

**Justifying the Requirement of Consent under the Land Use Act: A Historical and Equitable Perspective\***

**Abstract**

*In Nigeria, there are several laws that regulate land tenure, but the Land Use Act of 1978 is the principal legislation that governs the use and administration of land. Since its promulgation on March 29<sup>th</sup> 1978, it has generated a lot of controversies both in juristic and academic circles, more so, as it brought about many innovations in the use and enjoyment of land. One of the controversial provisions of the Land Use Act has to do with the requirement for the Governor's Consent first had and obtained before the alienation of interests in land. Majority of persons have argued that the said provision constitutes a clog in the wheel of commercial transactions and economic development. It has to be presumed that the framers of the Act, while making the Act, had the benefit of the country as a corporate entity and the good of the citizens as the constituents of the corporate entity at heart. This, at least, may be inferred from the language of the Preamble to the Act. In the light of this presumption, this work undertook a critical examination of the consent policy from a historical and equitable perspective. The work found that the policy is predicated on the need for the Governor to be in control of the land which has been vested in him by virtue of section 1 of the Land Use Act and has its origin from the requirement to obtain the consent of the family head before alienation in communal land holding. The work also found that the consent provision is not the problem but the implementation of same. In response, the study proposes an improvement of the implementation regime.*

**Key Words:** Land Use Act, Consent, Governor, Nigeria, Right, Requirement

**1. Introduction**

The promulgation of the Land Use Act was borne out of the necessity to ensure that land as a veritable tool for national development is put to an optimal and judicious use. More specifically, the Land Use Act was promulgated to harmonize the land tenure system in the country and address the problem of land speculation as well as the difficulty in obtaining land for business and developmental purposes.<sup>1</sup> It seems that it is this need that appears to have given rise to the provision of Section 1 of the Land Use Act; the exact purport of which has been a subject of raging controversy among scholars and jurists.<sup>2</sup>

While some persons have argued that the purport of the provision of Section 1 of the Act was to signal the death knell of private property rights because the provision nationalizes all land in the country<sup>3</sup> by vesting the ownership of same in the State Government,<sup>4</sup> others believe, on the contrary, that the provision neither expropriates nor extinguishes individual rights in land, the implication being that private ownership of land survives the Act. It is however, generally agreed by all that upon the commencement of the Act, individuals are no more capable of

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<sup>1</sup> A Nnamani, 'The Land Use Act; 11 Years After' (1989) *GRBPL*, 31.

<sup>2</sup> S A Oretuyi, "Public Take Over of Land - Federal and State Government Rights Over Land - The conflict" in U. Abugu, *Principles of the Land Use Act*, (Kaduna, Joyce Graphic Printer and Publishers, 2008) p. 14.

<sup>3</sup> This is of course with the exception of land vested in the Federal Government and its agencies.

<sup>4</sup> H A Amankwa, *The Legal Regime of Land in West Africa: Ghana and Nigeria* (Hobart, Tasmania: Pacific Law Press, 1989) p. 120.

having absolute ownership of land or exercising unrestricted rights thereon as the radical title is now vested in the Governor of each State.<sup>5</sup>

One of the major incidents of the naturalization policy introduced under the Land Use Act, which has further been a subject of raging controversy, is the need for Governor's consent being sought and obtained prior to the alienation of any interest in land. The relevance of this policy to the overall administration and implementation of the provisions of the Land Use Act can never be over emphasized. This is primarily because the ease with which the various strata of government access land for developmental purposes is predominantly dependent on the level of control which they exercise over such land and the authority to grant the requisite consent enables them to retain this control.

On the other hand, the inclination of individuals to carry out developmental activities or investments on land depends on the level of security of interest which they perceive exists over such land; especially as it relates to their right to use the land as a collateral for credit facilities in terms of mortgage or through outright sales.

## **2. Examining the Provisions of the Land Use Act as to Consent Requirements**

Consent simply means to give assent or approval<sup>6</sup> or *a voluntary agreement to another's proposition*. The Black's Law Dictionary defines consent as 'a voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person; legally effective assent.'<sup>7</sup>

For clarity of thought and argument, we shall reproduce the various provisions of the Land Use Act relating to the consent requirement thus:

21. except with requisite consent or approval it shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever—

(a) without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable Sheriffs and Civil Process Law; or

(b) in other cases without the approval of the appropriate local government.

