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COMPULSORY ACQUISITION OF LAND (PRIVATE PROPERTY) IN NIGERIA: PRIORITIZING PUBLIC INTEREST OVER PRIVATE INTEREST

Samuel I Nwatu* & Collins C Ajibo**

Abstract

Compulsory acquisition of land (private property) is permitted under the Nigerian law, but such acquisition must be conducted in accordance with the prescriptions of law. A fundamental criterion in compulsory acquisition is the compliance with the public purpose requirement. Increasingly, state governments in Nigeria have been engaging in massive land grabbing for many reasons that tend to challenge the public purpose requirement. In certain cases, including governments' acquisition for mass housing projects, the resultant beneficiaries are far from qualifying for the ascription of the term 'public' for the purpose of compliance with the public purpose requirement. This casts doubt on the acquiring authority's compliance with the extant law. Using a doctrinal methodology, this paper argues for the prioritization of public interest over private interest. The paper aims to provide a roadmap for ensuring that public interest requirement reigns supreme in any compulsory acquisition in Nigeria.

Keywords: Land, compulsory acquisition, government, public purpose, options

1. Introduction

Compulsory acquisition of land is a crucial development tool employed by governments to ensure that land is available for vital uses that are beneficial to the public.¹ Increasingly, governments are under intense pressure to deliver public services necessitating compulsory acquisition.² Compulsory acquisition of land distinguishes from market-based approach to acquisition of land which is largely determined by arm's length dealings and competitive pricing. Market-based approach to acquisition of land is ill-suited for governmental uses of land for public purpose since it stultifies development programmes. For instance, the landowner might refuse to sell thus rendering nugatory the government development drive for public benefit, or the market price may be too high

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¹ Collins C. Ajibo and others, 'Standard of Review in Indirect Expropriation: Reconciling the Effect Rule with the Doctrine of Intent' (2022) 11 *GJCL* 36; Jonathan Mills Lindsay, 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects' (2012) 1(3) *PPP Insights* 1-2.

² Simon Keith and others, 'Compulsory acquisition of land and compensation' (2008) *Food and Agriculture Organisation Land Tenure Studies* 1.

thereby rendering the public purpose economically otiose. Consequently, compulsory acquisition of land by governments is an important feature of national constitutions and international law.³ Despite the prevalence of this governmental power in many jurisdictions, compulsory acquisition continues to attract controversy both in theory and practice.⁴ There is a convergence of opinions that compulsory acquisition is an area filled with tension.⁵ From the economic actors' perspective, the 'often conflictual and inefficient aspects of the process are seen as a constraint to economic growth' and national development.⁶ Compulsory acquisition of land becomes even more controversial in the face of rapid growth in population, expansion of public services and economic activities. Most compellingly, compulsory acquisition causes tension among landowners who are threatened with dispossession.⁷ While compulsory acquisition of land for development purposes could ultimately bring benefits to the society it can be disruptive to people whose land is acquired.⁸ Specifically, it creates displacement of families from their homes, farmers from their fields, and businesses from their neighbourhoods.⁹ It may interfere with livelihoods, separate families, deprive communities of important religious or cultural sites, and destroy networks of social relations.¹⁰ If compulsory acquisition is poorly undertaken, it may leave people landless and homeless, with no viable way of earning a livelihood, and with the feeling that they have suffered a grave injustice.¹¹ The power of compulsory acquisition can be abused and it is usually the case in the atmosphere of weak institutions.¹² Unfair procedures for the compulsory acquisition of land and inequitable compensation for its loss can reduce land tenure security, increase tension between the government and citizens, and reduce public confidence in the rule of law.¹³ In similar vein, unpredictable and unenforceable procedures create opportunities for rent-seeking and corruption.¹⁴ While good governance is vital to provide a balance between the governments' need to acquire land and the need to protect the rights of people whose land is to be acquired,¹⁵ such good

³ Liz Alden Wily, 'Compulsory Acquisition as a Constitutional Matter: The Case in Africa' (2018) 62 (1) *Journal of African Law* 77.

⁴ Jonathan Mills Lindsay, 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects' (2012) 1(3) *PPP Insights* 1-2.

⁵ Keith and others (n 2) 1.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

governance is generally lacking in Nigeria. This is owing to the existence of weak institutions, the corruptive flatulence of the political class and a parasitic patronage system.

