'Taking' with the Right Hand and Giving with the Left: Part Two
Issues Arising from Government Acquisition of Public Land for Private Investor Use in Nigeria.*

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ABSTRACT
Acquisition of land for public use by government originates from the colonial legacy in Nigeria. Land and economic development are concurrent and the taking of land for public usage has continued under the various indigenous governments. Nigeria's policies on land use and acquisition for development exercised during the military era, were perceived as being corruption prone, leading to allegations of abuse of power. The Land Use Act now ensconced in the 1999 Constitution is the law regulating compulsory acquisition of land in Nigeria. Public purpose has been defined under S. 51 of the Act, which states that public purpose includes, use by both government and public use by a body corporate or concerning the provision of public service such as education and other social services like railways and provision of telecommunications, electricity or mining. It could also be for land required for planned urban or rural development/ settlement.

The Supreme Court in Osho v Foreign Finance Corp [1991] 4 NWLR PART 184, was of the opinion that revocation for public purpose "outside" the ones prescribed in the list even though ostensibly for purposes prescribed in the list is against the policy and intention of the Act. On the other hand the Court of Appeal in Olatunji vs Military Governor, Oyo State (1995 5 NWLR PART 397 categorically held that "although the section opens with the words "public purpose includes" which imply that the definition of public purpose therein may not be exhaustive, other public purposes not stated under Section 51 have to be inferred from the reference to public purposes stated therein. Such other public purposes must be those similar to those stated in the section". Land acquisition policies have changed from acquisition mainly for government use to usage by both the government and the new private sector organizations operating as successor companies to the previous monopolistic State Owned Enterprises (SOE's), under the economic liberalization reform. The objective of state land acquisition in this new dispensation would necessarily be different.

The paper examines the impact of these reforms in terms of legal changes in respect of the land acquisition system and the regulatory framework for both the old and new regime; especially in terms of compensation when land taken for public use is given over to private sector operators.

Introduction

Nigeria is a federation of 36 States with approximately 923,768 square kilometres of land,[1] with Abuja as its capital. In the Interpretations Act 1900, Land is defined as

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'including any building and any other thing attached to the earth or permanently fastened to anything so attached but does not include minerals'. Land in the generality of Nigerian cultures is perceived as a trust held on behalf of future generations and cannot be totally severed from the community.[2] To most traditional Africans it is a valuable communal resource useful for housing, farming, burial of deceased members and other communal uses. Culturally, land allocation was carried out by the kings, chiefs and other approved authorities with the recognition that land is to be shared for the common good.[3]

Modern infrastructural development such as roads, telecommunications and electricity masts, water and oil pipelines and social services such as schools and health facilities, require that they are sited on land. Nowadays, land is a valuable resource which can severed and transferred from one party to another. It is not free and acquiring it requires buying or acquisition via government notice, gazetted regulation or law, which deprives the existing owner or user of the land and transferred to a new preferred user.

Land Rights in Nigeria

The Nigerian Constitution affirms the power of exercise of jurisdiction over all land in Nigeria by demarcating boundaries of all land areas, such as states and local governments in Chapter 1, Part II, Section 8. In addition, section 44(3) of the Constitution specifies that all minerals in, on all land in Nigeria belong to the State. Thus effectively converting all mineral rich land to State property. In addition, the Constitution incorporates the previously enacted Land Use Act (LUA) of 1978,[4] which contains provisions on the ownership and administration of all lands in Nigeria.

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[1] Nigeria Land Area, www.IndexMundi.com

[2] O.A Odiase-Alegimenlen, Consequences of an Unbalanced Political System. A Socio-Legal Perspective to Conflict in the Nigerian State. NJIA, vol 26, No 1and 2. (2001) p.51-53.

[3] id.

[4] Land Use Act (LUA) CAP L5, LFN 2004 incorporated in the Nigerian Constitution 1999 as amended.

This Act reduced the rights of the erstwhile land owner to just the right to occupy and use land subject to the overriding right of the State. Section 1 the LUA distinguishes between urban land and rural land and devolves the right to urban land on the governor who was/is…

> *hold[ing] such land in trust for the people and would henceforth be responsible for allocation of land in all urban areas to individuals resident in the State and to organisations for residential, agricultural, commercial and other purposes while similar power with respect to non-urban areas are conferred on Local Governments.*[5]

This allows the governor and local government Chairmen to devolve the land for use without the problems of multiple negotiations over the same land.[6] The Act infers a legal claim against all other rights to land not given under the Act.[7]

The situation under the LUA at present is that all land is held in trust for Nigerians by state governments.[8] However, any mineral rich land and land abutting on inland waterways belong to the Federal government and potentially viable for appropriation.[9] The primary right of acquisition of land therefore rests within the purview of the state government although the federal government has the power to override the state power over land when the land is mineral rich,[10] or on the shore line.[11] In addition, the Federal Government access to land under the Act is at the behest of the Governor

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[5] Preamble to the Land Use Act.

[6] Various judgments and the opinion of some jurists are however that only state land is vested in the government by virtue of the Act, thus the other interest in land still subsists. Others opinions have stated that the right left to the owner of land after the LUA is that of occupancy. See generally, Salami v Oke (1987) 9-11 SC 43 and Abioye v Yakubu (1991) 5 NWLR pt 190 at 130.

[7] Sections 9, 14 and 29 LUA.

[8] State in capitals refer to the country while state in lower case refer to the 36 administrative units of the country. Nigeria has a three tier administrative structure; in descending order these are; the Federal government at the apex, followed by the 36 states and then the 144 local government units. In addition to this, there is a federal capital territory, Abuja.

[9] See Section 44 of the 1999 Nigerian Constitution as well as the Inland Waterways Act.

[10] The 1999 Nigerian Constitution, Section 44.

[11] Land 100 metres of the 1967 shorelines is vested in the Federal Government of Nigeria. Lands (Title Vesting, etc) Act 1st January 1975. Section 1(1) ousts jurisdiction of the Constitution.

under Section 28(2) (b). The Constitutional provisions are therefore to be read concurrently with this section of the LUA.[12]

Origin of 'Taking' of Land.

