Resolving the Problem of Land Ownership in Nigeria

RESOLVING THE PROBLEM OF LAND OWNERSHIP IN NIGERIA

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I. INTRODUCTION

Land use is generally possible where the holder of land possesses some form of ownership rights or acquires some sort of user rights and is regulated by the existing land tenure system. The land tenure system consists of the rights and institutions that govern access to and use of land and involves a system of rights, duties and responsibilities concerning the use, transfer, alienation and ownership security of land.[1] The land tenure system in a country is largely dependent on its legal system.[2] In Nigeria, three legal systems exist: the common law legal system, the customary law legal system, and the religious or Islamic legal system.[3] These legal systems are operated through a federal government, 36 state governments and 774 local governments. The scope of this article excludes the Islamic legal system. Nigerian judicial decisions and legislation, which are modelled on English law as a result of Nigeria's colonial links to the United Kingdom of Great Britain and Northern Ireland, fall within the common law legal system and apply to the whole country through the federal and state governments. Customary law, which consists largely of unwritten rules derived from the culture and customs of various indigenous communities and tribes, applies amongst the various communities in Nigeria and through state and local governments.

The customary law and common law legal systems simultaneously address a range of matters and, in essence, create conflicting legal structures between the common law legal system, in the form of statutes and judicial decisions, and the customary laws recognized by and applicable to various indigenous

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1 I.B. Oluwatayo, O. Timothy and A.O. Ojo, 'Land Acquisition and Use in Nigeria: Implications for Sustainable Food and Livelihood Security' in L. Loures (ed.) *Land Use Assessing the Past, Envisioning the Future*, IntechOpen (2019), p. 92.

2 In general, five legal systems exist: common law, civil law, religious law, customary law and mixed legal systems. They all have different characteristics. 'Guide to International and Foreign Law Research: Legal Systems' (*University of South Carolina Law Library*, 2018), available at <https://guides.law.sc.edu/c.php?g=315476&p=2108388> (accessed 8 August 2023).

3 The focus of this article is the common law and customary law legal systems. Discussion on the Islamic legal system is excluded from this article.

communities. One key reason for this conflict is that Nigerian judicial decisions and legislations do not reflect Afrocentric perspectives on land ownership as they do not entirely embrace the character of customary law, which is unwritten and relies on information handed down from generation to generation; it is flexible and a reflection of changing economic and social conditions.[4] Customary law makes use of a dispute resolution mechanism which involves bringing people together to talk out a problem and then plan ways to deal with the issue; it provides connectivity with religion, an embodiment of values and principles and an embeddedness in the memory of community elders which are reapplied over time.[5] This differs from the character of judicial decisions and legislations, which are written, do not rely on the memory of community elders, have no connectivity with religion and therefore do not adequately reflect customary law views and, in essence, create a conflict.

This conflict is evident in the land ownership structure, which is predominantly governed by customary laws of culturally different indigenous groups that are comprised of various indigenous customs accepted by members of a community as binding among them.[6] Customary law granted a right of ownership of land. Nigeria has approximately 250 ethnic groups[7] and an estimated population of 225 million people. Customary law applies to 61.6% of the entire population,[8] the majority of which are based in southern Nigeria. Land in the southern part of Nigeria is held under different tenurial systems. An examination of historical data from the National Archives on the system of land tenure in southern Nigeria, dating back to 1906, reveals that land is held under family, individual, feudal and communal tenures.[9] Communal and family ownership of land are widely seen as the main land tenure systems under customary law,[10] as opposed to individual and feudal ownership.[11] Under communal ownership, land is owned

4 *Alfa* v. *Arepo* [1961] W.N.L.R. 95.

5 G.R. Woodman, 'The Development "Problem" of Legal Pluralism: An Analysis and Steps Towards Solutions' in B. Tamanaha, C. Sage and M. Woolcock (eds.), *Legal Pluralism and Development*, Cambridge University Press (2012).

6 A.O. Obilade, *The Nigerian Legal System*, Sweet & Maxwell (1979); S. Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges', 22 *European Journal of International Law* (2011): 121–40, 122.

7 M. Lawan, 'Islamic Law and Legal Hybridity in Nigeria', 58 *Journal of African Law* (2014): 303–27, 310.

8 This is comprised of Yoruba 15.5%, Igbo (Ibo) 15.5%, Tiv 2.4%, Ibibio 1.8%, Ijaw/Izon 1.8% and others 24.9%. Only the Hausa 30%, Fulani 6% and Kanuri 2.4% do not apply customary law. See 'Nigeria' (*CIA.gov*, 2022), available at <https://www.cia.gov/the-world-factbook/countries/nigeria/summaries> (accessed 28 August 2023).

