation paid to the previous holder and if the previous holder declines the offer to repurchase, the licensee may offer the right of occupancy to any other person on such terms and conditions as NERC may direct.³⁰ This can rekindle the hope of a landowner that his land may one day be reverted to him. People, communities and individuals may have one site or others they cherish, Regulation 2012 provides that the Licensee shall comply with State and Federal Laws pertaining to the protection and preservation of sites or objects of archaeological, paleontological or historical interests which are encountered or unearthed in the course of executing an electricity project and in the course of operations.

III. CHALLENGES AND PROSPECTS OF LAND ACQUISITION FOR ENERGY INFRASTRUCTURE DEVELOPMENT IN NIGERIA

A. Revocation of interest in Land for a Private Entity

The Power Sector reform in Nigeria is anchored on private sector-driven growth. The nature of the new electricity sector makes land an indispensable component for governance as effective land administration is crucial to a sustainable electricity regime. Under the new structure, land acquisition by revocation of the right of occupancy for electricity purposes necessarily straps public interest with profit-making objectives of private

³⁰ ESPRA, s 77(11).

electricity companies engaging in the generation, transmission or distribution of electricity.

For the purpose of electricity, a generation licensee, transmission or distribution licenses, or a proposed licensee for generation, transmission and distribution services may apply to NERC in a manner as may be prescribed, for a declaration that the land is required for purposes of generation, transmission or distribution of electricity.³¹ NERC may require more information in connection with an application submitted for this purpose and may invite and consider submissions from the Commissioner of Lands of the state where the land concerned is situated.³² NERC may, subject to further conditions as it may specify, declare that the land identified by the licensee is required for generation, transmission and distribution of electricity, with such modifications to the boundaries as NERC may specify.³³

The NERC shall not make the above declarations until a person having an interest in the land under consideration shall have been given adequate opportunity to make representations against such declaration.³⁴ NERC shall not make a declaration that a piece of land is required for electricity purposes unless, upon the representation made by the licensee or proposed licensee for electricity generation, transmission or distribution of electricity practicability and sustainability of the electricity project is not in doubt.³⁵

B. Notice of Need for Public Purpose

Upon a declaration requiring land for purposes of electricity, the President shall issue a notice in the Official Gazette to the effect that the land is required by the Government of the Federation for the public purpose of the Federation. Revocation of land for 'overriding public interest' may not ordinarily justify revocation of existing rights of occupancy or allocation of same to a business enterprise simply because such entities trade in electricity or related activities. Beyond all doubts, generation, transmission or distribution licensees are business enterprises trading with the ultimate objective of profit maximisation in electricity. They are not charitable enterprises. Thus, when and if it becomes inevitable on grounds of national exigencies, a declaration that land is required for purposes of generation,

³¹ EPSRA, s 77(1).

³² *ibid*, s 77(2).

³³ *ibid*, s 77 (3).

³⁴ *ibid*, s 77 (4).

³⁵ *ibid*, s 77 (5).

transmission or distribution of electricity should be based on payment of fair and adequate compensation. It remains curious whether the allocation of land to a going electricity concern would come within the ambit of public purpose simply because such land is required for electricity purposes.

The EPSRA affords a legal right of action to the extent that any person aggrieved by any decision of NERC made regarding a declaration that a piece of land is required for the purpose of electricity generation, transmission and distribution services may appeal against such decision under section 77(8) in line with the procedure established under EPSRA.³⁶ EPSRA provides that any person aggrieved with any decision of NERC may apply to NERC for review of the decision, order or refusal.³⁷ NERC may, reconsider, vary or rescind its decisions before issuing a final decision, in accordance with such procedures as NERC may establish; provided that such review or reconsideration shall be completed within sixty days of the date it is requested.³⁸

If any question of law arises from an order or decision of NERC, it may, on its own initiative or at the request of any person directly affected by such order, reserve that question for decision of the High Court. Where a question has been reserved, NERC shall state the question in the form of a special case and file it with the Registrar of the High.³⁹ It cannot be in doubt that the final decision of NERC cannot be final in the sense of finality be reason of the provision of the CFRN 1999. The final decision of NERC is subject to appeal to the High Court of a State or the Federal High Court of Nigeria as the case may be.