Consequently, this paper seeks to explore the avenues for enthronement of good governance in compulsory land acquisition in Nigeria. It argues that the court should prioritize public interest requirement in compulsory acquisition of land in Nigeria by government. This will afford the court an opportunity to determine the appropriateness of state actions and de jure compliance with the spirit of rule of law. In effect, this paper is not really concerned about the applicable reparation or compensation regime, the standard or adequacy of compensation and valuation method (even though excerpts of these areas are used to illustrate the points made). Rather, the main thrust of the paper hinges on the enthronement of good governance in the procedures for and aftermath of compulsory acquisition of land. The payment of compensation by government tends to obscure or legitimize the lack of transparency and fraudulent leanings that underpin the compulsory acquisition. Hence, this paper seeks to chart a sustainable way of compulsory acquisition that satisfies not only the letters but also the spirit of the law.

The article is divided into seven sections. Apart from the introduction above, section two generally examines compulsory acquisition. Section three evaluates the context and limits of compulsory acquisition. Section four assesses reparation and compensation. Section five considers the criteria for compulsory acquisition. Section six argues for the prioritization of public interest over private interest, while section seven concludes.

2. Compulsory Acquisition

2.1 Classification of Acquisition

Compulsory acquisition is not a new phenomenon in Nigeria, but it is gaining currency because of the frequency and potential for abuses. The term ‘compulsory acquisition’ of land is sometimes referred to as expropriation, compulsory purchase, eminent domain, police power, land acquisition and resumption.¹⁶ Expropriation could be direct, indirect or regulatory.¹⁷ Indirect expropriation also can be classified as creeping and consequential,¹⁸ constructive, de facto, disguised, or acts tantamount to expropriation.¹⁹ Indirect

¹⁶ Ibid.

¹⁷ UNCTAD, ‘Expropriation’ [2012] <http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> accessed 10 January 2022.

¹⁸ A creeping expropriation could be a cumulative series of regulatory acts or omissions over a prolonged period of time, often interspersed with lawful state regulatory actions, none of which can necessarily be identified as the decisive event that deprived the investors of the value of its investment.

¹⁹ Acts tantamount to expropriation or consequential expropriations involve, inter alia, deprivations of the economic value of a foreign investment, based on failures of the host

or regulatory expropriation generally involves actions and omissions of the government that undermine or tend to undermine the value of investment. This could be in the form of actions and omissions or series of actions or omissions, which individually may not completely constitute an expropriatory act, but when viewed as a whole, it would make any reasonable observer to conclude that expropriation has occurred. Equally, indirect expropriation extends to the multiplicity of improper regulatory acts, omissions, and other unjustifiable conducts that undermine or tend to undermine the essential normative framework created and maintained by law, even if the government, in effect, does not evince the intention to expropriate. Indirect expropriation can occur even without the intention of the state to do so.²⁰ Indirect expropriation is a dominant feature of contemporary investment agreements.²¹ Early in time, it was noted that (1) ‘a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention’, and (2) ‘even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated’.²²

A comprehensive scope of the mode of indirect expropriation is hardly predictable. Each case has to be judged based on the circumstances. Nevertheless, evidence indicate that indirect expropriations are characterized by the following cumulative elements: (1) act or omission attributable to the state; (2) interference with property rights or other protected legal interests of foreign investors; and (3) interference that undermines the economic value of investment, even though the owner still retains the legal title or remains in physical possession.²³ Although outright expropriation is more relevant in national context, the significance of indirect expropriation lies in the divergences that underpin lawful and unlawful acquisition and the quantum of compensation applicable.

2.2 Lawfulness and Unlawfulness of Acquisition

The issue of lawfulness or unlawfulness of acts constituting regulatory expropriation is more pronounced in international law than national law.²⁴ Under international law, the rule is that every act of a state’s breach of

state to fulfil its basic obligations to establish and maintain an appropriate legal, regulatory, and administrative framework for foreign investment.

²⁰ JR Higgins, ‘The Taking of Property by the State: Recent Developments in International Law’ (1983) III *Recueil Des Cours* 259, 322.

²¹ See US Model BIT 2012, art 6.

²² GC Christie, ‘What Constitutes a Taking Under International Law’ (1962) 38 *BYBIL* 307, 310 11.

²³ UNCTAD (n 17) 12.