9 *Committee on the Tenure of Land in West African Colonies and Protectorates, West African Lands Committee* (1916), The National Archives London CO 879/118/1, African (West) No. 1048, p. 158–254.

10 P. Oluyede, *Modern Nigerian Land Law*, Evans Brothers (Nigeria Publishers) Ltd (1989), p. 68; *Ricketts* v. *Hassan* [2001] LPELR – 5860 (CA); *Suberu* v. *Sunmonu* [1957] 2 FSC 33, *Olanrewaju* v. *Bamigboye* [1987] 3 NWLR (Pt 60) 353, *Unity Bank Plc* v. *Bouari* [2008] 7 NWLR (Pt 1086) 372 at 398 (SC) and *Sapo* v. *Sunmonu* [2010] 11 NWLR (Pt 1205) 374 at 398 on family land; and *Bajulaiye* v. *Akapo* [1938] 14 NLR 10, *Josiah Aghenghen* v. *Chief Maduka Waghoreghor & Ors*. [1974] LPELR 247 (SC) and *Alao* v. *Ajayi* [1989] 4 NWLR (Pt 118) 1 on communal land.

11 T.O. Elias, *Nigerian Land Law*, Sweet & Maxwell (1971).

by the entire community and managed by the head of the community. Members of the community are allocated portions of land and have equal rights to the land as other members of the community. Any sale or transfer of the land must have the consent of the community. One significant point is that members of the community share common historical and cultural ties and are seen as the same body or group of people. Under family ownership, land belongs to the family and evolves from the originator of the family first settling on a particular portion of land. After his death, the land is inherited by his children and thereupon becomes family property. No individual within the family can sell or dispose of the land without the consent of other family members. The ownership regimes apply to distinct communities and different families; the only commonality is the tribe the family or community belong to. This created a problem as multiple customary laws could apply to different communities and families; an issue that plagued the security of tenure. This is what the common law sought to address through legislation. The introduction of the Land Use Act 1978 (hereinafter 'LUA'), which granted a right of occupancy, sought to remedy this issue. However, in attempting to make land accessible to all Nigerians, the LUA inadvertently created a range of problems. These problems range from the ineffective recognition of land ownership under customary law to the issue of the ownership of mineral resources found beneath land. Other problems include the significant impacts on the Niger Delta region, farmers–herdsmen conflict, the leasehold system for land tenure and a plethora of other negative consequences.

The move from a right of ownership under customary law to a right of occupancy under the LUA, without putting them in relation to each other, introduced a significant change to the nature of land tenure. Title to land was vested in the Governor of a state and individuals were granted a right of occupancy instead of the right of ownership previously enjoyed under customary law. Furthermore, rights under customary law were not extinguished. This change led to the application of two legal systems, customary law and common law, to land matters. The former was based on existing indigenous customs and the latter was applied through the LUA. The existence of two legal systems on land ownership created a conflict between customary law and legislation on land in Nigeria. This is because ownership of land under the LUA differs from ownership under customary law due to the nature of the two systems' history. Customary law is a product of the experience of indigenous people over several centuries and is passed down from generation to generation. Legislation, on the other hand, is based on Western ideas of the concept of written laws and its influence on law-making in former African colonies, which, in some cases, do not align with the unwritten nature of customary law on land ownership.

While research exists on the challenges of legal pluralism more generally, with reference to land management and the antithesis between statutory and customary land ownership in Africa, no research has effectively made an impact sufficient to change the 45-year-old LUA. This article differs significantly from the available research on legal pluralism and land management as it furthers the discussion on resolving the tension.

The central aim of this article is to provide a different understanding of the problem from current scholarship on the topic, including insights that benefit current stakeholders, and to identify potential reforms of the LUA. To achieve its central aim, this article examines the conflict presented by the application of two legal systems in determining land ownership in Nigeria. It begins by exploring the theoretical basis of land ownership under customary law before examining the existing legal framework on land ownership under customary law and common law. Beyond that, the article discusses ways of resolving the land ownership conflict created by legal pluralism. It concludes that the current framework on land ownership in Nigeria needs the harmonization of the customary and common law systems.