22 (1) It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained: Provided that the consent of the Governor—

(a) shall not be required to the creation of a legal mortgage over a statutory right of occupancy in favour of a person in whose favour an equitable mortgage over the right of occupancy has already been created with the consent of the Governor;

(b) shall not be required to the reconveyance or release by a mortgagee to a holder or occupier of a statutory right of occupancy which that holder or

<sup>5</sup> *Nnadi v Okoro* [1998] 1 NWLR (Pt. 535) 573; *Adeniyi v Oroja* [1992] 4 NWLR (Pt. 235) 322; N Tobi, 'The Land Use Act and Judicial Activism' (2003) Vol. 23 *JPPL*, 6; RW James, *Nigerian Land Use Act; Policy and Principles* (Ife: University of Ife Press, 1987) p. 33, O Adigun, *Cases and Texts on Equality, Trusts and the Administration of Estates* (Abeokuta, Ayo Sodimu Publishers Ltd, 1987) p.265.

<sup>6</sup> <https://www.merriam-webster.com/dictionary/consent>, accessed on 15 August, 2022.

<sup>7</sup> B A Garner (ed), *Black's Law Dictionary* 10<sup>th</sup>edn (St. Pauls-Minnesota: Thomson West, 2014).

occupier has mortgaged to that mortgagee with the consent of the Governor; (c) to the renewal of a sub-lease shall not be presumed by reason only of his having consented to the grant of a sub-lease containing an option to renew the same.

(2) The Governor when giving his consent to an assignment, mortgage or sub-lease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sub-lease and the holder shall when so required deliver the said instrument to the Governor in order that the consent given by the Governor under subsection (1) of this section may be signified by endorsement thereon.

26. Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.

The judicial interpretation of the foregoing provisions of the Act has burdened Nigerian judges.<sup>8</sup> The consent provisions apply to both express & deemed grant.<sup>9</sup> It must be observed in the first instance that the consent provision does not prohibit alienation of a right of occupancy if such is consistent with the principles of the Act.<sup>10</sup> Thus the consent provision is not an impediment but a mere administrative hurdle.<sup>11</sup> The only person who must not dispose of his interest under any circumstance is a holder of customary right of occupancy deemed granted by the governor by virtue of Section 36 (5). In his case, there is an absolute restriction.<sup>12</sup> This has been described as legislative fiction or at best a legislative misadventure.<sup>13</sup>

Since the decision in *Savannah Bank v Ajilo*,<sup>14</sup> there have been endless controversies over the consent provisions of the Act; especially the apparent inelegance of its drafting and consequent hardship caused by its interpretation on its, usually helpless, victims.<sup>15</sup> On this controversy, I. O. Smith has opined that judicial opinion over the years is that a transferor whose duty it is to seek and obtain Governor's consent will not be allowed to use the statute as an engine of fraud by raising a plea of lack of consent to nullify a legitimate transaction; as any such plea is considered reprehensible and particularly so when consideration has passed. The learned author went further to submit that 'on the issue of governors consent, the case of *Savannah Bank v Ajilo* only stands as an authority for the proposition that governor's consent is required for all transfer permitted by the Act whether of actual grant or deemed grant and no more';<sup>16</sup> It has also been argued that on a strict interpretation of the Act, the consent provision would apply to

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<sup>8</sup> E Chianu, *Law of Sale of land* (Benin City: Oliz publishers, 2009) p. 196. See also *P.I.P. Ltd v Tradebank* (Nig) Plc [2009] 13 NWLR (Pt. 1159) 577; *E.A. Industries Ltd v Nerfund* [2009] 8 NWLR (Pt. 1144) 535.

<sup>9</sup> P E Oshio, 'Farewell to Consent Controversy; Savanna Bank V Ajilo', 29, OR Akujobi, 'Governors Consent under Section 22 of the Land Use Act: The Position since Savannah Bank v Ajilo' in IO Smith (ed), *Land Use Act 25 yrs after* (Lagos: University of Lagos, 2004) pp. 204-210.

<sup>10</sup> G Ezejiolor 'The Land Use Decree: A Critical Review' (1977) 2*Nig. B.R.*, 1 at 7.

<sup>11</sup> O O Sholanke, 'Is the grant of Governor's Consent under the Nigerian Land Use Act Automatic?' 13.

<sup>12</sup> A A Utuama, *Nigerian law of Real Property* (Ibadan: Shenneson Publications, 1989) p. 134.