²⁴ See also cases of *S D Myers, Inc v Government of Canada* [2000] UNCITRAL 96 (particularly the separate opinion by Dr Bryan Schwartz on partial award) [69 – 75]; *Azurix Corp v Argentine Republic* [2006] ICSID ARB/01/12 para 311 111.

international obligation engages state responsibility.²⁵ Thus, one school of thought contends that whether regulatory expropriation is lawful or unlawful compensation applies. The implications of this position are threefold: (1) regulatory action of the government that is lawful is compensable; (2) regulatory action of government that is unlawful is compensable; and (3) regulatory action of the government that falls within the borderline of lawfulness and unlawfulness is compensable.²⁶ The only difference herein pertains to the degree of compensation applicable.²⁷ Thus, in a lawful expropriation the degree of compensation is lesser. That is, the quantum of compensation would be lesser, since the government might be somewhat justified to initiate the controverted action. On the other hand, where regulatory expropriation is unlawful the threshold of compensation is higher. The implication would be that the disputed governmental action would be unjustifiable or hardly justifiable. Therefore, the degree of compensation would be higher.

The preceding view is juxtaposed with the argument that only cases of unlawful expropriation attract compensation. Thus, where the regulatory expropriation satisfies the standard of legality (such as public purpose, non-discrimination, and due process), compensation may not be claimable.²⁸ The preceding reflects the position of international law concerning international investment. While indirect expropriation is vital in the sphere of international investment law, outright expropriation or compulsory acquisition is more relevant in the national context involving citizens' real property.

3 Context and Limits of Compulsory Acquisition

3.1 Compulsory acquisition and fair hearing

Compulsory acquisition in Nigeria is primarily regulated by the constitution of the Federal Republic of Nigeria 1999 (as amended). Since the constitution is the grundnorm it supersedes all other laws and regulations. Accordingly, section 44(1) of Nigerian 1999 constitution provides that '[n]o 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'. In other words, the constitution allows compulsory acquisition, but it must

²⁵ WM Reisman and RD Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) 74 *The British Yearbook of International Law* 121.

²⁶ There is no unanimity of position by the tribunals as indicated hereunder. See Collins C Ajibo, *International Investment Law: National, Regional and Global Perspectives* (Nijmegen Netherlands: Wolf Legal Publishers, 2020) chap 11.

²⁷ See *ADC v Hungary* [2006] ICSID ARB/03/16 para 496 93; *Ioannis Kardassopoulos & Ron Fuchs v Republic of Georgia* [2010] ICSID ARB/05/18 & ARB 07/15 para 502 161.

²⁸ JM Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) 29 *Golden Gate University Law Review* 465.

be conducted in accordance with the prescription of the law. Such prescriptions of the law that must be adhered to by the acquiring authority include the prompt payment of compensation; and affording any person claiming such compensation a right of access for the determination of his/her interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in Nigeria.²⁹

The payment of compensation and the right of fair hearing are, therefore, two constitutional prescriptions that must be complied with. The constitution, however, does not define the meaning of 'prompt payment of compensation'. While prompt compensation has an established meaning under international law, it is arguable if it should be construed as such under the national law. In the final analysis, the textual and contextual meaning of the term should be adopted. In that case, 'prompt' is interpreted in accordance with its denotative meaning bearing in mind the context it is used. Accordingly, it means that the acquiring authority must undertake payment (of compensation) timeously and not belatedly. Similarly, the section does not clarify on the quantum and/or adequacy of compensation. This gives the impression that, in principle, the acquiring authority may compensate the landowner with any amount even if a pittance. In reality, the Land Use Act (incorporated into the constitution) stipulates extensive procedures for the payment of compensation that largely address the ambiguity inherent in section 44 of the constitution.³⁰

Apart from the manner of payment of compensation, the landowner is entitled to fair hearing in a court of law or tribunal or body having jurisdiction in that respect to determine his/her interest in the property and the amount of compensation payable.³¹

3.2 Exceptions

The requirement of section 44(1) of 1999 Constitution above does not apply to compulsory acquisition of property to satisfy general law. Compulsory acquisition to satisfy general law includes:

- (i) for the imposition or enforcement of any tax, rate or duty;
- (ii) for the imposition of penalties or forfeiture for breach of any law, whether under civil process or after conviction for an offence;
- (iii) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts;
- (iv) relating to the vesting and administration of property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of

²⁹ CFRN 1999, s44.