Although there are other theories that support taking of private land for a public purpose, the practice is usually attributed to the doctrine of "Eminent Domain" of the sovereign from English common law. This allows State conversion of privately held land to public use as is widely done in infrastructure and public service provision. It has also been utilised to implement a land reform system, whereby land is redistributed from large single holding to other users,[13] or to public or private development use. As Wordsworth Odame Larbi asserts, *Eminent domain* refers to the power possessed by the state over all property within the state, specifically its power to appropriate private property for public use.[14] In the US, the theory of republicanism allowed that the State is the ultimate power and can in exercise of this power engage in acts which are for the benefit of the whole. This right is however in conflict with the modern democratic right of the individual to own property, which is the basis of Capitalism. In the United States (US), before the government exercises Eminent Domain: the property must be taken for public use, and just compensation required. In a federal Eminent Domain case appearing before the US Supreme Court, *City of Cincinnati v. Vester,* [15] the Court noted that "…the question what is a public use is a judicial one." This opened the door to judicial interpretation by individuals seeking a redress of takings of their land by legislative fiat and served as a restraint of legislative power to 'Take' private land.

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[12] The LUA in 28 (1) gives the Governor the right to revoke a right of occupancy for overriding public interest, either for public purposes within the State, *or the requirement of the land by the Government of the Federation for public purposes of the Federation;*The revocation of right of occupancy should be through the issuance of a *notice by or on behalf of the President if such notice declares such land to be required by the Government for public purposes.*

[13] Examples that comes to mind here are Maroko, Surulere, Festac and Satellite town all in Lagos.

[14] Wordsworth Odame Larbi, Ghana; Compulsory Land Acquisition and Compensation in Ghana: Searching for Alternative Policies and Strategies.

[15] 281 U.S. 439, 446 (1930)

Compulsory Taking of Land in Nigeria

Muhammad Bashar Nuhu and A. U. Aliyu, note that "Apart from the frequently emboldened economic importance of land, it remains the fulcrum of life and a symbol of pride and identity to the inhabitants." [16] This attachment of the people to their land under the customary land tenure system is diametrically opposite to the received land law which has devolved land on the State and divorces owners from their land permanently. The customary land system made the government land acquisition process lengthy, constituting a delay to 'public/government' projects. There were issues of identification of real owners as ownership was held in common. Issues of customary ties to ancient landmarks and holy shrines and burial grounds that had symbolic significances to the people also affected land acquisition for industry and productive enterprise. The process for land acquisition and compensation was accordingly strenuous as the different owners and customary interests had to be privy to the consent to transfer title in the land. This usually delayed the implementation of development projects as no definite schedule could be set for the land acquisition process.

This conflict between the people and the State over who owns the land [17] necessitated government to take another approach to gain access to land for development projects. The promulgation of the various Land Acquisition laws[18] and ultimately the Land Use Act (LUA) were touted as a way out.[19] Without these laws, many public infrastructural development projects would have been held up as the customary land

[16] Muhammad Bashar Nuhu and A. U. Aliyu,. Compulsory Acquisition of Communal Land and Compensation Issues: The Case of Minna Metropolis. TS 7E Compulsory Purchase and Compensation and Valuation in Real Estate Development in FIG Working Week 2009, Surveyors Key Role in Accelerated Development. Eilat, Israel, (3-8 May 2009).

[17] Wilson Akpan., Putting Oil First, Some Ethnographic Aspects of Petroleum Related land use Controversies in Nigeria. African Sociological Review. 9 (2) 2005, p. 135.

[18] During the colonial period, the crown enacted laws appropriating land; these are the Crown Lands Ordinance, The Public Lands Acquisition Ordinance and the Minerals Ordinance. See also the Public Lands Acquisition Act No 33 of 1976, which merely updated the colonial ordinance of the same name

[19] This was in effect an extension of the Northern Lands Administration Act to the whole of Nigeria.

holding system was slow and indefinite in application. However, despite the laws, the issue of the taking of land for public usage by government continues to be fraught with problems. The indigenous peoples of Nigeria continue to deal with land issues as if the LUA [20] does not exist. The result is that land acquisition that is not Government acquisition, goes through a double regimen of both the formal government approved process as well as the informal customary law dealings with land.[21] This complicates issues relating to land acquisition, especially as government has neglected to reconcile the provisions of the LUA with the customary law on land. Jonathan Mills Lindsay notes in this regard that;

> Although the compulsory acquisition power is deeply rooted in virtually all legal systems, the establishment of efficient and fair legal and institutional frameworks for exercising this power remains unfinished business in many countries around the world.[22]

This unresolved issue of duality of land holdings is coupled with allegations of abuse of power and corruption in the government acquisition process.[23]

The LUA seems to perceive all activities of government as development oriented and thus as public use.[24] Public purpose has been defined under S. 51 of the Act, which states that public purpose includes, use by both government and public use by a body corporate or concerning the provision of public service such as education and other social services like railways and provision of telecommunications, electricity or mining. It could also be for land required for planned urban or rural development/

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[20] CAP L5, LFN 2004.

[21] Although in the US, the individual states were able to remove or lessen the effect of Kelo, re compulsory acquisition on their land, this is difficult in Nigeria, as the country does not utilise the subsidiarity principle i.e In this case, that the level of government closest to the people in respect of land administration does the acquisition and legal regulation.

[22] Jonathan Mills Lindsay; id.

[23] A case in point is the acquisition of land at Maroko Lagos state by the then military government. This resulted in the mass evacuation of indigent Nigerians, the issue was compounded when the land was reallocated to affluent private persons and land developers. Indeed, the issue is still open after many years as the original owners of the land are still owed compensation.

[24] Section 51 LUA.

settlement. Most infrastructure in businesses such as power generation, transportation, shipping services manufacturing extend over a large areas of land, in addition may be dangerous to other users, requiring exclusivity of use. The result is that they cannot be used for any other traditional usage of land such as living, farming, hunting and so on.

The definition of 'overriding public interest' in the case of the local government and customary right in the rural area is under 28 (3);

> *28 (3) Overriding public interest in the case of a customary right of occupancy means-*
> *(a) the requirement of the land by the Government of the State or by a Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation;*

'Public interest /purpose' is basically interpreted as uses for development purposes. Thus it is an important and generally relevant benefit, which the government perceives as an imperative. It covers acquisition of land for roads, provision of public services as well as government facilities. This is consistent with the assertion of Jonathan Mills Lindsay who expands the 'Eminent Domain' theory when he notes that,[25]

> " Compulsory acquisition is the power of government to acquire private rights in land for a public purpose, without the willing consent of its owner or occupant (Keith, 2008). This power is known by a variety of names depending on a country's legal traditions, including eminent domain, expropriation, takings and compulsory purchase."