<sup>13</sup> J F Fekumo 'The Land Market under the Land Use Act' (1989) 2 *GRBPL No.* 822, 87.

<sup>14</sup> *ibid.*

<sup>15</sup> A A Utuama 'The Crocodile Tears in Savanna Bank V Ajilo and Anor' (1989) 2 *GRBPL No.* 4, 20; P E Oshio, 'Farewell to Consent controversy Savanna Bank V. Ajilo (1989) 2 *GRBPL No.* 7, 29; R C Okoli, 'Crocodile Tears at Supreme Court' (1989) 2 *GRBPL No.* 7, 37; V A Nwudugbo, 'A way out of the Quandary of Savannah Bank V Ajilo' (1989) 2 *GRBPL No.* 7, 41; O O Sholanke 'Is the Grant of Governor's Consent under the Nigeria Land Use Act Automatic' (1989) 2 *GRBPL No.* 2, 13.

<sup>16</sup> *ibid.*, p. 510. See also D E Nelson, 'Mortgage of Land as Security under the Land Use Act' (2003) 11 *Nig. JR.*, 147; U Osimiri 'Post Land Use Act 1978 Conveyancing: Ogba vs Adoga Revisited' (1995) 2 (1) *Lawyers Bi-Annual*, 208; *Ogba v Adoga* [1994] 3 NWLR (Pt. 333) 469.

all periodic tenancies even for weekly Tenancies;<sup>17</sup> however, that based on the application of Jeremy Betham's utilitarian principle of the greatest good to the greatest number under conditions of freedom and economic efficiency, i.e., maximizing economic benefit over cost, that periodic tenancy would be excluded from the consent provision.<sup>18</sup>

However, Umezulike on the other hand has argued that the effect of not obtaining consent would be to invalidate the transaction; it does not matter if the person seeking to invalidate the transaction is the transferor.<sup>19</sup> He asserted that apart from the exemptions contained in section 22, no other valid exemption exist under the Act.<sup>20</sup> In fact, he overstated the principle by opining that the requirement of consent under the Act is all-pervading and would apply to such transactions under the Act as up stamping, vesting deed, irrevocable power of attorney and so on.<sup>21</sup>

It is the opinion of the researcher that the provision of the Act relating to consent is a salutary one as it enables the Governor who is the 'manager' of all land in the territory of each state to efficiently superintend and manage the land which has been vested in him.

### 3. Time for Obtaining Consent under the Act

One major issue that usually arises with regards to the consent provision is usually at what stage the consent must be sought. As we have seen, it is settled on authorities, especially the recent ones that the consent of the government is required in transaction relating to land in Nigeria.<sup>22</sup> The question essentially raised with regard to the issue at hand is, whether the consent must be sought and obtained before the parties execute the document evidencing the transaction or if it can be done after they have executed the document and perfected the transaction.

It has been argued that the combined effect of the sub-provisions of Section 22 and 23 of the Act is that it did not matter when a deed was executed by the parties, as alienation could only be said to have taken place after the Governor had given his consent. The implication of this is that prior to the consent of the Governor, the transaction was merely inchoate. In *Denning v Edwards*,<sup>23</sup> while interpreting a provision similar to the consent provisions under the Act, it was opined, per Lord Viscount Simmons that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained.

It is must be observed however, that this postulation has to be received with caution for the reason, *inter alia*, that the House of Lords was not considering a provision on all fours with Section 22 of the Act. More so, an agreement to enter into a contract is not the contract itself; thus once it is proved that the parties have executed the instrument by which they intend to convey the land without any apparent intention expressed on the alienation document to obtain the requisite consent, the transaction shall be invalid if there is no Governor's consent.<sup>24</sup>

<sup>17</sup> E Chianu, 'Land Use Act and individual Land Rights' in I O Smith (ed), *Land Use Act, 25 years After*, op cit, p. 117.

<sup>18</sup> E Chianu, *Law of Landlord and Tenant* (Benin City: Oliz Publications, 2001) p. 123.

<sup>19</sup> I A Umezulike, *ABC of contemporary land law in Nigeria*, (Enugu, Snaap Press Nig Ltd, 2013) p. 182.

<sup>20</sup> *ibid*.

<sup>21</sup> *ibid*, p. 186; A position that the researcher is opposed to.

<sup>22</sup> This of course is with the exception of those transactions expressly exempted under ss. 21 & 22.

<sup>23</sup> (1961) A C 245.