³⁰ The provisions of the Land Use Act concerning compensation are addressed hereunder.

³¹ Section 47(2) of the Land Use Act states that '[n]o court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act'.

- unsound mind or deceased persons, and of corporate or unincorporated bodies in the course of being wound-up;
- (v) relating to the execution of judgements or orders of court;
 - (vi) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;
 - (vii) relating to enemy property; 8. relating to trusts and trustees;
 - (viii) relating to limitation of actions;
 - (ix) relating to property vested in bodies corporate directly established by any law in force in Nigeria;
 - (x) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;
 - (xi) providing for the carrying out of work on land for the purpose of soil-conservation; or
 - (xii) subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or to lay, install or erect 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, telecommunication services or other public facilities or public utilities.³²

In these foregoing cases, subsection 1 is inapplicable. Similarly, under the provisions of the Land Use Act, no compensation is payable where a right of occupancy is revoked or compulsorily acquired as a result of the alienation of a right of occupancy, statutory or customary, without the requisite consent of the Governor or the appropriate Local Government Authority; a breach of any of the provisions which a certificate of occupancy deemed to contain by virtue of section 10 of the Act; a breach of any term contained in the certificate of occupancy or in special contract made under section 8 of the Act, or; a refusal or neglect to accept and pay for a certificate which was issued in evidence of a right of occupancy but has been cancelled by the Governor.³³ Also, it is noteworthy that the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.³⁴

³² CFRN 1999, s44(2).

³³ Land Use Act, ss28(2)(a) and (5)(a-c). For discussion see, Akintunde Otubu, 'The Land Use Act and Compulsory Acquisition without Compensation (2016) (4) *Gravitas Review of Business and Property Law* 13.

³⁴ CFRN 1999, s44(3).

4. Reparation and Compensation

4.1 Standard of Compensation

The requirement of payment of compensation mentioned above requires deeper analysis from national and international law. Under international law, the Hull standard appears to hold sway. The Hull standard stipulates that expropriation of property must be accompanied by the payment of prompt, adequate and effective compensation. However, the requirement of Hull standard is controverted by many countries particularly the developing countries. Thus, it is widely accepted under international law that a sovereign state in its exercise of right of eminent domain can expropriate foreign investments but is obliged to pay compensation.³⁵ But the contentious issues had been the standard of compensation for the acquired property, and the space of time within which the sovereign expropriator should pay.³⁶ This controversy remains unresolved to date despite surreptitious incorporation of the Hull standard in many treaties. According to one commentator, '[i]t is nothing short of absurd to pretend that the protestation of the rule of full, prompt and adequate compensation ... in all circumstances is representative of customary international law'.³⁷ The UN Declaration on Permanent Sovereignty of the Peoples over their Natural Resources (PSPNR), Resolution 1803 (XXII) of 1962 Resolution (a consequence of decolonisation) made no mention of payment of 'prompt, adequate and effective' compensation but instead used the expression 'appropriate compensation'. However, it has been argued that 'appropriate compensation' is synonymous with the Hull standard of 'adequate' compensation.³⁸ But if this was the case, the Resolution would have said so in clear terms.³⁹ Nevertheless, the forces of globalisation and significant liberalisation of economies to attract foreign investment and trade have taken the centre stage lately, forcing many countries to accept the Hull standard. Hence, the element of Hull standard is seen in the compensation regime embodied in the Nigerian Investment and Promotion Commission (NIPC) Act.⁴⁰ The 1999 constitution equally uses the term 'prompt' compensation in section 44. The Land Use Act half-heartedly reflects the spirit of Hull standard. There

³⁵ Adeoye Akinsanya, 'International Protection of Direct Foreign Investments in the Third World' (1987) 36 *International and Comparative Law Quarterly* 60.

³⁶ Lee A O'connor, 'International Law of Expropriation of Foreign-Owned Property: The Compensation Requirement and the Role of the Taking State, the Notes and Comments' (1983) 6 *Loy LA Int'l & Comp LJ* 399.

³⁷ Wolfgang Friedmann, 'National Courts and International Legal Order: Projections on the Implication of Sabbatino Case' (1965-1966) 34 *GWLR* 454.