It should however be noted here that not all land needed by a public authority is subject to compulsory acquisition.[26]

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[25] Jonathan Mills Lindsay; Compulsory Acquisition of Land and Compensation in Infrastructure Projects. Senior Counsel, Environmental and International Law, Legal Vice-Presidency, World Bank. www.world bank. ppp.

[26] Land may be acquired through direct negotiation with the owners of land. This reflects the legal fiction that the LUA is perceived as. The situation is that only government can acquire land absolutely, but due to communal agitation, there may be issues of inability to utilize the land even when government sanctions the land acquisition. In this case, peace is bought by settling the owners through

Types of 'Taking'

1. 'Taking' could be in the Public Interest, where the government itself is the primary beneficiary, or for Private Interest which is providing for public infrastructure or provision of utilities service. [27]

2. There is also 'Taking' for Private Purpose, which is only beneficial to a private individual and a Privately owned entity is the primary beneficiary.

3. 'Taking' can also be used to acquire land that are for exclusive use as they cannot be utilised for jointly with any other purpose. Development infrastructure/investments like power generation, health services, manufacturing facilities are extensive and in addition may be dangerous to other users, requiring exclusivity of use.[28] They cannot share land with other traditional usage of land such as houses, farming, hunting, fishing and so on.

4. 'Taking' is allowed under the law if the use is that which is equally beneficial to citizens as in the case of private utility providers. This is perceived as economic benefit for the common good, under Section 51 of the LUA. This seems to be congruent with the US case of ***Kelo*** *v. City of New London*[29] which defined public use simply as 'economic development'.

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some other process of compensation. This is the real situation, as the existing quantum of compensation for land acquisition under the LUA is not economically realistic.

[27] In this case, the power of the government and the perceived general use of the land, for the benefit of all, seems to moderate the conflict of interest between the primary owner of the land and the government.

[28] It follows therefore that almost every taking of land in Nigeria can be justified under Section 51 of the LUA.

[29] Kelo

5. 'Taking' may also be for making up the contribution of the government to development based projects whether Greenfield or Brownfield, by providing access to land[30] for the business.[31]

Land Use Implications of Liberalisation of the Nigerian Economy

Foreign investment is an important aspect of development and is recognized as a means of acquisition of capital, technology and managerial expertise lacking in developing States. Reform of the economy sees the entry of new business/investors, which require access to land to set up locally. The reform of the Nigerian economy from a government focused developed and regulated one to a liberalized private investor led allows private participation in the major sectors of the economy is as a result of the both the abrogation of the Nigerian Enterprises Promotion Act, (the erstwhile Indigenisation Decree) and the operation of the advice of the International Financial Institutions (IFI). The economic reform allows up to 100% foreign investment in any part of the Nigerian economy in accordance with the Nigeria Investment Promotion Commission (NIPC) Decree No. 15 of 1995.[32] Liberalization of the Nigerian economy and privatization of SOE's not surprisingly has resulted in the entry of foreign capital and business into the economy, either as direct buyers of government business or as technical or venture capital partners of indigenous buyers of the enterprises. The State owned enterprises (SOE's) became joint private/public owned or wholly privatised under the Privatization Act of 1998.[33] The extensive

[30] The inability of government to contribute financially to the projects due to financial incapacity makes it important that it contributes land to the business.
[31] It should be that this is perceived as government weighing in on the side of the private investor to oppress the hapless owner of the land, thus infringing the basic right to property guaranteed under the Chapter 2, section 16 (2) of the Nigerian Constitution.
[32] CAP N117 LFN (2004).
[33] The Privatisation and Commercialisation Act of 1988, had commenced the privatisation process in Nigeria. The initial process was latter on made more comprehensive in nature under the Privatisation of 1998.

government involvement in the economy meant that the privatization affected every sector of the economy.[34]

The new Brownfield and Greenfield entrants into the business of service provision and development in Nigeria are symbols of a new era of development, which are yet to be fully captured in the laws. In the case of those Brownfield investors that bought into existing businesses, they acquired the whole package, including the land on which the business stands. In the case of Greenfield investors, a major problem is the acquisition of land to conduct their business. However, the end results for both type of investors are similar in the sense that, when government acquired land for use as the sole owner in the case of the old State owned Enterprise (SOE), this was done under the guise of legal provisions and justification for development purposes, i.e, the common good; when government acquires land for development by private investors, it is also under the public purpose doctrine. For the Greenfield investor, government views them as being independent and is reluctant to assume responsibilities in terms of assistance for land acquisition, except when this is written into the operating agreement. This may be the case for the class of investors such as the Concessions[35] and Public/Private Partnership, there is the implication that the partnership thrives on the assistance given by government to the entity. The major difference in the issue for both types of foreign investment is when the land is acquired;

*for the Brownfield land is transferred with the investment, while

*for Greenfield land is acquired on application to government if allowed by the enabling law.

*Alternatively, the private business may decide to negotiate and buy/lease land direct form the owner/occupier.

[34] The State and its Agencies had operated in virtually all aspects of the economy, sometimes as sole operator as in the oil sector and electricity sub-sector or in conjunction with private operators as in the transport and health sectors.

[35] See the Infrastructure Concession Regulatory Commission (Establishment, Etc) Act, 2005.

However, a problem of land converted from government taking to private business usage, is the moral burden and the potential for social conflict that it connotes. In the *Kelo*[36] Case, although the U.S Supreme Court noted that it would not assent to taking of private property just to confer benefit on a particular private party,[37] the focus however should be on what purpose the land is to be utilized for. In Nigeria, the basic test however is whether the purpose for taking the land fits the provisions of the law, vis; Public Purpose in S. 51 of the LUA.

The intention of Public purpose as defined under S. 51 of the Act, includes, use by both government and public use by a body corporate or concerning the provision of public service such as education and other social services like railways and provision of telecommunications, electricity or mining; It could also be for land required for planned urban or rural development/ settlement.