The reason for this position can be found in the provision of the CFRN 1999 which provides that the judicial powers of the Federation shall be vested in the courts enumerated in the Constitution and such powers extend to all matters between persons, or between governments or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.⁴⁰ This paper, therefore is of the view that it is beyond any scintilla of doubt that the final decision of NERC as regard land acquisition for electricity project can be challenged and ventilated in the court rooms with jurisdictional power to determine the matter by a

³⁶ *ibid*, s 77(8).

³⁷ *ibid*, s 50(1)(i).

³⁸ *ibid*, s 50(2).

³⁹ *ibid*, s 49(1)&(2).

⁴⁰ CFRN 1999 s 6 (1)(b).

party who is aggrieved with the final decision of NERC. The Supreme Court of Nigeria in *APC & ORS v Enugu State Independent Electoral Commission*, recently had the opportunity of reaffirming the jurisdiction of the courts established by the Constitution to intervene in matters which touch on civil rights and obligation of person in Nigeria when it held:

Under section 6(6) (b) of the 1999 Constitution (supra), the judicial powers duly vested in the Courts are far-reaching: 6(6). The judicial powers vested in accordance with the provisions of this Section: (b) shall extend to all matters between persons or between government or authority and to any person in Nigeria and to actions and proceedings relating thereto, for the determination of any question as to civil rights and obligations of that persons. In the *locus classicus*, *Senator Abraham Adesanya v President Of Nigeria* (1981) 2 NCLR 358, this Court, in laying a firm foundation for the jurisprudence *locus standi*, aptly postulated: The section material to the issue is section in 1979 Constitution (which is *impari materia* with section 6(6)(b) of the extant 1999 Constitution). This Sub-section expressed the scope and content of the judicial powers vested by the Constitution in the Courts, within the purview of the Sub-section. Although, the powers appear to be wide, they are limited in scope and content to only matters, actions and proceedings ‘for the determination of any question as to the civil rights and obligation of that person.’ It seems to me that upon the construction of the sub-section, it is only when the civil rights and obligation of the person, who involves the jurisdiction of the Court, are in issue for determination that the judicial power of the Courts may be invoked. Per Bello JSC (as the learned Lord then was) at 385.⁴¹

C. Revocation of Land for Electricity Purpose

One of the most (potentially) controversial issues in EPSRA is the provision that, for the purpose of electricity, a generation licensee, transmission or distribution licenses, or a proposed licensee for generation, transmission and distribution services may apply to NERC in a manner as may be prescribed, for a declaration that the land is required for purposes of generation, transmission or distribution of electricity.⁴² The Commission may require more information in connection with an application submitted for this purpose and may invite and consider submissions from the Commissioner of Lands of the state where the land concerned is situated⁴³ NERC may, subject to further conditions as it may specify, declare that the

⁴¹ (2021) LPELR – 4419 (SC) 67-68, paras A-B (Saulawa JSC).

⁴² *ibid*, s 77(1).

⁴³ *ibid*, s 77(2).

land identified by the licensee is required for the purpose of generation, transmission and distribution of electricity, with such modifications to the boundaries as it may specify.⁴⁴

The NERC shall not make the above declarations until a person having an interest in the land under consideration shall have been given adequate opportunity to make representations against such declaration.⁴⁵ No declaration that a piece of land is required for electricity purposes shall be made unless upon representation made by the licensee or proposed licensee for electricity generation, transmission or distribution of electricity the practicability and/or sustainability of the electricity project is not in doubt.⁴⁶ The exception granted for the purpose of a declaration requiring land for electricity purposes may include a condition that the physical environment is protected, and that there is no greater damage to the streets or interference with traffic that is reasonably necessary. It may also require that funds are available for meeting any liabilities which may arise from the exercise of any rights or power.⁴⁷ The Governor, as custodian of land, shall be bound by a declaration that a piece of land is required for public (electricity) purposes. EPSRA provides that when the President issues a notice requiring the land for public purpose pursuant to section 28(4) of LUA, the Governor of a State shall revoke the existing right of occupancy in respect of the land and grant a certificate of occupancy in favour of the licensee.