<sup>24</sup> *CCCTCS v Ekpo* (2008) 6 NWLR (pt. 1083) 362.

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One of the counsel in *Awojubagbe light Ind. Ltd v Chinukwe*<sup>25</sup> had submitted that practical realities dictates that Section 22 of the Act should not be given a literal interpretation such as to require parties to transaction to ask the Governor to approve their intention to enter into a transaction. It has been stated in reply to this suggestion that this is a misconception because once the words of a statute are clear, it is the duty of the courts to give effect to their literal meaning and cut emotions adrift<sup>26</sup> as it is not part of the duty of the court to consider the practical realities of the clear words of a statute.<sup>27</sup> The Supreme Court in *CCCTCS v Ekpo*<sup>28</sup> held in unequivocal terms that lack of prior consent before execution renders such a transaction without consent invalid. Referring to the provision of Section 22 of the Act the Supreme Court stated thus:

It is very clear that the said provision is by the tone and tenor mandatory; it makes the obtaining of consent a precondition for the validity of any alienation of a right of occupancy under the Land Use Act 1978. Though there is no time limit to the obtaining of the said consent by the provision, it is very clear that before the alienation can be valid or be said to confer the desired right on the party intended to benefit therefrom the consent of the governor of the state concerned must be first had and obtained. That does not, by any means, make the transaction without the requisite consent inchoate. It makes it invalid until the consent is obtained.<sup>29</sup>

It is important to point out that the rationale for the court's decision is, according to the court, that 'it is not the case of the parties or any them that Exhibit A is an agreement for sale of land but a conveyance of the land in question – a completed act of the parties'.<sup>30</sup>

The court went further to emphatically state thus.

The consequence of the unlawful act of alienating a right of occupancy without the requisite consent of the governor is what is stated under section 26.... It makes the transaction such as exhibit A expressly null and void. Section 26 uses the word "shall" which, in the instant case makes the provision mandatory, not directory or discretionary.<sup>31</sup>

In *Awojubagbe Light Industries Ltd v Chinukwe*<sup>32</sup> on the other hand, the position taken by the Supreme Court is quite interesting and illuminating of the principle that prior consent must be obtained. Igu JSC resting his decision on *Dennings v Edward*<sup>33</sup> stated as follows

I think it ought to be stressed that the holder of a statutory right of occupancy is certainly not prohibited by Section 22 (1) of the Act from entering into some form of negotiation which may end with a written agreement for presentation to the governor for his necessary consent or approval. This is because the Land Use Act does not prohibit a written agreement to transfer or alienate land. So long as such written agreement is understood and entered into subject to the consent of the Governor, there will be no contravention of

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<sup>25</sup> [1995] 4 NWLR (Pt. 390) 379 at 406.

<sup>26</sup> *Willock v Noble* 7 L.R. it L 580.

<sup>27</sup> I A Umezulike, *A B C of contemporary land law in Nigeria*, (n.19), 191; *CCCTCS v Ekpo* (n.24).

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

Section 22(1) of the Land Use Act by the mere fact that such a written agreement is executed before it is forwarded to the Governor for his consent.<sup>34</sup>

In his own contribution which the researcher considers the distinct point between this case and most cases where the transactions have been invalidated, Onu JSC said:

From the foregoing, it is clear that the date of execution is not material to the operation of Section 22 of the Act. The deed (Exhibit E) consequently had not become effective at the date of execution between 1980 and 1982; it became effective upon its delivery on 8<sup>th</sup> October, 1985 to the second respondent following the Governor's consent on Exhibit E1, which was signified on or about the 12<sup>th</sup> September, 1985. The result of my observation above is that although Section 22 of the Act prohibits the alienation of right of occupancy without the consent of the Governor first had and obtained. It does not prohibit agreement so to do or preparation for the purpose of effecting such alienation.<sup>35</sup>

Ogwuegbu JSC on his own part stated thus:

The case of *Dennings v Edward* is very relevant in the interpretation of section 22 of the Land Use Act. It buttresses the point that the signing and sealing (execution) of *Exhibit E* is within the contemplation of subsection 2 of section 22 of the Land Use Act.<sup>36</sup>

It is submitted, in the light of the foregoing, that the phrase 'first had and obtained' as used under the Act makes the obtaining of consent a condition precedent to alienation. The most reasonable and inescapable meaning of that phrase in relation to alienation of land is that the validity of an instrument or deed or any other document evidencing the transfer of title in land is dependent on the consent of the Governor first had and obtained. The section does not accord any provisional status to 'completed' deeds or instrument already executed and delivered before the consent of the Governor was sought and obtained.