1.5 Land Acquisition under Public Purpose Including use by Private Investors

The process of compulsory acquisition is administered by the state Governor[38] with the help of the Land Use and Allocation Committee.[39] Section 51 of the LUA defines "public purpose" for which land can be acquired as including for;

- **exclusive Government use or general public use**

the implication is that government is allowed as the primary and constitutionally sanctioned owner of land in Nigeria, to appropriate any land it wishes. In addition it can utilise land for public usage. The courts in *Osho* have already defined public use. If government is in a partnership with a private business or the private business is

[36] Susette *Kelo, et al*., Petitioners, v City of New London, Connecticut, et al US Supreme Court No. 04–108.
[37] *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186,
[38] Land that is in the rural areas is managed by the Local Government Chairman, who is assisted in the administration of land in his area by the "the Land Allocation Advisory Committee' (LAAC) consisting of such persons may be determined by the Governor acting after consultation with the Local Government.
[39] This consists of at least two estate surveyors or land officers of not less than five years standing; and a legal practitioner. The Committee advises the Governor on the management of land resettlement of persons affected by the revocation of rights of occupancy on the ground of overriding public interest under this Act; as well as moderating issues on the amount of compensation payable for improvements on land.

operating a business for use of the general public, then government is justified in acquiring land for use of the business.

- **use by body corporate directly established by law or under Companies and Allied Matters Act in which Government owns shares, stock, debenture**

The section also allows the appropriation of land for use by a body corporate which has been directly established by law or registered under the Companies and Allied Matters Act, if the Government owns shares, stock, debenture in it. This refers to virtually all formally registered business in Nigeria as well as joint ownership companies, where government has stocks and shares.

- **in connection with sanitary improvements of any kind**

Another category of approved takings of land, when the taking is in connection with sanitary improvements of any kind. This would include construction of open drains and underground flood systems, establishment of dumpsites and landfills as well as the building of infrastructural capacity to manage waste.

- **for controlling land contiguous to land that would be enhanced by the construction of railway road, or other public work or convenience about to be undertaken by Government**

The next category is land acquired for controlling land contiguous to land that would be enhanced by the construction of railway road, or other public work or convenience about to be undertaken by Government. This is right of way parameters, i.e the thirty (30) feet that is allowed on both sides of electricity infrastructure and pipelines. This is usually acquired simultaneously with the land in which the service infrastructure is sited, or passes through.

- **for controlling land required for development of telecommunications, electricity or mining purposes**

Land can also be acquired by government for controlling land required for development of telecommunications, electricity or mining purposes. Since these are regarded as development oriented projects, land has been traditionally acquired for their siting and usage. The laws regulating these sectors include provisions on land acquisition. An example is Section 77 (9) of the EPSRA which states that;

> *Where the President issues a notice under subsection (6), the Governor shall, in accordance with the provisions of section 28(4) of the Land Use Act, revoke the existing right of occupancy respecting the land and grant a certificate of occupancy in favour of the concerned licensee in respect of the land identified by the Commission in such notice and the grant of such certificate, the right of occupancy over the land shall vest in such licensee to the exclusion of the previous holder of the right of occupancy respecting the land, who shall be entitled to claim compensation in accordance with the provisions of the Land Use Act.*

- **for controlling land required for planned urban or rural development of settlement**

The acquisition of land for planned urban or rural development or settlement is a recognized taking and is in fact the most widely practiced taking of land by government. All states and local government have reserved government land for

either housing or agricultural purposes. Government usually acquires wide expanses of land which is de-reserved when appropriate. Alternatively, especially in heavily urban areas such as Lagos, government issues notices to existing users of land, under the LUA,[40] that the land is required for public use.

- **for controlling land for economic industrial or agricultural development**

As noted previously, government acquired huge tracts of land in the rural areas for controlling land used for economic industrial or agricultural development. However, most private users of land for agricultural purposes, acquired land through direct purchase from the communities and later processed the documents formally. In this case, they are holders of long term lease land and not acquired land. In some cases, government went through the process of de-reservation of already acquired land for use by these private entities on payment of some sum of money; the title is also term leasehold, in these cases.

- **Land can also be taken for education and other social services.**

The government as the major stakeholder in the education sector set up a number of educational institutions at all levels. These require land and land was acquired in vast acreages for their development. The privatization of education changed the process for acquiring land as the private owners of educational and other social services, such as orphanages, resort to buying land for their purpose. In the case of the educational institutions which were privatized, the issue of the status of the land utilized by these bodies has not been addressed. For now, it is as if the government also devolved the land on the institutions when they were privatized.

These are very wide intendments but the word "includes" suggests that the list is not exhaustive. It is therefore clear that despite the liberalized, privatized and deregulated economy, the implication is that in every sector, as allowed by the law, there can be acquisition of land for the use of private business by the State. As an example, a land compulsorily acquired by the government for the purpose of mining purposes or for laying of oil pipelines may be granted to a private individual or private business concerns that has been granted license or lease to explore the mineral oils in the land will exercise their rights over the land by reason of the license or lease, for exploration of mineral resources and laying of oil pipelines for the transportation of the natural resources to their terminals. This illustrates the major criticisms of the Nigerian land acquisition process which include the excessively wide interpretation of

[40] LUA Section 51

public purpose which includes not just activities of public interest but also commercial activities, whether or not government is involved.

Where however, the land is compulsorily acquired by the government for public purposes, but is subsequently granted for the use of a corporate body, with objective to carry out services that are of public purpose in nature, would it be proper to hold the view that the subsequent granting of the land to that company would negate or vitiate the hitherto compulsory acquisition? In *Samuel Ononuju & anor v. Attorney General, Anambra State & ors,* an expanse of land was compulsorily acquired for the Federal Government use but was subsequently granted to the 3rd respondent a private individual converted its use into private purpose. It was the contention of the appellants that "the 3rd respondent to whom the grant of the land was made never used it for public purpose within the definition of section 50 of the Land Use Act, rather he built flats on it part of which he let to bank workers, lecturers in nearby university and some private individuals from which he collected rents" the Court held per Aderemi J.S.C., that "…no one including the government, can deprive a holder or occupier of a parcel of land unless the land is acquired compulsorily in accordance with the provisions of the Land Use Act e.g. for overriding public interest or for public purpose by the Local Government or State Government." Here the court defined the term 'Public Use' in a narrower manner than in the LUA.