The contention here is that revocation of land for overriding public interest' may not ordinarily justify revocation of existing rights of occupancy or allocation of same to a business enterprise simply because such entities trade in electricity or related activities. Beyond all doubts, companies holding either generation, transmission or distribution licenses are business enterprises trading with the ultimate objective of profit maximisation in electricity. They are not charitable enterprises. Thus, when and if it becomes inevitable on grounds of national exigencies, a declaration that the land is required for purposes of generation, transmission or distribution of electricity should be based on payment of compensation equal to the current commercial or market value of the land in question as it exists in respect of the compulsory purchase of land, as argued below Payment of commercially realistic amount in compensation

⁴⁴ *ibid*, s 77(3).

⁴⁵ *ibid*, s 77(4).

⁴⁶ *ibid*, s 77(5).

⁴⁷ *ibid*, s 77(7).

would mitigate apparent social injustice of declaration that a person's right of occupancy would be revoked for going concerns and mercantilists' entities engaging in electricity trading on the ground of 'public need'.

The EPSRA gives generation, transmission and distribution licensees the right of access over lands, building sand streets for discharging their obligations under the licences to the extent and manner prescribed by EPSRA and regulations made pursuant thereto by NERC.⁴⁸ A crucial provision of EPSRA is the right of repurchase of the land after an electricity licensee ceases to require the land for generation, transmission and distribution purposes. This offers a statutory 'right of first refusal'⁴⁹ to the original owner of the land.

D. Public Interest Revocation and Electricity Undertakings

The right of occupancy introduced under LUA is expressly revocable under Section 28 of LUA and indirectly under Section 5. While Section 28 enables the Governor to revoke a right of occupancy for overriding public interest, Section 5 makes it lawful for the Governor to, whether or not in an urban area, grant rights of occupancy to any person for all purposes. The power of revocation is not absolute. According to Umezulike, revocation of right of occupancy is peremptory and automatic in its operation, unless a different date is specified in the notice, it operates to extinguish the right of occupancy directly upon receipt by the holder of notice of revocation signed by a public officer duly authorized in that behalf by the Governor.⁵⁰

Although, Umezulike is of the opinion that the power of revocation is absolute, however, having regard to the fact that revocation must comply the requirements of the law, it is submitted that the statutory power vested in the Governor of a State to revoke a right of occupancy cannot be absolute because of the provisions of Section 28 of LUA. The position of the law is that land ownership is a fundamental right, and any revocation not within the contemplation of the applicable law, subject to the provisions of the constitution, will be null, void and of no effect whatsoever. Thus, beyond procedural issues, any purported revocation of the right of occupancy could be challenged on grounds of the constitution and substantive law.⁵¹

⁴⁸ *ibid*, s 77(10).

⁴⁹ Technically and legally speaking a 'Right of First Refusal' is a contractual right that gives the beneficiary the option to be first consulted, approached or make an offer before a third party.

⁵⁰ IA Umezulike, 'The Econo-Legal Implications of Mortgage of Right of Occupancy: A Hammer or Illusion' (2005) 4 *Enugu Forum Policy Papers* 1.

⁵¹ See, eg, CFRN 1999 s 44 and Land Use Act, s 28.