³⁸ Stephen M Schwebel, 'The Story of the Un's Declaration on Permanent Sovereignty over Natural Resources', (1963) 49 *ABAJ* 465 66.

³⁹ Patrick M Norton, 'A Law of the Future or a Law of the Past? Modern Tribunal and International Law of Expropriation' (1991) 85 *AJIL* 478.

⁴⁰ NIPC Act, art 25.

is a requirement of payment of compensation within a reasonable time reflecting prompt compensation.⁴¹

4.2 Restitution, Compensation and Valuation

The International Law Commission Articles on State Responsibility (ILC) follows the standard of compensation epitomised by the Hull standard if restitution is impossible. The ILC position is in line with the ruling earlier in time that ‘reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.⁴² The ruling is no less than *restitutio in integrum*. Hence, Article 35 of ILC provides, *inter alia*, that ‘a state responsible for an internationally wrongful act is under an obligation to make restitution’ provided reversion to such a *status quo ante* is possible, and that it is not disproportionate ‘to the benefit deriving from restitution instead of compensation’.⁴³ Similarly, Article 36 of the ILC Articles provides that in event that *restitutio in integrum* is impossible, compensation should be paid.⁴⁴ The quantum of compensation ought to cover ‘any financially assessable damage including loss of profits’ as long as the claimants could establish it.⁴⁵

The combined effect of the Article 35 and Article 36 of the ILC shows that restitution remains the general standard of reparation in cases of internationally wrongful acts of the state including cases of expropriation. However, where reversion to such a *status quo ante* is impossible, compensation is paid by the delinquent state. The analysis of the Commentaries to article 36 indicates that the prevailing customary international compensation standard depends, by and large, on the circumstances of each case.⁴⁶ Loss of future profits may or may not be awarded depending on the circumstances.

The implication of the foregoing is that Article 35 and Article 36 of the ILC applies to compulsory acquisition of land belonging to foreign enterprises or investors. Hence government would be required to apply restitution. It is only if restitution is impossible that compensation applies. In the context of compulsory acquisition of citizens’ land by government, restitution would arise only if the public purpose requirement fails, otherwise compensation prevails.

Under international law, consequential compensation revolves around three methods of valuation, namely: fair market value, including interest though

⁴¹ Land Use Act, s6(7).

⁴² Chorzow Factory case (*Germany v Poland*) (1928) PCIJ Rep Series A No 13 47.

⁴³ James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) 213.

⁴⁴ See ILC articles on State Responsibility, art 36(1).

⁴⁵ See Ibid art 36(2).

⁴⁶ Crawford (n 43) 218 30.

future profit remains doubtful, book value, or discounted cash flow.⁴⁷ Fair market value reflects the prevailing market rate conducted at arm's length competitive pricing when symmetrical information prevails. Arguably, fair market should reflect the compensation payment in every compulsory acquisition in Nigeria.

5. Criteria for Compulsory Acquisition

The main criteria under international law are that compulsory acquisition must be conducted in accordance with public purpose, non-discrimination, and due process.⁴⁸ Section 44 of the constitution does not explicitly embody these criteria. However, public purpose requirement is part of the Land Use Act,⁴⁹ which in turn is incorporated into the constitution. Similarly, public purpose is required under the Nigerian Investment legislation.⁵⁰ The three main provisions that seem to be abused by (state) government in compulsory acquisition of land are illustrated by section 51(1)(a, b and g) of the Land Use Act, namely: (1) compulsory acquisition for exclusive Government use or for general public use; (2) compulsory acquisition for use by a body corporate directly established by law or by a body corporate registered under the Companies and Allied Matters Act respecting government ownership of shares, stocks or debentures; and (3) compulsory acquisition to obtain control over land required for or in connection with planned urban or rural development or settlement.

5.1 Acquisition for Exclusive Government Use or for General Public Use

Section 51(1) of the Land Use Act stipulates that public purpose includes compulsory acquisition for exclusive Government use or for general public use. The expression 'exclusive Government use' creates opportunity for exploitation. The acquisition for 'general public use' is clear and requires no over-flogging. The expression 'exclusive Government use' should be strictly construed as such. This means that 'exclusive Government use' is not to be linked to private interest. Hence, compulsory acquisition to build or expand government offices and institutions satisfy this requirement. Similarly, compulsory acquisition to provide government facilities used by the general public is apprehended under this requirement. However, compulsory acquisition ostensibly for 'exclusive Government use' but which is really owned by individuals violates this subsection. Thus, the court, when called upon to do so, constantly should inquire into whether the public purpose requirement is satisfied in the compulsory acquisition undertaken by any government. As stated in the case of

⁴⁷ See *Libyan American Oil Company (LIAMCO) v. Government of the Libyan Arab Republic* (1977) 20 ILM 1 [1981] 75 148, 87 172, where award of future profits was refused.