A. Contribution to Knowledge

This article advances scholarly understanding of legal pluralism and land ownership in Nigeria by providing insights to help stakeholders understand the tension between legal pluralism and land ownership in Nigeria. In proffering solutions, this article goes beyond identifying the need for a review of legislation pertaining to land and suggests effective legal reforms that place the recognition and incorporation of customary law principles and tribal recognition at the heart of any reform. It also mulls legislative suggestions for the replacement of the LUA.

II. THEORETICAL UNDERPINNING OF CUSTOMARY LAW

Customary law is underpinned by the *Volksgeist* theory,[12] the spirit of the *Volk* (people). The theory was developed by Friedrich Carl von Savigny in the early 19th century. According to him, law arises not from individual acts of behaviour but from common consciousness. Individual acts of behaviour do not create customary law but merely the appearance of indications of a pre-existing common conviction about the law. The *Volksgeist* theory is based on the idea of law being legal nationalism, based on national ethos or peoples' higher values.[13] The theory considers a nation as a community of people linked together by historical, geographical and cultural ties.[14] A *Volksgeist* is a unique, ultimate and often mystical reality linked to the biological heritage of the people.[15] The *Volksgeist* theory considers the law as developing from a response to the impersonal powers found in the people's national spirit rather than the result of an arbitrary act of a legislator.[16]

12 Based on Savigny's philosophy of law. He rejected natural law and to him a legal system was part of the culture of the people.

13 R.W.M. Dias, *Jurisprudence*, 5th ed., Butterworths (1985), p. 378; J.E. Penner, *McCoubrey & White's Textbook on Jurisprudence*, 4th ed., Oxford University Press (2008), p. 67.

14 *Ibid*. at 378.

15 M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 8th ed., Sweet & Maxwell (2008), p. 1079.

16 *Ibid*.

As *Volksgeist* is evidence of the spirit of the people manifested in customary rules, any law-making should therefore take account of historical development.[17] Every *Volk* is considered different from another, and each nationality/custom is characterized by its own unique spirit. Likewise, every distinct cultural group in Nigeria[18] possesses its own cultural traits informed by its ancestral history and experience of its unique environment. Each group mentally constructs its social life through the law, albeit predominantly unwritten, and holds the people's culture, finetunes their religion and forges their politics and the law, and can only be superimposed upon so as to ensure a continuous influence of the *Volksgeist* on the group's development.[19]

This theory is not without criticism. Mittlebeeler[20] criticized the theory as being narrow or ethnocentric. He further criticized it for the idea of presenting a nation as a single entity and assuming that a nation manifests unity of action when it comes to developing customary laws. Watson's[21] criticisms of the theory are that it hides several historical instances where the minority has imposed its will on the majority in the form of laws and that it dismisses the possibility of a country borrowing laws from other countries. Another criticism of this theory is identified by Wacks,[22] who notes the fundamental difficulties that Savigny's *Volksgeist* concept gives rise to. He identifies the existence of a collective 'spirit' of a 'people' as misguided due to its overlooking of the subjugation of minorities, or even majorities, by war, invasion or occupation; the undifferentiated notion of culture, the undervaluing of the purpose of legislation; and the idea that the theory may have been responsible for generating the racial laws enacted by the Nazis.[23]

III. LAND OWNERSHIP UNDER CUSTOMARY LAW

Ownership and management of land in many communities are governed by the customary law of the indigenous community, with varying characteristics and peculiarities.[24] The two main forms of ownership under customary law are communal ownership and family ownership.

17 Dias, above at note 13 at 378.

18 The country has over 250 ethnic groups with distinct cultures and customs. See; 'Nigeria – Language, Culture, Customs and Etiquette' (*Commisceo Global Consulting Ltd.*, 2020), available at <http://www.commisceo-global.com/country-guides/nigeria-guide> (accessed 8 August 2023).

19 F. Adaramola, *Jurisprudence*, 4th ed., Lexis Nexis (2008), p. 298.

20 E.V. Mittlebeeler, *African Custom and Western Law*, African Publishing Company (1976), p. 25.

21 A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed., The University of Georgia Press (1993), p. 55.

22 R. Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*, 5th ed., Oxford University Press (2017), p. 238.

23 *Ibid*. at 245.

24 *Otogbolu* v. *Okeoluwa & Ors*. [1981] 6–7 SC 62 at 76.