Whether or not a document would be treated as inchoate or invalid would depend on the terms of the transaction and the circumstance of each particular case. If on the face of a deed it can be seen that it was not binding on the parties to the contract as at the date the Governor's consent was obtained, then the transact is valid but if the document evidencing the transaction is a completed document so that it has become binding on the parties prior to the consent, then the document is invalid.

For instance, in *Awojugbagbe v Chinukwe*<sup>37</sup> there was a manifest intention of the parties not to be bound by the contract till the Governor's consent was obtained. The fact was even made a term of contract and the parties had to wait till after they got consent to sign and deliver the deed. This was unlike the situation in *CCCTCS v Ekpo*.<sup>38</sup>

Thus, it is the position of this work that *Awojugbagbe's case* cannot be an authority for the postulation that parties to a contract for alienation of right of occupancy can execute the contract and proceed to enjoy their rights under the contract pending the obtaining of the Governors

<sup>34</sup> *ibid*, at 435-436.

<sup>35</sup> *ibid* at pp. 425-426.

<sup>36</sup> *ibid*, at p. 418.

<sup>37</sup> *ibid*.

<sup>38</sup> *ibid*.

consent as such contracts are inchoate. Section 22 (2) of the Act does not, in our view, accord any provisional status to deeds or instruments already executed and perfected before the consent of the Governor is sought and obtained. Such deed is a contrivance not warranted under the Act and remains invalid. In this view it has been asserted that the expression ‘first had and obtained’ seems superfluous with regards to the concept of consent.<sup>39</sup> Thus, even without the use of the phrase “first had and obtained, the consent of the Governor must be sought and obtained as a precondition to the validity of any transaction involving alienation of land.

It has been clearly established that the consent requirement is an integral component of the right of occupancy introduced under the Act. Any interpretation of the consent provision which implies that parties can conclude the agreement and then proceed with their right while seeking for the consent would mean that the security transaction is upheld; while the consent requirement is retained as a routine affair.<sup>40</sup> The reason for the foregoing observation is that the effect of such an interpretation would be to provide the citizens with a route through which to circumvent the express provision or requirement of the law; especially in a country like Nigeria where people have a penchant for doing the wrong things.

#### **4. Equitable Justification for the Introduction of Governor’s Consent**

The seemingly slavish insistence of the court on the case of consent is usually greatly criticized by various authors on the basis that it is against the equitable principle of ‘*ex turpi causa non oritur actio*’ - no action may be founded on **illegal or immoral conduct**. The principle implies that the courts may refuse to enforce a claim arising out of the claimant's own illegal or immoral conduct or transactions. Hence, parties who have knowingly entered into an illegal contract may not be able to enforce it and a person injured by a fellow-criminal while they are jointly committing a serious crime may not be able to sue for damages for the injury.<sup>41</sup> Where the maxim of *ex turpi causa* is successfully applied it acts as a complete bar on recovery. It is often referred to as the **illegality defence**, although it extends beyond illegal conduct to immoral conduct.

The *ex turpi causa* principle is very much based on public policy and no clear legal principles emerge. In *Gray v Thames Trains*<sup>42</sup>, Lord Hoffman stated as follows;

The maxim *ex turpi causa* expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations.

The public policy factor often cited for *ex turpi causa non oritur actio*, is that it is wrong to allow a criminal to profit from his crime.<sup>43</sup> In this wise, J. A. Omotola<sup>44</sup> argued that the Act by its objectives and its revolutionizing nature must be construed differently from the hitherto existing common law principles and other statutes and therefore the court should not jettison the ‘*ex turpi causa non oritur actio*’ equitable maxim. He fortified his argument by resort to the fact that the principle of law that a wrongdoer should not be allowed to profit from his wrong should not be an immutable one. The condonation by law, according to him, should be

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<sup>39</sup> N Tobi, *Hand Book on the Land Use Act* (Zaria: Ahmadu Bello University Press Ltd, 1989) p. 84.

<sup>40</sup> J A Omotola ‘Interpreting The Land Use Act’ (1992) *Vol. 1 Journal of Nigerian Law*, 108.