It is our view that a land can be compulsorily acquired by the government for public purposes on the ground that mineral resources is concentrated on it, and the land is subsequently granted to a private company to which the government owns no stocks or shares or debentures as contemplated by the Land Use Act, as long as the business of the Company is intended to pursue the public purpose for which the land was

acquired by the government, such acquisition cannot be vitiated by the subsequent grant of the land by the government to a private individual or company. [41]

Where a land is compulsorily acquired by the government, it is expected that such exercise must be within the overriding public interest as contained in subsections (2) and (3) of section 28 of the Land Use Act. While section 51 (1) defines "public purposes" to include (a) for exclusive Government use or for general public use; (b) for use by anybody corporate directly established by law or by anybody corporate registered under the Companies and Allied Matters Act as respect which the Government owns shares, stocks or debentures; (f) for obtaining control over land required for or in connection with mining purposes; and (h) for obtaining control over land required for or in connection with economic, industrial or agricultural development.

It is very clear then that the LUA allows that land acquired by government can be given over to the private investor who is in the business of provision of public service as well as those involved in commercial activities as candidates for government acquired land, or government assisted acquisition of land.

In reality however, it may not be so simple.

First the courts may vitiate such a 'Taking' …The Supreme Court in *Osho v Foreign Finance Corp* [1991] 4 NWLR, PART 184, was of the opinion that revocation for public purpose "outside" the ones prescribed in the list even though ostensibly for purposes prescribed in the list is against the policy and intention of the Act. This view was however moderated by the Court of Appeal in *Olatunji v Military Governor, Oyo State* (1995) 5 NWLR PART 397 where the court was categorical that "although the section opens with the words "public purpose includes" which implies that the

[41] *Berman*, 348 U.S., at 33, 75 S.Ct. 98. The US court rejected the petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue.

definition of public purpose therein may not be exhaustive, other public purposes not stated under Section 51 have to be inferred from the reference to public purposes stated therein. (It has however been argued in respect of the compulsory acquisition of land for public need, that it is the *form* of activity (and not the type of entity acquiring i.e. public authority, private, limited company etc.) that is important; i.e. the *activity* itself and the *purpose* of the acquisition that matter.)[42] The implication being that the concern is not *who* acquires the land. This is because the criterion for public need is satisfied even when it is an institution in the private sector that fulfils the requirement of section 51, which requires the land.[43]

Second, the regulatory requirements for land such as approvals may limit the ability of the preferred user to access the land. For instance, the Nigerian Communications Act,[44] provides that;

> *135. Licensees under this Act may require approvals of the State Government, Local Government or other relevant authority for installation, placing, laying or maintenance of any network facilities on, through, under or across any land and* ***it shall be the responsibility of such licensees to obtain such approvals****.*

Thirdly, Private compulsory purchase of land even when assisted by government has also been addressed differently from acquisition for public purpose by government. In the case of private acquisition of land rights, since the business is for profit, then the acquisition of rights in the land in this case is not at the nominal value. In addition the process of private acquisition is quite rigorous and would feature an Environmental Impact Assessment (EIA) be provided on the intended use of the land in question, under the EIA Act.[45]

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[42] Thomas Kalbro; Private Compulsory Acquisition and the Public Interest Requirement. *Social Strategies*, Vol. 38. 2004.p4,

[43] An example here would be an Export Processing Zone.

[44] Nigerian Communications Commission Act 2003.

[45] Environmental Impact Assessment Act 86, 1992.

The existing situation would however tend to justify Justice O'Connors observation in her dissenting judgment re; *Kelo*, the majority of the judges held that the construction of economic development projects may constitute a public use means. In her minority ruling, she notes that "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public in the process."[46]

The Legal Regimen for Compensation of Land Rights in Nigeria

Ultimately however, the major issue in the land acquisition process even when private business is the end user is compensation. On the issue of payment of compensation it is clear that the new user of the land is to pay. Where however the private business and government are in business together, the terms of payment will be included in their operating agreement. In addition, if the land is devolved to the private business by government there is a reasonable expectation of payment, either immediately, or on terms as determined within the contract. Compensation in Nigeria is strictly a business transaction based on the valuation of the property. Expectedly the quantum of compensation for urban land is more than that for rural land. In other countries issues of hardship to life, loss of goodwill and payment for disturbance are computed in the compensation package. In the United States, owners of land have the option of private negotiation with the preferred user before government attempts to acquire the property compulsorily.[47] In fact, where the object is for private use, negotiations are the means utilized. Presumably the issue of compulsory acquisition, as a means of deeding land to the private business will arise if the land which has already acquired by the government, is part of an urban renewal process, or a regulatory 'Taking' done through legislation. The issue of compensation in Nigeria is complicated by the

[46] Kelo, id.
[47] Kelo, id.

duality of operational laws i.e. formal law and customary laws especially as the latter is not recognized in issues of compensation. As again noted by Jonathan Mills Lindsay, in referring to the Ghanaian situation which shares some similarity with that of Nigeria.,[48]

> "It is not unusual for compulsory acquisition laws to presume a level of documentation of rights that may in fact not exist—once again perhaps a legacy of legal approaches from developed land market economies not being sufficiently adapted to the realities of less developed contexts. Some laws, for example, the eligibility for compensation narrowly to whether the land right is registered in accordance with the country's land registration legislation. This can be problematic where, as is frequently the case, only a fraction of a given country's land has actually been registered. Many countries have modern registration laws on the books, but implementation frequently suffers from financial or other capacity constraints or a lack of political will. And in many cases registration systems may not capture all important secondary rights that are present. In such contexts, too strict application of a "registered-interests-only" rule to compensation would result in many interests going uncompensated or under-compensated." [49]

A problem relating to compensation is that disputes on compensation are referred to the Land Use and Allocation Committee, which are government agents and thus perceive their job to be in favour of the government. This gives rise to many issues as the courts are ousted from intervening on issues of compensation.[50] This is also contrary to Section 44 (1) of the Constitution vis;

> *"No moveable property or any interest in an immovable property shall be taken possession of 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 purposes prescribed by a law that, among other things;*

- *Requires the prompt payment of compensation therefore; and*
- *Gives to any person claiming such compensation a right of access for the determination of his interest in the property and amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria."*

Does Land Acquisition by Government Require Compensation?