In general terms, revocation means the cancellation of the rights which an occupier has in the land he occupied while he is still entitled to occupy the same legally or in equity.⁵² The Governor may revoke a right of occupancy under Section 28 of LUA for 'overriding public purpose' or where such land is required for mining purpose or oil pipelines or any other purpose connected therewith. Electricity is not one of the overriding public interests listed under Section 28(2) and (3) of LUA as bases for revocation of statutory or customary rights of occupancy. However, electricity is listed under the interpretation section as a 'public purpose'. Thus, where the purpose of revocation is to meet the need of Local, State or Federal Governments for a public purpose, according to a notable scholar, any of the purposes under Section 51 of LUA as amended is implied.⁵³ The statutory grounds for revocation of the right of occupancy under the governing law are that the land in question is required:

- (a) for exclusive use of the government or for general public use;
- (b) for use by body corporate directly established by law or a body corporate registered under the Companies and Allied Matters Act⁵⁴ in respect of which Government owns shares, stocks or debentures;
- (c) for or in connection with sanitary improvement of any kind;
- (d) for obtaining control over land contiguous to any part or over land the values of which will be enhanced by the construction of any railway, road or other public work or convenience about to be undertaken or provided by the Government;
- (e) for obtaining control over land required for or in connection with development of telecommunications or provision of electricity;
- (f) for obtaining control over land required for or in connection with mining purposes;
- (g) for obtaining control over land required for or in connection with planned urban or rural development or settlement;
- (h) for obtaining control over land required for or in connection with economic, industrial or agricultural development; and
- (i) for educational and other social services.⁵⁵

The notion that the right of occupancy to land may be revoked for purposes of electricity undertakings appears to negate the essence of total

⁵² Land Use Act, s 28.

⁵³ *ibid.*

⁵⁴ Companies and Allied Matter Act, 2020.

⁵⁵ Land Use Act, s 51.

deregulation and commercialisation of electricity in Nigeria.⁵⁶ The central objective of a liberalised electricity regime is commercial in nature.⁵⁷ Although item 51(e) of LUA lists electricity as a ground for revocation of the right of occupancy for an overriding public interest, it is the considered opinion of this work that the old NEPA era is contemplated under the provision of LUA. NEPA regime was based on a federal monopoly in the electric power sector. NEPA served as state bureaucracy, regulator and service provider compared with the reformed sector which anchors on private ownership. Given this reality, item 51 (e) cannot justifiably form a basis for revocation of the right of occupancy for overriding public purpose in the reformed electric power sector of Nigeria. This is because private business motives, as against public interest underlie the current regime of electricity in the country.⁵⁸

By the decision in *Lawson & Ors v Ajibulu*,⁵⁹ it would appear that revocation of the right of occupancy for a private purpose is permissible in law. However, a careful perusal of the decision and factual scenarios surrounding it suggests the contrary, and that the case is an isolated precedent decided based on its peculiar circumstances and facts by the Supreme Court of Nigeria. The decision of the Court, in this case, is to the effect that where a right of occupancy is revoked for a public purpose and the right is subsequently granted to a private company for the fulfilment of the said public purpose on behalf of the State, such cannot be impugned.⁶⁰ The Supreme Court was emphatic that granting the right over acquired land to a private company to carry on public purpose on behalf of the State was legitimate.⁶¹

The logic of the above decision is that the first revocation was for a public purpose, and subsequent re-allocation to a private company in furtherance of public purpose by the State through the private company is not improper. Despite the decision in Ajibulu's case, this paper contends that the basis of initial revocation of a right of occupancy for electricity purposes may be set-aside unless it is proved that the government has or retains equity or a kind of public stakes in the company. The need for government to own shares, equity, debenture or other forms of stakes in respect of body corporate registered under CAMA or law as basis for public

⁵⁶ Public Enterprises (Privatization and Commercialization) Act.

⁵⁷ Long title to EPSRA.

⁵⁸ *ibid*, s 32.

⁵⁹ [1997] 6 NWLR (Pt 507)14.

⁶⁰ *ibid*.