<sup>41</sup> *Ashton v Turner* [1981] 1 QB; *Vellino v Chief Constable of Greater Manchester* [2002] 1 WLR 218; *Pitts v Hunt* [1990] 3 All ER 344.

<sup>42</sup> [2009] 3 WLR 167.

<sup>43</sup> *Murphy v Culhane* [1977] QB 94.

<sup>44</sup> J A Omotola, ‘Interpreting the Land Use Act’ (1992), (n.40) at 110 -111.

based on public policy which should hold sway in the interpretation of the provisions of the Act.

The researcher share the sympathy of the learned Professor of Law especially in view of the manifest injustice which it occasions. However, the researcher submit that appeal to public policy is neither a solution to the manifest problems of the Act nor can it be used as a means for circumventing the express provision of the Act. More so, such reasoning leaning towards public policy is difficult to reconcile especially in situations where all the parties in a transaction leading to the suit are privy to the illegality in issue.

Public policy, as a concept, is not capable of ascertainment. It can, at best, only be described; and the description given to it, in most cases, is predominantly influenced by the experiences and inclinations of the ‘describer’. Percy Winfield has described it as ‘a principle of judicial legislation or interpretation founded on the current needs of the community’.<sup>45</sup> Nassbaum on his own part referred it as ‘an enzymatic monster which shows no desire of being analysed and which defies the concerted attack of professors, daring thesis writers and treaty makers’.<sup>46</sup>

It is an unruly horse; resort to argument on public policy or appeal to equity, on this issue, will amount to trying to place something on nothing. And, in the word of Lord Denning, ‘if an act is void, it is void for all purpose. You cannot put something on nothing and expect it to stand, it will surely fall’.<sup>47</sup>

The intention of the legislature with regard to Section 26 is plain and simple. Thus it would be logically atrocious and against the spirit and letters of the Act to reach a conclusion contrary to that contained in *Ajilo’s case* and *CCCTSC’s case* in the face of the clear and unambiguous provisions of the relevant sections of the Act. This argument is further supported by the law that when the provisions of a statute are clear and unambiguous, the court is obliged to apply it as it is notwithstanding any negative effect.<sup>48</sup> The only way out of this problem is a legislative intervention which will address the hardship and painful losses caused by this far reaching provision. Such hardship and painful losses can only be a trigger to justify a quick resort to law reform by way of legislative intervention to cure what has been described as a social and moral problem.<sup>49</sup>

Assuming, (without conceding) that the provisions of the Act in this respect is not plain, it is also argued that the virus which is argued should affect that case of a vendor who seeks to vitiate such a transaction should also affect the purchaser based on the *ex turpi causa* principle since he/she is aware that the transaction is not fully concluded or illegal and proceeded to alter his position in that respect. In such instance, both parties could be said to be *in pari delicto*. The correct position should therefore be that the transaction should be declared invalid and none of the parties should benefit from it or enforce a right arising therefrom.

<sup>45</sup> P H Winfield, ‘Pubic Policy in English Common Law’ (1928-29) 42, *Harvard. Law Review*, 92.

<sup>46</sup>A Nussbaum, ‘Public Policy and the Political Crisis in the Conflict of Laws’ (1940), 49(6) *Yale LJ*, 1047 <<http://www.jstor.org/stable/792228>> accessed on 15/04/2022.

<sup>47</sup>*Macfoy v UAC* (1962) AC 152.

<sup>48</sup>*Okumagba v Egbe* (1965) All NLR 64.

<sup>49</sup> See generally, L Scarman, ‘Law Reform; The New Pattern: The Lindsay Memorial Lectures delivered at University of Keele, November 1967 (London: Routledge & K Paul, 1968) cited in M D Freeman, *op cit*, p. 964.



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It is therefore submitted that the *ex turpi causa* principle is no equitable justification of the view that the transferor of a right of occupancy cannot be allowed to vitiate same for the lack of Governor's consent.

Much as we agree, as posited by Widgery L.J. in *Buswell v Godwin*,<sup>50</sup> that 'the proposition that a man will not be allowed to take advantage of his own wrong is, no doubt, a very salutary one and one which the court would wish to endorse;<sup>51</sup> we also believe that equity follows the law. Equity follows the law in the sense of obeying it and conforming to its general rules and policy whether contained in common law, customary law or statutory law. The rules of equity cannot override the specific provisions of the law. It is trite that the discretion of the court is to be regulated by the rules of law and equity, which are not opposed, but each, in turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, and in other assists it and advances the rigour of it but in no case does it contradict or overturn the grounds of the principle thereof.