[48] Jonathan Mills Lindsay. id.
[49] ibid.
[50] This is presumably to lessen the time spent on the land acquisition process, since land matters in court are lengthy.

It is clear from the foregoing that taking of land from private to public or public to private implies compensation. In addition, to Section 44(1) above, the Constitution in Section 44 (2) (m), stipulates that compensation should be paid for damage to property in the course of:

> *…surveying, digging, laying and installation of cables, erection of poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunications services or other public facilities or public utilities…*[51]

Taking 44(1) and (2) it is clear that payment for compensation is therefore not just statutory as stated in section 29, 33 and 51 of the LUA but also a constitutional right. The quantum of compensation in such cases could be calculated as either a partial or full indemnification, in which case the owner is restored to the position he was before the acquisition. Compensation could also be for the damage suffered, or just for the market value of the property.

In Nigeria, even with the LUA in operation,[52] negotiations over acquisition and compensation are still protracted in nature, making the whole land acquisition process unnecessarily lengthy. Under Section 29, the LUA allows that Compensation may be 'payable on revocation of right of occupancy by Governor in certain cases. Under the LUA, the pre-existing rights left to the occupier are occupation and partial possession, which invoke the right to use. If a right of occupancy for urban/rural land is revoked for pursuant to paragraph (b) of subsection (2) of section 28 of this Act or in paragraph (a) or (c) of subsection (3) of the same section, the holder and the occupier shall be entitled to compensation for the value at the date of revocation of their *unexhausted improvements*.' Thus the quantum of compensation for compulsorily

[51] The Nigerian Constitution, 1999 (as amended) Section 44 (2) (m).
[52] Under the law, the state owns the land. Compensation is for loss of use by the occupier.

acquired land is limited to the value of unexhausted improvements on the land.[53] This is nil value for the land and compensation for the improvements only.[54]

The provisions on compensation are contained in Section 29 of the LUA.

> *29 (4) Compensation under sub-section (1) of this section shall be, as respects*
> *(a) the land for an amount equal to the rent, if any, paid by the occupier during the year in which the right of occupancy is revoked;*
> *(b) building installation or improvement, thereon, for the amount of the replacement cost of the building, installation or improvement, that is to say, such cost as may be assessed on the basis of the prescribed method of assessment as determined by the appropriate officer less any depreciation together with the interest at the bank rate for delayed payment of compensation and in respect of any improvement in the nature of reclamation works being such costs thereof as may be substantiated by documentary evidence and proof to the satisfaction of the appropriate officer*
> *(c) crops on land apart from any building. Installation or improvement thereon for an amount equal to the value as prescribed and determined by the appropriate officer.*
> *(5) Where the land in respect of which a right of occupancy has been revoked forms part of a larger area, the compensation payable shall be computed as in sub section 4 (a) as above, less a proportionate amount calculated in relation to that part of the area not affected by the revocation but of which the portion revoked forms a part and any interest payable shall be assessed and computed in the like manner.*
> *(6) Where there is any building installation or improvement or crops on the land to which subsection (5) applies, then compensation shall be computed as specified hereunder, that is as respects;*
> *(a) such land on the basis specified in that subsection*
> *(b) any building installation or improvement or crops therein (or any combination of two or all of those things) on the basis specified in that subsection and subsection (4) above or so much of those provisions as are applicable and an interest under those provisions shall be computed in like manner.*
> *(7) For the purpose of this section, installation means any mechanical apparatus set up or put in position for use or material set up in or on land or other equipment but excludes any fixtures in or on any building.*
> *(30) Where there arise any disputes as to the amount of compensation calculated in accordance with the provisions of section 29, such dispute shall be referred to the appropriate Land Use Allocation Committee.*

With respect to the compensation, it is an anachronism that Section 47 of the LUA purports to oust the courts jurisdiction from determining any matter relating to the amount or adequacy of compensation.

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[53] See Section 51 LUA.

[54] This limitation is oppressive in the sense that it does not confer true value to the dispossessed land owner and is one of the issues that give rise to problems arising from the 'Taking' of land.

The LUA makes a saving for the previous law thus;

> *(31) The provisions of the Public Lands Acquisition (Miscellaneous provisions) Act of 1976 shall not apply in respect of any land vested in or taken over by the Governor or any local government pursuant to this Act or the right of occupancy to which is revoked under the provisions of this Act, but shall continue to apply in respect of land compulsory acquired before the commencement of this Act.*

All said and done the payer of the Compensation is the user of the land. In the event that the government pays, that is presumably its share in the enterprise as a joint owner or to facilitate the business and will be expected to recoup its investment from the land user.

The Quantum of Compensation

In Nigeria as in other places where land is compulsorily taken this is an issue. In Nigeria, due to the power of the State, the valuation for State acquired land is by government agents. In some cases when the private business is acquiring the land, the valuers are the agents of the buyer. This infers that the valuation is conservative in nature as the sellers are in the ones in charge of the sale. In addition the payment of compensation is not directly channelled to the parties/owners, but through third parties, thereby leaving room for corruption. The quantum of compensation under S.29 (4)(b) of the Act prescribes for the replacement cost of acquired buildings or improvements, less depreciation, together with interest at bank rate for delayed payment. Other key issues relating to compensation include; when the payment of compensation is made; there should be prompt compensation, but this is not the case as the government delays payment. In addition the value of the compensation is not market value and the users of the land are not put in the same or better position than before the acquisition.

The Integrity of the Process;

Where a land is compulsorily acquired for public purposes in accordance with the provisions of the Land Use Act and the same land is thereafter granted to a private individual or a private business concerns for its use, the question is whether such land can still be valid as the purported public purpose has been abandoned by the acquiring authority?[55] This was answered in the case of *Rasaki Olatunji v. The Military Governor of Oyo State & ors.* The Court of Appeal per Salami, J.C.A., held that "if a property is ostensibly acquired for public purpose and it is subsequently discovered that it has directly or indirectly been diverted to serve private need, the acquisition can be vitiated."[56] The issue is affected by the conflict in policy and law that has not been ironed out yet by express legislation or long term policy implementation. In the situation where a land is compulsorily acquired by the government for the purpose of mineral oil exploitation and for the laying of oil pipelines to transport the mineral oils found to be concentrated in the land so acquired, it can be argued that such exercise can be said to be within the purview of paragraph (a) and (h) of section 51 (1) of the Land Use Act. Such land can be said to have been acquired by the government for overriding public purse or use or in connection with economic and industrial development.