⁶¹ *ibid*.

interest revocation is also emphasized under item 51(b) of LUA above. Where the right of occupancy, therefore, is revoked for allocation to a private electricity company in which no stakes is retained or maintained by the government, such revocation may be successfully challenged under the Constitution⁶² and relevant sections of LUA and other applicable laws.

Although the Constitution provides for compensation and compliance with the enabling law in revocation, it would appear difficult to use 'public purpose' as a basis for revocation of the right of occupancy for private commercial entities in the electric power sector. The 'public purpose' element or component of such revocation will be lost where the company has one hundred percent private stakes or equity regardless of whether or not it generates, transmits or distributes electricity to Nigerians.⁶³

The philosophical basis and purpose of governmental intervention in land is to permit redistribution of land to achieve the most socially desirable and beneficial use such as for housing, health, conservation and other purposes.⁶⁴ This permits the government to revoke the existing interest in land and compulsorily acquire the same for an overall public purpose, subject to payment of compensation to the owners of the acquired land.⁶⁵ While a detailed revocation process is not the focus of this work, it needs to be put in context that, assuming the procedures are complied with and compensation paid to the owners of the acquired land, the basis of such revocation cannot be reasonably justifiable as 'overriding public purpose'. This is because, unlike government-owned NEPA, private companies are intended as direct beneficiaries of such revocation under EPSRA, and no public interest is served since consumers are to pay market value charges by way of tariff for electricity services.

The above argument is informed by the fact that electricity products, unlike petroleum products, are not subsidised unless where direct assistance is given to electricity consumers under the Power Consumer Assistance Fund (PCAF).⁶⁶ Given the foregoing arguments, the ideal model, where land is required for electrification purpose by private electricity concerns is not to confuse 'overriding public purpose' with

⁶² CFRN 1999, s 44.

⁶³ *ibid.*

⁶⁴ OG Amokaye, 'The Land Use Act and Governor's Power to Revoke Interest in Land: A Critique' in IO Smith (ed), *The Land Use Act: Twenty Five Years After* (Folar Prints 2003) 246, 251.

⁶⁵ *ibid.*

⁶⁶ Y Oke, *Essays on Nigerian Electricity Law* (Princeton & Associates Publishing Co, 2016) 20.

'business-oriented objectives'. The right of occupancy should not be revoked for purposes of money-making private electricity companies contrary to what exists under EPSRA.⁶⁷ The best and most equitable model is to deploy the mechanism of 'compulsory purchase' as against unjust deprivation by revocation of the right of occupancy. Compulsory purchase mechanism is now being deployed in some developed countries to strike an equitable balance between needful acquisitions of land that enable parties to negotiate agreeable compensation with the backing of the government as against seemingly questionable revocation. The need for 'compulsory purchase' as against revocation of the right of occupancy for private electricity concerns is largely due to the commercial motive of the current electricity regime in Nigeria.

E. Compulsory Purchase of Land for Electricity Purpose

Compulsory acquisition is part of the powers of the state to expropriate private land for some public purposes.⁶⁸ Taking land compulsorily for public projects, such as roads and airports is accepted as proper use of powers of acquisition. The law has since shifted in some jurisdictions to the extent that power of acquisition may be resisted where a private undertaking is able to profit from the taking of land at a price that disregards the value of the land to the project.⁶⁹

The language of the law has been modified; the phrase 'Revocation of Title' seems derogatory for legally depriving individuals of the right to property for public purpose. The term 'Compulsory Purchase' would seem less derogatory and preferable. It denotes that the land is being bought or sold at negotiated prices for public good. However, like 'revocation of title', the power of compulsory purchase must be statutory.⁷⁰

Revocation of title to land for the purpose of electricity undertakings in Nigeria may need to attune with the trends of compulsory purchase due to the nature of the reformed electricity sector in Nigeria, which is private-

⁶⁷ EPSRA, s 77(9).

⁶⁸ B Denyer-Green, *Compulsory Acquisition and Compensation* (8th edn, EG Books 2005) 15.