A. Communal Ownership

Under communal ownership, individual members of the community are allocated portions of the land. These individual allottees are not regarded as owners, as all land belongs to the community, but as holders of a customary tenure with equal rights to all other members of the community. Each member of the community enjoys collective usufructuary rights in respect of the communal land. This is the right to enjoy the property in the same manner as the owner of the property but subject to an obligation to conserve the substance and native title of the land.[25]

Under customary law, communal land is not gifted to members of the community; members are not borrowers or lessees, they are grantees of the land under customary tenure and hold a determinable interest in the land which may be enjoined in perpetuity, subject to good behaviour.[26] Some examples of communal land include shrines or holy land for deities, burial grounds, stool land,[27] throne land,[28] beach land,[29] streams which are vested in the community and foreshore land.[30]

B. Family Ownership

In this form of ownership, the land belongs to the family, and it evolves from the originator of the family first settling on a particular portion of land and after his death, the land as property is inherited by his children and thereupon becomes family property. No individual member can lay claim to it. Nor can they sell, dispose, mortgage or transfer ownership of the land without the consent of other family members.[31] Uwaifo, JSC,[32] defines family as the 'body of persons who live in one house or under one head, including parents, children, servants… the group consisting of parents and their children, whether living together or not'.[33] This suggests a broad definition of the concept of family when compared to the English or European concept of family. Family in the Nigerian context includes

25 *Shittu & Ors.* v. *Hassan* [2018] LPELR 45555 (CA).

26 *Josiah Aghenghen* v. *Chief Maduka Waghoreghor & Ors.* [1974] LPELR 247 (SC). The court also noted that, in practice, this interest is regarded as practically indefeasible once permanent buildings or other forms of improvements, like extensive commercial farming, have been established on the land by the grantees.

27 This is vested in the Head Chief as royal property and is part of a royal estate permanently attached to the chieftaincy stool; its use and control are vested in the chief who acts as the head. *Olusesi* v. *Oyelusi* [1986] 3 NWLR (Pt 31) 634.

28 This is vested in the monarch and on the death of the monarch, it passes on to the ruler's successors. *Oyekan* v. *Adele* [1957] 2 All ER 784.

29 Water frontage or trading posts in the riverine areas of Nigeria, like Lagos, Bayelsa, Edo, Ondo and Cross Rivers states. *Bassey* v. *Eteta* [1938] 4 WACA 153 at 155; *Dede* v. *African Associated Ltd.* [1910] 1 NLR 130, where the court invalidated the sale of beach land because the real owners were the community and not the chiefs.

30 Land bordering on the sea adjoining a large collection of water.

31 P. Oluyede, *Modern Nigerian Land Law*, Evans Brothers (Nigeria Publishers) Ltd (1989), p. 68; J.A. Omotola, *Essays on Nigerian Land Use Act 1978*, University of Lagos (1984), p. 109.

32 *Okulade* v. *Awosanya* [2002] FWLR (Pt 25) 1666 at 1679.

33 *Coker* v. *Coker* [1938] 13 NLR 83 at 85, on the definition of family.

blood relationships in its widest connotation, even to the 100th degree or including relationship by marriage.[34] In relation to a person, under customary law, it means: his wife, son, daughter, father, mother and any person, whether related to him by blood or not, who is wholly or mainly dependent upon him.[35] However, only those descended by blood or common ancestry are eligible to own or inherit land within a family.[36] On the death of the originator of the family's land, his children are entitled to the ownership of the land to the exclusion of other relatives or family members. In the strict sense of it, the brothers, sisters, cousins, or uncles of the deceased founder of a family do not come within the meaning of the term 'members of the family.'[37] This is different from the European understanding of family which is based on a pre-defined set of criteria like marriage, a couple relationship and parent–child relationships based on shared bio-genetic substance and generally excludes the application of customary law ideas.[38]

Family land is land vested in a family as a corporate entity. The individual members of the family, therefore, have no separate claim of ownership to any part or whole of it. However, a member of a family can sue to protect or defend the interest of the family in respect of any family property. However, if the family member suing does not have the authority of the family to bring the action to court, then the family will not be bound by the result unless the family is prevented from denying that action.[39] An individual member has no disposable interest in the family property. It is only the family that can transfer its title to any person under customary law. Any transfer of family land by a member of the family is void and of no effect.

Communal and family ownership of land under customary law is recognized in judicial decisions. In the Supreme Court of Nigeria case of *Idundun* v. *Okumagba*,[40] the court stated customary law as one of the ways that ownership or title to land can be proved. In particular, the court noted traditional evidence in the form of traditional history to prove ownership of land under customary law. It is submitted that this method relates to the nature of customary law, which relies on the traditional history embedded in the memory of community elders and people of a particular traditional group and reapplied over time. Therefore, proof of ownership of land by traditional evidence, as stated in the *Idundun* case,[41] relates to proof under customary law and is still a valid form of proof despite

34 *Oloba* v. *Akereja* [1988] 3 NWLR (Pt 84) 508 at 511.