It is in the light of the forgoing exposition, that it is argued that the principle of equity cannot operate to subvert the express provision of the law. Section 26 of the Land Use Act is both clear and emphatic of the intention of the framers of the Act to wit, invalidate any transaction purporting to alienate the right of occupancy introduced under the Act without the Governor's consent.<sup>52</sup>

It is also submit that parties ought not to perform their obligation under the said contract or enjoy the benefit accruing therefrom without first obtaining the consent. This is because the right to such obligation and benefit cannot crystallize without the consent being obtained. Thus, where the transferee decided to proceed to perform his obligation under the contract, he should bear whatever risk that arises therefrom. More so, any such transaction may<sup>53</sup> qualify as an illegal transaction or contract<sup>54</sup> which is not unenforceable by the court. And since both parties are *in pari delicto* none of them can effectively come to equity because 'he who comes to equity must come with clean hands'. Thus, the position taken by this work also finds support under the rules of equity. This is more so, as the researcher strongly hold the view that the principle of equity that 'he who comes to equity must come with clean hands' precludes a transferee who intends to plead the principle that a person should not be allowed to benefit from his fraud.<sup>55</sup> It is therefore submitted that the court of equity will not help a party who conscientiously took part in illegality even if the illegality 'seems' to have put him in an unjust situation. As such, the express provisions of the Act make it undesirable to invoke the maxim *exturpi causa non oritur actio*.<sup>56</sup>

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<sup>50</sup> (1971) 1All ER 418.

<sup>51</sup> *ibid*, p. 421.

<sup>52</sup> *CCCTSC v Ekpo* (*ibid*).

<sup>53</sup> If the Act had provided for punishment for any such alienation.

<sup>54</sup> In, fact it is even doubtful to contend that the Act did not prescribe any penalty for such alienations; because invalidating such a transaction is enough penalty. It does not matter that the Act did not make any provision for fine or imprisonment. It is our submission that by invalidating such transactions the Act seeks to punish both a transferor and a transferee party there to. Thus, it will not only be incongruous, but also against the letter and spirit of the Act for the court to afford the transferee who, with full awareness that a transaction is unlawful, proceeded to enter into such transactions and enjoy the benefits accruing therefrom.

<sup>55</sup> The justification for the foregoing assertion is predicated on the fact that it is this principle that will set the equitable jurisdiction of the court in motion.

<sup>56</sup> An action does not arise from a base cause.

## 5. Historical Basis for the Introduction of Governor's Consent

Consent of the governor to alienation of interest in land has its philosophical basis in the concept of ownership. Under the Land Use Act, the concept of ownership has both legal and social implications. That is to say that while the governor was vested with the legal title to land (in other words 'radical title'), the beneficial interest still vests in the people of Nigeria. The idea of governor's consent is basically utilized in such ways as to give effect to the duality of interest that is retained on land by virtue of the provisions of the Act, that is to say, the legal interest retained by the governor and the equitable interest retained by the individual. Ordinarily, alienation is one of the incidences of ownership. One can therefore, alienate his interest in land without the consent of any body.<sup>57</sup> However, with the introduction of the Land Use Act, the radical title in all land in every state became vested in the Governor as a trustee for all Nigerians.<sup>58</sup> Consequently, the right and interest of people in land became short of absolute ownership which can no longer be alienated or disposed as they wish contrary to the content of ownership.

Ownership consists of an innumerable number of claims, liberties, powers and immunities with regard to the thing owned and since the Land Use Act has placed some restrictions before one can exercise his right of ownership, one wonders if indeed, land can still be owned in Nigeria. The basis for justification of the requirement of governor's consent nevertheless, relates to the jurisprudence of customary transactions in land prior to the Land Use Act where;

1. consent of the family head was required for a valid alienation of family property; and
2. consent of the landlord in leasehold relationship is required before the transfer of interest by the tenant, where there is a covenant to that effect.

On the issue of consent of the family head, it was not the practice in the past to alienate land because land was considered to be held by the present owners in trust for future generations. However, it is known that under customary law, gifts of land to close relatives and friends are common. In addition, alienation may take the form of loan or borrowing, pledge and recently, sale. In all these transactions the consent principle has been the law and practice. The sale of family property by principal members of the family without the consent of the family head is void *ab initio*.<sup>59</sup> This principle may have informed the wisdom behind the requirement of Governor's consent under the Land Use Act as the governor is regarded as the ultimate authority in land transfers. The merit of this argument could be seen from the fact that the Governor as a trustee of all land within the territory of the state under the Land Use Act represents the position of the family heads under customary law who are seen as trustees of the family land for the benefit of the whole family.