⁴⁸ See World Bank Guidelines on the Treatment of Foreign Direct Investment, section IV (1); Energy Charter, art 13; NAFTA, art 1110.

⁴⁹ See Land Use Act, ss 6(3), 28(2)(b), 28(4), 51.

⁵⁰ NIPC Act, s 25.

Goldmark Nigeria Limited and Others v Ibafor,⁵¹ where the government failed to comply with the laid down procedure for acquisition of property it is the duty of the courts to intervene between the government and the private citizen.

5.2 Acquisition for Body Corporate

There is another underbelly to the situation which tends to embolden incidences of land grabbing by government. Section 51(1) of the Land Use Act notes that public purpose includes compulsory acquisition for use by anybody corporate directly established by law or by anybody corporate registered under the Companies and Allied Matters Act as respects which the government owns shares, stocks or debentures. This provision literally means that once the government ‘owns shares, stocks or debentures’ in a body corporate involved in compulsory land acquisition the public purpose criterion is satisfied. The implication of the preceding is that the courts would be disinclined to nullify such a compulsory acquisition. Apparently, this could be abused in the absence of good governance and in a jurisdiction with prevalent violations of rule of law like Nigeria. Good governance and adherence to the rule of law are crucial to effective and fair compulsory acquisition.⁵² Consequently, the courts should play a more active role in mounting judicial scrutiny to determine the probative value of competing public and private interests.

Specifically, the court should scrutinize the government ownership of ‘shares, stocks or debentures’ in a body corporate involved in compulsory land acquisition. In this context, the categorization of government should be classified into two forms for the purpose of liability: government as a fictional entity and government as composition of individuals. The ownership of securities by the former means that government’s ownership is in continuity. That is, even if the incumbent leaves office the ownership of the securities continues to exist under the management of the successive government. This means that ownership does not reside with individuals constituted in the government, but the fictional entity known as the government. This form of ownership satisfies the tenet of public purpose. Arguably, this should be the interpretation that should hold sway. By contrast, if the ownership of securities resides with individuals and/or corporate bodies owned by individuals constituted in the government then this violates the public purpose requirement. That is, if the individuals constituted in the government can transmit the ownership based on their discretion and equally vacate office with their ownership it would be antithetical to public purpose criterion envisaged by the law. This is without prejudice to individuals in the government holding the securities on trust for the benefit of the generality of the people.

A more intractable scenario, however, is where the quantum of shares owned by government can be said to constitute a charade to disguise the true intention behind the compulsory acquisition. For instance, where government

⁵¹ (2012) LPELR 9349(SC) 23.

⁵² Keith and others (n 2) 1.

owns a paltry two per centum of shares in a company the ownership structure of which suggests a desperate attempt by political actors merely to meet the statutory requirement of public purpose, such acquisition should attract the searchlight of the courts and be struck down as being in violation of the land rights of the affected citizens. The possibility of this scenario is made real because the definition of public purpose in section 51 of the Land Use Act does not stipulate the quantum of shares or debentures which the government should own in the company. In the absence of some form of interstitial legislation or activism by the courts, this loophole would constitute a veritable joker in the hands of an aberrant Governor.