Ameliorating Effect of the 'Taking' on the Owner(s).

The LUA prescribes under Section 33 that there can be a *pro-rata* compensation in form of resettlement which can even be of a higher value than the property acquired. If the cost of the resettled accommodation is higher, then the excess can be considered as rent payable by the occupier, vis;

> *(33) (1) Where a right of occupancy in respect of any developed land on which a residential building has been erected is revoked under this act, the governor*

[55] Charles E. Cohen, Eminent Domain After **Kelo** v. City of New London: An Argument for Banning Economic Development Takings, 29 Harv. J.L. & Pub. Pol'y 491, 494 (2006).
[56] *Berman*, 348 U.S., at 33, 75 S.Ct. 98. The US court rejected the petitioners' argument that for takings of this kind the Court should require a "reasonable certainty" that the expected public benefits will actually accrue.

or local government as the case may be may in his or it discretion offer in lieu of compensation payable in accordance with the provisions of this act resettlement in any other place or area by way of a reasonable alternative accommodation (if appropriate in the circumstances).
(2) Where the value of any alternative accommodation as determined by the appropriate officer or the LUAC is higher than the compensation payable under this Act, the parties concerned may by agreement require that the excess in value in relation to the property concerned shall be treated as a loan which the person affected shall refund or pay to the government in the prescribed manner.
(3) Where a person accepts a resettlement pursuant to subsection (1) of this section his rights to compensation shall be deemed to have been duly satisfied and no further compensation shall be payable to such person.

The acquisition process usually causes serious disaffection and even communal problems for the business entities. The issue is complicated by the fact that although the Act provides for prompt compensation on the compulsory acquisition of land, this is not always the case. Compensation is also not perceived as fair by the parties involved. The LUA provides for compensation for the value of "unexhausted improvements".

However the EPSRA makes provision that the land can be offered back to the owner if no longer needed by the State. 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 under subsection (9) and the provisions of the Land Use Act 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 the Commission may direct."[57]

This is similar to the provisions of the NCC Act viz;

136 (2) If a licensee engages in an activity under this Part in relation to any land, the provider shall take all reasonable steps to restore the land to a condition that is similar to its condition before the activity began. (3) All licensees shall, in connection with the installation of their respective network facilities, take all reasonable steps to— (a) act in accordance with good engineering practice ; (b) protect the safety of persons and property ; (c) ensure that the activity interferes as little as practicable with— (i) the operations of a public utility ; (ii) public

[57] EPSRA Section 77(9).

roads and paths ; (iii) the movement of traffic ; and (iv) the use of land ; and (d) protect the environment. (4) All licensees shall take all reasonable efforts to enter into respective agreements with public utilities that make provision for the manner in which the licensees will engage in activities that are— (a) covered by this Part ; and (b) likely to affect the operations of the utility.

Resolving Conflict Arising from Land Acquisition for Public Use and Granting it to Private Use

Inasmuch as such compulsorily acquired land can be granted by the government to any corporate body, it is the law that the government should be seen to hold shares or stocks or debentures in such corporate body for the such acquisition to be said to still maintain the toga of public purposes. Where such lands are granted or leased by the government to private business concerns it has holds no shares, stocks or debentures following the government effort to divest itself from any form of business, would such acquisition still continue to be seen as public purpose? The Supreme Court in the case of *S. O. Adole v. Boniface B. Gwar* held per Ogbuagu, J.S.C.,"… that any revocation for purposes outside the ones prescribed even though ostensibly for purposes prescribed by the Act, is against the policy and intention of the Act and can be declared invalid and null and void by a competent court of law." The attitude of the government to purports to acquire land compulsorily for public purposes but in actual fact, the compulsory acquisition is embarked upon for the sole purpose of granting same to a private business interests played out in the case of *Francis Okafor & ors. V. A. G. Anambra State & anor* where the government of Anambra State purported to compulsorily acquire large parcel of land belonging to the appellants for public purpose which it thereafter allocated a portion of same to a private company Ibeto Industries Limited.

Where a land is compulsorily acquired by the government for the purpose of mineral oils exploitation and for the laying of oil pipelines to transport the mineral oils found

to be concentrated in the land so acquired, it can be argued that such exercise can be said to be within the purview of paragraph (a) and (h) of section 51 (1) of the LUA. Such land can be said to have been acquired by the government for overriding public purse or use or in connection with economic and industrial development. It is common knowledge nowadays that oil fields are leased out by government to private individuals or private business concerns to explore on payment of royalties to the government for such leases or licenses. Presumably the land is not permanently devolved to such users and government must have extracted value for the land within the lease/licence agreement.

Where however, the land is compulsorily acquired by the government for public purposes absolutely but the land is subsequently granted for the use of a corporate body that its objects are to carry out services that of public purpose in nature, would it be proper to hold the view that the subsequent granting of the land to that company would negate or vitiate the hitherto compulsory acquisition? In *Samuel Ononuju & anor v. Attorney General, Anambra State & ors,*. an expanse of land was compulsorily acquired for the Federal Government use but was subsequently granted to the 3rd respondent a private individual converted its use into private purpose. It was the contention of the appellants that "the 3rd respondent to whom the grant of the land was made never used it for public purpose within the definition of section 50 of the Land Use Act, rather he built flats on it part of which he let to bank workers, lecturers in nearby university and some private individuals from which he collected rents" the Court held per Aderemi J.S.C., that "…no one including the government, can deprive a holder or occupier of a parcel of land unless the land is acquired compulsorily in accordance with the provisions of the Land Use Act e.g. for overriding public interest or for public purpose by the Local Government or State Government."

It seems that when land compulsorily acquired by the government for public purposes, and is subsequently granted to a private company to which the government owns no stocks or shares or debentures as contemplated by the Land Use Act, as long as the business of the Company is intended to pursue the public purpose for which the land was acquired by the government, such acquisition cannot be vitiated by the subsequent grant of the land by the government to a private individual or company.