⁶⁹ *ibid.*

⁷⁰ See, eg, UK's *Planning and compulsory Purchase Act, 2004*; see also 'Fundamental Review of the Laws and Procedures Relating to Compulsory Purchase and Acquisition' (Report of the Department of the Environment, Transport and Regions 2000); 'Compulsory Purchase and Compensation: Delivering a Fundamental Change' (Report of the Law Commission - Towards a Compulsory Purchase Code: (1) Compensation (Law Com. No. 286) 003 and (2) Procedure (Law Corn. N2004)).

sector driven and commercial or profit-oriented.⁷¹ A fundamental rule in compulsory purchase is that the authority or body requiring land must first obtain legislative power to legalize the compulsory purchase.⁷² Consent is given and compensation paid to landowners and other persons who acquired an interest in the land. Where public interest intertwines with private business motive, as contended in this paper in cases where land is required for the purpose of electricity undertaking, the following procedure should be adopted to ensure fairness:

If a compulsory purchase is analogous to a private purchase, it follows that the acquiring authority will acquire, in the conveyance, whatever title, freehold or leasehold the original owners possessed. However, any encumbrances, such as easement, restrictive covenants or equitable interest, will not prevail against acquiring authority acting under statutory powers; any person who has the benefit of such interest will, if they are interfered with, be entitled to compensation... An acquiring authority, which purchases a reversionary interest, will be bound by leases which affected the previous owners, but are not bound by statutory security of tenure.⁷³

The principle of compulsory purchase, compared to revocation of right of occupancy, enables the acquiring authority to assume the obligation of paying for the full value of the land to be purchased or taken.⁷⁴

The profit motive and nature of the reformed electricity sector of Nigeria, which is structured for active private sector-led growth, would appear to make compulsory purchase a suitable mechanism for compulsory acquisition of land for electricity purposes. Beyond pretensions, private interests intertwine with the supposed public interest in the electricity sector. This makes compulsory purchase a more equitable model given the commercial motive of the re-packaged electricity sector of Nigeria. Compulsory purchase of land where private-commercial motives intermingle with public interest makes for the payment of full, market value for the land purchased or acquired.

In contradistinction with revocation of right of occupancy, where land is required for the purpose of electricity, undertakings either for generation, transmission or distribution; a fair and just end is attained that makes for a win-win situation unlike the acrimonious relationship

⁷¹ *ibid.*

⁷² Oke (n 66) 14.

⁷³ *ibid.*

⁷⁴ Lands Clauses (Consolidated) Act 1845, s 63.

between landowners or resource-bearing communities and oil companies in Nigeria. A prudent electricity company, knowing that a level-playing field is created, must be sufficiently positioned to recoup expenses and cost, including compensation paid for compulsory purchase directly or through the instrumentality of the state, as electricity undertakings are matters purely of commercial or business decisions.

F. Compensation for Loss of Land

Issues surrounding compensation for losses suffered and who-gets-what, when government acquires a piece of land are typically the most complex and controversial aspects of compulsory acquisition. A long-standing principle in many jurisdictions is that compensation should be guided by the objectives of 'equity' and 'equivalence' that is, the adequacy of compensation should be measured against the goal of ensuring that people are neither impoverished nor enriched⁷⁵

A variation on this standard view argues that it may be appropriate in some cases, particularly where a taking is occurring in the context of a development project or program, to aim beyond equivalence to improving the position of those affected wherever possible. The existing laws in Nigeria do not provide for resettlement of the displaced persons or community resulting from energy infrastructure projects. This is the principle articulated in the World Bank Policy on involuntary resettlement:

Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.⁷⁶

G. Assessing the Fair Market Value of Lost Assets

A common legislative approach is to define market value as the amount a willing buyer would pay a willing seller on the open market where some choice exists. There are several reasons this calculation might be difficult to make in a given setting (particularly when it comes to land values as opposed to other non-land assets). In some areas, formal land markets may be non-existent or extremely thin, especially in rural areas.