5.3 Acquisition for Urban or Rural Development or Settlement

Section 51(1)(g) of the Land Use Act, as pointed out, allows compulsory acquisition to obtain control over land required for or in connection with planned urban or rural development or settlement. As a matter of fact, there are numerous development and settlement projects that come under this subsection. However, the most compelling one is the state governors' acquisition of land for housing project. There would be no problem if the housing projects are meant for all, both the rich and the poor. However, extensive land grabbing for housing projects by various state governors in Nigeria are not always meant to build houses for all. Rather, the housing projects are meant to benefit their friends and cronies, as well as to satisfy private interests. Certainly, extensive land grabbing to provide housing for the rich few does not satisfy the public purpose criterion. In the case of *Goldmark Nigeria Limited and Others v Ibafon*,⁵³ the court held that compulsory acquisition must be for bona fide public purpose. The court acknowledged the convergent of opinions that for a particular purpose to qualify as public purpose or public interest it must not be vague and the way it benefits the public at large must be capable of proof. The court noted that the test is whether or not the purpose is meant to benefit the public and not just to aid the commercial transaction of a company or a group of people for their own selfish or financial purposes.⁵⁴ Indeed, compulsory acquisitions to satisfy the interest of few beneficiaries that are supporting the incumbent government contradict the legal conception of the public for the purpose of public purpose requirement.

5.4 Prioritisation of Public Interest over Private Interest

It is important to emphasise that the Nigerian courts would be unlikely to intervene where an acquiring authority complies strictly with the law on the revocation of the right of occupancy and the compulsory acquisition of land.⁵⁵

⁵³ (2012) LPELR 9349(SC).

⁵⁴ (2012) LPELR 9349(SC); *Alhaji Bello v The Diocesan Synod of Lagos & Ors* [1960] WNWL 166.

⁵⁵ Oladipo O Sholanke, 'Three Supreme Court Cases on Compulsory Acquisition of Land in Nigeria' (2014) 58 (2) *Journal of African Law* 266, 270.

However, the court will be favourably disposed to intervene where the reason for the revocation of right occupancy was not covered by the enabling law,⁵⁶ or where the purpose of acquisition was not stated in the notice of revocation.⁵⁷ Similarly, the court would likely inquire if the acquisition is simply a case of the acquiring authority dispossessing one party of his/her property only to give it to another party.⁵⁸ The court might inquire if it is a case of acquiring the property for no reason or for a reason that has failed.⁵⁹ Similar disposition of the court might obtain in a case of revoking the right of occupancy in order to aid the commercial transaction of a company or a group of people for their financial purposes.⁶⁰

The court should not hesitate to enquire into the public interest nature of compulsory acquisition of land by government. Specifically, the categories of occurrences apprehended by the definition of public purpose under section 51 of Land Use Act require robust judicial safeguarding and shepherding. The mere exercise of the power of revocation for public purposes as embedded in section 51 of Land Use Act by a government should not automatically emasculate judicial scrutiny and rulings. Nevertheless, the aggrieved party must frame his reliefs properly otherwise it would fail. In the case of *Alhaji Tsoho Dan Amale v Sokoto Local Government and Others (Amale)*,⁶¹ the appellant's claim (concerning compulsorily acquisition of movable and immovable property by the government) centred on enforcement of fundamental human rights under Chapter IV. The Supreme Court ruled that the claim of the appellant as disclosed in his suit and the affidavit in support did not relate to one breaching his fundamental right. Rather, it was a claim for declaration of title to his statutory right of occupancy or for compensation for unexhausted development on the land which should not be brought under the Fundamental Rights (Enforcement Procedure) Rules.⁶² Consequently, the appellant's suit was declared incompetent as the main claims have nothing to do with breach or threatened breach of the right to fair hearing.⁶³

The aggrieved party ought to frame the matter within appropriate headings. This is particularly the case where compulsory acquisition violates good governance. Accordingly, a number of suggestions are presented to guide the landowners and the courts in such circumstances.

⁵⁶ *Dantsoho v Mohammed* [2003] 6 NWLR (Pt 817) 457 (SC).

⁵⁷ *Obikoya v Governor of Lagos State* [1987] 1 NWLR pt 50 385 (CA).

⁵⁸ *Ibrahim v Mohammed* [2003] 6 NWLR (Pt 817) 615 (SC).

⁵⁹ *Obikoya v Governor of Lagos State* [1987] 1 NWLR (Pt 50) 385 (CA).

⁶⁰ *Ereku v Military Governor Mid-Western State of Nigeria and Others* [1974] 10 42 (SC).

⁶¹ *Alhaji Tsoho Dan Amale v Sokoto Local Government and Others (Amale)* (2012) SC290/2001 (Unreported).