35 Per Obaseki JSC in *Oloba* v. *Akereja* [1988] 3 NWLR (Pt 84) 508 at 511.

36 *Olanrewaju* v. *Bamigboye* [1987] 3 NWLR (Pt 60) 353.

37 *Suberu* v. *Sunmonu* [1957] 2 FSC 33.

38 D. Luck and A. Castren, 'Personal Understandings and Cultural Conceptions of Family in European Societies', 20/5 *European Studies* (2018): 699–714.

39 *Unity Bank Plc v*. *Bouari* [2008] 7 NWLR (Pt 1086) 372 at 398 (SC); *Sapo* v. *Sunmonu* [2010] 11 NWLR (Pt 1205) 374 at 398.

40 [1976] N M L R 200.

41 It should be noted that before the *Idundun* case, a plaintiff who sought a declaration of title to land had the onus of showing with certainty, except where parties knew the land, the identity and location of the land in dispute, showing clearly its boundaries and features of the land, failing which their claim to a declaration of title to such land would fail. *Baruwa* v. *Ogunsola* [1938] WACA 159. This case was followed by *Udechukwu Amata* v. *Udogu* [1954] 14 WACA 580.

the introduction of the LUA which vests ownership of land in the Governor.[42] Consequently, traditional evidence is a valid proof of title to land irrespective of the provisions of the LUA.

Fundamentally, the nature of land ownership under customary law is underpinned by the *Volksgeist* theory, which considers a nation as a community of people linked together by historical, geographical and cultural ties. This is crucial as it provides an understanding of the importance of land ownership under customary law. Family and communal ownership of land highlight the connections required within a community of people, whether in the form of a large group of people linked together as in a community or a small group of people linked together as is the case with a family. There is a strong need to preserve this link within land ownership and any act that fails to recognize this link and implement it, will inevitably create tension between land ownership under customary law and under any other system. The clear lack of an understanding of the fundamental nature of land holding under customary law is evidenced in the provisions of the LUA.

IV. THE LAND USE ACT 1978

Before the introduction of the LUA, land rights in southern and northern Nigeria existed under customary and Islamic law respectively. Their existence was criticized for a number of reasons: the acquisition of land for private and public use was difficult and cumbersome, and the cost of obtaining land for public purposes was prohibitive.[43] There was a need to introduce legislation to dispense with these issues. This fuelled the introduction of an Act. One main reason for the enactment of the LUA was to give the government compulsory powers to acquire land, and this has made it one of the most far-reaching and controversial pieces of legislation in Nigeria to date. Other reasons given for the promulgation of the LUA include the expectation of curbing the speculation in land with the aim of stabilizing land values and further contributing to the stabilization of the cost of government projects, especially in urban areas of the country; reducing the difficulty that the government experienced in acquiring land; the introduction of a systematic arrangement regarding ownership and distribution of land to reduce non-formalized tenurial arrangements in the southern part of Nigeria; and finally, removing the shackles to economic development imposed by essentially archaic and anachronistic tenurial arrangements.[44]

The LUA was originally promulgated in 1978 as a military decree.[45] The aim of the Act was to nationalize landholding in Nigeria and make land acquisition

42 *Elegushi* v. *Oseni* [2005] 14 NWLR (Pt 945) 348.

43 J.A. Omotola, 'Law and Land Rights: Whither Nigeria?' (paper presented at the inaugural lecture series, University of Lagos, Lagos, 29 June 1988), p. 11.

44 Federal Minister of Works, Prof. S.M. Essang, 'Reflections on Some of the Provisions of the Land Use Act 1978' (keynote address at the National Workshop on the Land Use Act 1978) in J.A. Omotola (ed.) *The Land Use Act: Report of a National Workshop Held at the University of Lagos 25–28 May 1981* Lagos University Press (1982), p. 10.