With regards to consent of the landlord in a leasehold relationship, consent prior to the alienation is the offshoot of the covenants in a lease.<sup>60</sup> Where a tenant wishes to alienate the entire residue of his interest, the general rule is that the tenant in the absence of a provision to the contrary has a right to alienate his interest in a lease.<sup>61</sup> But where the tenant has covenanted not to alienate, he will be liable if he alienates. Hence, in most cases the covenant will contain a clause entitling the tenant to alienate with the consent of the landlord which would not be

<sup>57</sup> This was the position prior to the promulgation of the Land Use Act. The only consent needed was the consent of the family head if it was a family property or consent of the landlord if it was leasehold land which lease contained a covenant to that effect.

<sup>58</sup> *Onwuka & Ors v Ediala & Ors* (1989) NWLR (pt. 96) 182.

<sup>59</sup> *Lukan v Ogunsisi* (1972) S.C. 40.

<sup>60</sup> *ibid.*

<sup>61</sup> *Allaji Inu Awada v. Thomas Bryne* (1975)3 CCHCJ 59.

unreasonably withheld with respect to a responsible and respectable person. In such instances the tenant may not be able to alienate without the consent of the landlord and the landlord is not bound to give reason for refusal of consent.

Since the right of occupancy under the Land Use Act has some semblance of a lease, the right of occupancy under the Land Use Act may not be transferred without the written consent of the governor or Local Government first had and obtained. This could be said also to have derived its basis from the leasehold relationship where the consent of the landlord is usually required, subject to the provisions of the leasehold, to alienate.

## **6. Conclusion/Recommendation**

The requirement of consent is applicable to every alienation envisaged in sections 22 and 23 of the Act subject only to the need to obtain consent.<sup>62</sup> It is a platform through which the Governor can conveniently manage and stay in control of the land vested in him by Section 1 of the Land Use Act.

Historical justification for the consent provision may be found in the requirement for consent of family head<sup>63</sup> under customary law and that of the lessor<sup>64</sup> under lease. The requirement of consent may also be justified by the need to monitor and regulate land transaction by the legal owner.<sup>65</sup> This work therefore posits that any interpretation of the Act which seeks to validate or enforce any transaction involving alienation of right of occupancy without the consent of the appropriate authority would have no justification under the Land Use Act unless such alienation is one of those expressly exempted under the Act.<sup>66</sup>

The researcher is however, not unmindful of the hardship and effect that the principle, as it is adopted in the Act has continued to produce. In this wise, it is submitted that the job of creating a better and more equitable framework for the regulation, protection, use and administration of land and land rights is the work of the legislature and not that of the judiciary. In this wise, it is recommended that the Land Use Act be amended to exclude transactions short of outright transfers should from being subjected to the consent requirement.<sup>67</sup> This would ensure that most of the bottlenecks regarding land transactions are removed so as to hasten the perfection of interest in land. In addition to this, consent provisions in the Act should incorporate a clause to the effect that such consent, if sought, shall not be unreasonably withheld. The effect of this is to enable an aggrieved party to obtain an order of mandamus against the Governor.

However, before such legislative interventions, it is recommended that all States of the Federation develop a geographic information system (GIS) which will help facilitate the requisite considerations for grant of consent.

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<sup>62</sup> Ss. 22, 23, 34(7). The only exception to the principle of alienability under the Act is with respect to customary right of occupancy which is deemed granted under S.36.

<sup>63</sup> L Babatunde, *Hints on Land Documentation and Litigation in Nigeria* (Law Breed Ltd, 2002) p. 101.

<sup>64</sup> *ibid*, p. 119.

<sup>65</sup> It is however difficult to justify the requirement for consent under paragraph (a) of section 21 of the Act; ie for Judicial sale of a customary right of occupancy even when the security may have been created with the Governors consent; which we submit extends the power of mortgagee to exercise his powers of sale.

<sup>66</sup> Land Use Act ss. 21 & 22.

<sup>67</sup> This is in view of the fact that the consent provision is a source of revenue for the Governor and affords him the platform to monitor land transactions.