⁶² *Ibid.*

⁶³ *Ibid.*

First, where a land compulsorily acquired is used for a purpose that creates doubt about its compliance with public purpose (e.g., compulsory acquisition for political elite housing) the landowners should proceed to court to challenge the action of the government. In this context, the court has a duty to inquire into whether the compulsory acquisition by government is a mere smokescreen to provide housing or land space for family members, cronies and affiliated group. Where the governmental action lacks public interest character and constitutes a mere covert ploy to confiscate land, the court should justifiably intervene at the suit of the landowner. The concern has been raised as to what happens if, for instance, a right of occupancy over a plot of land only in a high-density area is revoked for mining purposes (eg oil, zinc, limestone, etc), and it is proved by an expert that there is no such mineral in the land, or a right of occupancy over a plot of land is revoked to build a university, hospital or stadium which never materialized?⁶⁴ Arguably, the acts that constitute public purpose should be able to satisfy public interest. Hence, compulsory acquisition of land by government on the ground of public purpose should be able to satisfy public interest. If the acquisition is undertaken on the ground of public purpose but applied to satisfy private interest the public purpose criterion is defeated which nullifies the acquisition, remedied only if applied for public purpose.

Secondly, the court should examine the nature of government's interest *ex ante* in the compulsory acquisition and the beneficiaries of the acquisition *ex post*. The overriding consideration of the court should be, is the acquisition meant to benefit the universality of the population irrespective of class, status, and affiliation? Or does the acquisition benefit a private few? If the former is the case in the sense that even the poor, the opposition and the plurality of the population can benefit then the public purpose requirement is met. By contrast, if the latter holds sway, then the court should be able to hold that a private few are not equal in effect to the public. In that respect, such compulsory acquisition by government is a nullity.

Thirdly, the landowners should not be afraid to approach the court for interpretation and potentially protection in the event of arms-twisting by the government through coercion and/or compensation.⁶⁵ It is understood that covert carrot and stick approach is applied by the government to arm-twist the landowners to accept the government proposal to cede with their lands even if the public purpose requirement is not met by the government. Nevertheless, it is the obligation of landowners to preserve and protect their heritage so long as the public purpose requirement espoused by the government is a sham. Compulsory acquisition of private property for a purpose other than that prescribed by law, that is not duly notified to the landowner and that does not offer the landowner

⁶⁴ Samuel I Nwatu, 'The Right to a Fair Hearing under the Land Use Act' (2000-2001) 8 *Nigerian Juridical Review* 196, 215.

⁶⁵ *Ohochukwu v Attorney General of Rivers State & Others* (2012) SC207/2004 (Unreported).

appropriate compensation, ought to fail.⁶⁶ Arguably, the provisions of compulsory acquisition ought to be construed by the court strictly against the acquiring authority and sympathetically in favour of the complainant concerning any irregularity covered by the statute.⁶⁷

6. Conclusion

Compulsory acquisition of land is an emerging concern in Nigeria. The situation is aggravated by lack of good governance and prevalent weak institutions. Compulsory acquisition of land distinguishes from market-based approach to acquisition of land which is largely determined by arm's length dealings and competitive pricing. While good governance is vital to provide a balance between the governments' need to acquire land and the need to protect the rights of people whose land is to be acquired, such good governance is generally lacking in Nigeria. Consequently, recommendations are provided to enhance transparency and adherence to rules of law in compulsory acquisition of land in Nigeria. First, where a land compulsorily acquired is used for a purpose that creates doubt about its compliance with public purpose the landowners should proceed to court to challenge the action of the government. Secondly, the court should examine the nature of government's interest *ex ante* in the compulsory acquisition and the beneficiaries of the acquisition *ex post* in order to apportion liability. Thirdly, the landowners should approach the court for interpretation in the event of arms-twisting by the government through coercion. Arguably, in the event of ambiguity the provisions of compulsory acquisition should be construed by the court strictly against the acquiring authority and in favour of the complainant.

⁶⁶ Sholanke (n 55) 272.

⁶⁷ *CSS Bookshops Ltd v RTMCRS* [2006] 11 NWLR (Pt 992) 530 (SC); *Peenock Investments Ltd v Hotel Presidential Ltd* [1983] 4 NCLR 122; *Alhaji Bello v Diocesan Synod of Lagos* [1973] 1 All NLR (Pt 1) 247; *Nigerian Telecommunications Ltd v Chief Ogunbiyi* [1992] 7 NWLR (Pt 255) 543; *Osho v Foreign Finance Corporation* [1991] 4 NWLR (Pt 184) 157.