Land acquisition policies have changed from acquisition mainly for government use to usage by both the government and the new private sector organizations operating as successor companies to the previous monopolistic State Owned Enterprises (SOE's), under the economic liberalization reform. For the developing country which has previously operated a government monopoly of infrastructure and service provision, the transition to a wholly private sector or mixed government and private ownership is confusing. The situation is that there is at present no particular policy to address the issue; however, some laws backing the deregulation of particular sectors make provision as to how the issue of land acquisition will be addressed. Land acquisition for these SOE's were, before reform, carried out as compulsory land acquisition for public use under the Land Use Act. Post economic reform, the EPSRA makes provisions for the compulsory acquisition and compensation of land. It in addition imports Section 29 of the LUA on compensation in the EPSRA Section 77(9).[58] In the NCC Act[59] there is provision for the supremacy of the regulations of the State;

> *137 (5) Nothing in this section shall be construed to apply to or to give the Commission jurisdiction with respect to access to any posts, network facilities or right-of-way where a State Authority, local authority or other authority regulates such matters.*

[58] "A generation licensee, transmission licensee and distribution licensee shall be entitled to access rights over lands, buildings and streets for discharging its obligations under its licence to the extent and in the manner prescribed in regulations issued by the Commission."
[59] Nigerian Communications Commission Act No 19 of 2003.

Conclusion

The theory of Eminent Domain arose from the ancient theory of State sovereignty but is in conflict with the newer democratic right to private ownership of land. It has however continued to be accommodated as a necessity, as a consequence of government power, especially in acquiring land for development purposes. Land Acquisition for public use in Nigeria originated from the colonial legacy, and conflicted with the cultural land tenure system. The taking of land for public usage has however continued under succeeding indigenous governments, with the Constitution and the Land Use Act of 1999 putting all lands in the hands of government. The cultural tenure system however still operates at some level of land administration, while government utilises its overall power to acquire land for development under the 'public purpose' provision of the LUA.

In the LUA, the definition of Public purpose under S. 51 of the Act, is wide enough to cover development oriented activities of new Green and Brownfield investors especially in the provision of infrastructure and social services. This is affirmed by the decision of the Nigerian Supreme Court in *Osho V Foreign Finance Corp*. However, the Court of Appeal in *Olatunji Vs Military Governor, Oyo State*[60] limited the wide powers conferred on the government by the LUA and may allow the land owner some respite if government overstretches its powers, especially by acquiring land to transfer to private investors.

Land acquisition policies have changed from acquisition mainly for government use to usage by both the government and the new private sector organizations operating as successor companies to the previous monopolistic State Owned Enterprises (SOE's), under the economic liberalization reform. The objective of state land acquisition in

[60] 1995 5 NWLR Part 397.

this new dispensation would necessarily be different. The paper examined the legal background of these reforms in respect of the land acquisition system and the regulatory framework under the Constitution, LUA and some new sector specific laws. The general observation is that the State continues to have the power to acquisition and devolution in Nigeria, whether such land is to be utilised directly by it or by a private party.

The reform of the nation's economic sector and the new institutions are required to deliver efficient service. To accomplish this they have to develop infrastructural and institutional capability to function optimally in the particular sector in which they operate. They require conflict free land to do this. Government acquisition of land over time has resulted in communal issues and this should be addressed to avoid issues of communal crises over land issues in the new dispensation. Since the privatized enterprises are no longer government owned, sections within their enabling laws which are remnants of the monopoly power of the State over land should be expunged, allowing dual usage of land. In addition, provisions that oust the jurisdiction of the court in the LUA should be amended, and the membership of the Land Use Allocation Committee should be enlarged to include more private citizens and in the rural areas, the community should be involved. These measures would disprove the perception that members are agents of the State and the many complaints of corruption. In the rural areas, including community representation would lessen issues relating to conflicting formal and customary administration of land.

Additionally, there is a distinction between those private entities that buy utilities from government (Brownfield) and are afforded the use of the land facilities, while those coming in directly, (Greenfield) are not afforded that benefit, making for an

uneven playing field. It is advised that Brownfield or Greenfield investors requiring land should endeavour to follow the example of the telecoms sector where the land is sourced directly from the owners, [61] as a basically private land acquisition. In this kind of land acquisition, the process is privately negotiated. In many cases this is done, without severing the full title to the land. As Morris[62] notes, this avoids the owner of the land being totally separated from concurrent (and long term) usage of the land. This is similar to the customary land usage familiar to the people and ensures there is less friction in the land acquisition process. This goodwill also allow the installations to be located within land owned by citizens thereby giving some element of security by providing revenue to the owner of the land thereby reducing friction between the user and the owner.

It is suggested that public acquisition should be utilized only when there is both exclusivity of use and government is directly involved…which should be unlikely in a deregulated economy. The country could also adopt the procedure in other countries in providing land for joint infrastructure corridors as part of the development programmes of the State. This consists of 'Right of way' passages, tunnels and other infrastructure to ensure that multiple municipal services are provided without much dislocation to the use of land, to simplify provisions of services by the relevant institutions. Currently the energy transmission lines and petroleum pipelines right of way are operated separately, but the concept of joint infrastructure service provision should be investigated. It is advised in this regard that the federal and state government liaise to ensure that some multi-use lands are carved out as national corridors for utility usage all over the country. The government could earn monies by

[61] See; Sebastian Morris, Indian Institute of Management, Ahmedabad. p. 6
[62] id.

leasing out sections of the land to private operators use in carrying service and infrastructure facilities.

Democracy means that the government should be accountable to the people, thus there should be less focus on rules that exclude the people and deprive them of their property unnecessarily. It is therefore advised that acquisition of land for 'public purpose' should be done less and with sensitivity so as not to compromise the perception of the quality of governance especially during a democratic government. In addition the issue of official corruption by the government officials who are in charge of these processes should be addressed to ensure efficiency as well as a good perception of the process.[63]

Reforms in respect of the economic sector deregulation also require that the reform of the land administrative system be hastened up. This is to complete the general economic deregulation. This should be done so that the land management aspect does not hold up the other reforms by discouraging the private investors, who are the end users of the system. Finally, the taking of private property by government although an act of power, should be done in good faith. Rules and other 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.

[63] id. p. 8