⁷⁵ S Keith and others, 'Compulsory Acquisition of Land and Compensation' (2009) 10 *FAO Land Tenure Studies* 12.

⁷⁶ World Bank Operational Policy on Involuntary Resettlement (2011) para 2(c) <<https://documents1.worldbank.org>> accessed 25 October 2022.

H. Replacement Cost versus Fair Market Value

International norms such as those promoted by the World Bank, IFC and others refer to ‘replacement cost’ as the appropriate benchmark for the valuation of assets. This is also a term found in a minority of national laws⁷⁷. Where land markets are robust, replacement cost and fair market value should be roughly equivalent. But as noted above, fair market value may be defined at the national level in a way that does not ensure that compensation will be adequate to acquire equivalent assets. In such contexts, a focus on ‘replacement costs’ at least in theory shifts attention usefully to the calculation of what it would really take in a given market to replace lost assets. When it comes to non-land assets such as housing and other improvements, a replacement cost approach also ensures that the depreciation of lost assets are not taken into account in the calculation of compensation, and that transaction costs associated with the purchase of new assets are covered.

I. Land for Land Compensation vis-a vis Cash Compensation

The complexities associated with assigning realistic monetary values to lost assets and displaced rights is symptomatic of the difficulties of applying a standard compulsory acquisition legal framework to social situations in which land is valued differently than it is in functioning market economies. In developed countries, modern takings law is predicated on the assumption that land is a fungible commodity. While this assumption does not always hold true even in such countries, it encounters numerous exceptions in the developing world, particularly in rural areas. Some land rights that are critical to rural livelihoods, such as rights of pasture or access to forest resources, may simply not be susceptible to monetisation and their loss may only be genuinely addressed through the provision of alternatives.

More generally, where markets for land are weak or severely distorted, cash compensation based on fair market value may be insufficient to compensate for the disruption to livelihoods and social cohesion caused by a taking. For example, if communities are seeking a solution where they can remain geographically together, they may prefer to receive land as compensation rather than money. The offer of alternative land as compensation may also avoid problems that can arise when financial

⁷⁷ See, eg, section 10 of Tanzania Village Land Regulations. These regulations are also notable for listing a range of losses beyond land and other asset values that may need to be compensated in a particular situation, including loss of profits and disturbance.

compensation is paid to people who are unused to handling large amounts of money and who may soon after receiving compensation, find themselves with no land to farm, no income stream to support themselves, and no job skills to compete in a non-agricultural economy.⁷⁸

Hence, the World Bank Policy on Involuntary Resettlement stresses the provision of alternative and equivalent land as a preferred solution where livelihoods are land-based. A number of countries have also explicitly included such a concept in their laws⁷⁹, and in other cases, legal frameworks are flexible enough to accommodate the provision of 'in kind' compensation where appropriate. There are, of course, constraints that limit the application of such an approach, particularly in rapidly changing areas where suitable alternative land may be difficult to find in light of population pressures.

J. Appropriate Quantum and Form of Compensation

Market value is the benchmark found in most compulsory acquisition laws when it comes to the calculation of compensation for an acquired asset. Laws and constitutions may also refer more broadly to principles such as 'just' or fair compensation. Yet a key consideration that emerges when one surveys the wide variety of economic, social and cultural settings in which takings occur is that there is no universally appropriate method for calculating loss. To design compensation packages that will genuinely approach the objective of ensuring that people are no worse off than they were before the taking requires careful tailoring to local realities. Thus, even laws from highly developed market economies generally recognise that compensation needs to go beyond the value of land and other assets, and to varying degrees contemplate compensation for losses associated with disturbance, costs related to moving and transition, in some cases harm to business, etc. Yet in many developing country settings, assembling the right compensation package may encounter an even more complex array of variables.

K. Ensuring that Compensation is Provided in a Timely Manner

The timing of the payment of monetary compensation or the provision of other types of compensation (such as land) is of critical importance. In many parts of the world, failure of governments to provide compensation

⁷⁸ Keith and others (n 75).

⁷⁹ See, eg, Tanzania Village Land Regulations (n 77) 25, which presents a list of potential forms of compensation that may be appropriate depending on the circumstances, including land for land.

in a timely fashion has left dispossessed people in limbo, and without even the leverage that comes from still occupying the property that was the subject of the expropriation. This outcome is facilitated by some national laws that vest ownership of land in the government from the moment an expropriation is issued, leaving compensation as a post taking obligation of government only.

A sounder approach found in a number of countries is to require the full provision of compensation as a prerequisite for government taking possession of the land in question, and a showing by the acquiring entity that the funds for compensation have been set aside before the taking is approved by government decision-makers. To prevent the possibility of development being stalled indefinitely by affected people challenging the compensation in court, a number of laws (as well as the World Bank's Involuntary Resettlement Policy) provide for the possibility of establishing an escrow account for the payment of compensation when disputes have been finally adjudicated.⁸⁰

IV. CONCLUSION

Land acquisition and energy infrastructure development are concurrent and the taking of land for public usage is recognised under the law. Land tenure possess serious challenges for investors and can be a disincentive for investors to invest in energy infrastructure development. Proper plan of and re-evaluation of the Nigeria Land Tenure system is necessary. It is never in doubt that land will be required for growth and expansion of the reformed electric power sector in Nigeria, but ESPRA appears overbearing to the extent of providing for compulsory acquisition by revocation of the right of occupancy for private electricity companies in which the Government has no shares, equity or any stakes whatsoever.

Beyond all doubts, generation, transmission or distribution licensees are business enterprises trading with the ultimate objective of profit maximisation in electricity undertakings. This does not take away the fact that transmission of electricity is wholly controlled by the Federal Government of Nigeria because it controls one hundred percent shares in the Transmission Company of Nigeria (TCN). However, with the 2023 new amendment to the 1999 Constitution which now places electricity in the

⁸⁰ Ghana State Land Act No 125 of 1962 s 6 <<https://ghanalegal.com/?id=3&law=63&t=ghana-laws>> accessed 25 October 2021.

concurrent legislative list, the entire arrangement will change to give room to the States to have a say on matter of electricity.

Notwithstanding all this, when and if it becomes inevitable on grounds of national exigencies a declaration that land is required for purposes of generation, transmission or distribution of electricity it should be based on payment of compensation equal to the current commercial or market value of land in question as it exists in respect of the compulsory purchase of land. The acquisition of land for 'public purpose' should be utilised with great care as it affects the perception of the quality of governance in a democratic government. The taking of private property by the government although an act of power should be done in good faith. The procedure for voluntary and compulsory acquisition of land for energy projects should be adhered to, without this there can be allegations of undue exercise of power by the State, which can erode the faith of citizens in government.

Payment of commercially realistic amount in compensation would mitigate apparent social injustice of declaration that a person's right of occupancy would be revoked for going concerns and mercantilist entities engaging in electricity trading on the ground of 'public need'. Displacement of persons as a result of government need for land and compulsory acquisition for an overriding public purpose has come to stay as a feature of modern governance. However, no stone should be left unturned in the bid to foster national peace. There is no doubting the fact that the exercise of public land acquisition illicit feelings of dissatisfaction and frustration on the landowners.

Yet, a successful exercise is achievable with little or no rancour or disquiet if Government can adopt a more sensitive and humane method of service of notice and other processes. The balance between the benefits of the energy infrastructure projects should outweigh the loss of asset/land by the landowners or communities affected by expropriation to bring meaningful justification for the compulsory acquisition of the land. In most cases, revocation of land title enables the payment of meagre compensation compared to the concept of compulsory purchase which enables the beneficiaries to pay actual market value for the land acquired.



ISBN 1119-3573