45 Under the then Military Head Of State General Olusegun Obasanjo.

easy.[46] The Act was preceded by an eleven-person Land Use Panel set up by the military government in 1977. The terms of reference of the panel covered: undertaking an in-depth study of the various land tenure, land use and land conservation practices in the country and recommending steps to be taken to streamline them; studying and analyzing all the implications of a uniform land policy for the country; examining the feasibility of a uniform land policy for the entire country, making necessary recommendations and proposing guidelines for implementation; and examining the steps necessary for controlling future land use and also opening and developing new land for the needs of the government and Nigeria's growing population in both urban and rural areas, and making appropriate recommendations.[47] Although the panel's majority did not recommend the nationalization of land, the federal government acted on the minority report and promulgated the LUA in 1978.[48] This is fundamental, as it demonstrates the minimal understanding of complex land issues exhibited by the military government in power at the promulgation of LUA. It also highlights the disregard for the importance of land ownership under customary law and the origin of the tension between the ownership of land under customary law and under the LUA.

The LUA principally governs issues in relation to land title, land use, ownership and enjoyment of land for the whole of the country. The preamble to the Act:

> vest (s) all Land compromised in the territory of each State (except land vested in the Federal government or its agencies) solely in the Governor of the State, who would hold 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, agriculture, commercial and other purposes while similar powers will with respect to non-urban areas are conferred on Local Governments.[49]

LUA has been described as the most 'revolutionary and controversial piece of legislation'[50] as far as land tenure law in Nigeria is concerned. Not only because the Act eliminated all the unlimited rights and interests that Nigerians had to their land before its promulgation, but also because these rights were substituted with limited rights. It introduced rigid control over the use and disposal of land. Another reason for this description is the fact that amending the Act is rigid and difficult due to its inclusion in the Constitution.[51]

46 R.T. Ako, 'Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice', 53/2 *Journal of African Law* (2009): 289–304, 294.

47 Federal Government White Paper on the Report and Recommendations of the Land Use Panel (1978) 1.

48 P.E. Oshio, 'Indigenous Land Tenure and Nationalisation of Land in Nigeria', 5/2 *Journal of Land Use & Environmental Law* (1990): 685–701.

49 Land Use Act 1978, preamble.

50 Per Obaseki JSC in *Savannah Bank (Nigeria) Ltd* v. *Ajilo* [1989] 1 NWLR (Pt 97) 2.

51 The Constitution of the Federal Republic of Nigeria, 1999, section 315(5).

The LUA abolished private ownership of land and introduced a right of occupancy system, by which it created a right of occupancy as the highest form of interest in land for the whole of the country.[52] His Lordship, Eso, JSC, noted that:

> the tenor of the Act as a single piece of legislation is the nationalisation of all lands in the country by the vesting of its ownership in the state leaving the private individuals with an interest in land which is a mere right of occupancy.[53]

The Supreme Court of Nigeria, while deciding the case of *Kachalla* v. *Banki*,[54] also re-emphasized this view when the court stated that the highest legal right an individual can have on land is a right of occupancy.

A. Right of Occupancy

A right of occupancy simply means the right to use and occupy land. The LUA does not define 'use' or specify what it involves. Likewise, the term 'occupy' is not defined in the Act but an 'occupier' is defined by section 51(1) of the Act as 'any person lawfully occupying land under customary law and a person using or occupying land in accordance with customary law and includes the sub-under lessee of a holder.' This provision emphasizes the holding of land under customary law, which the Act recognizes.

The interest in land that a person can is a right of occupancy, this is a right to the use and occupation of the land. The LUA provides no definition for the term 'rights of occupancy.' It does, however, distinguish between urban and non-urban land and grants different powers to different arms of government in relation to rights of occupancy in these areas. The Governor of a state is empowered to declare parts of the land in their respective states as urban areas and has the power to control land in such areas. The local government, on the other hand, is entitled under the Act to manage land in non-urban areas of the state. Rights of occupancy, under the LUA, are divided into statutory rights of occupancy and customary rights of occupancy.

1. Statutory rights of occupancy

Statutory rights of occupancy are granted by the Governor of a state in Nigeria.[55] They are rights granted by the Governor of each state to occupiers of land within the state. They entitle the grant holder to use the land for a fixed period. It does not grant a right of ownership to the grant holder. This right of occupancy bears resemblance to leasehold interests. They can be assigned. They can be mortgaged,

52 S.I. Nwatu and E.O. Nwosu, 'Applicability of the Consent Requirement of the Nigerian Land Use Act to the Asset Management Corporation of Nigeria Act', 60/2 *Journal of African Law* (2016): 173–89.

53 *Chief R.O. Nkwocha* v. *Governor Anambra State* [1984] 6 SC 362.

54 [2006] All FWLR (Pt 309) 1420. See also, *Ezennah* v. *Attah* [2004] All FWLR (Pt 202) 1858 at 1884.

55 Land Use Act 1978, section 5(1).

and they can be under-let or sublet. These transactions, however, can only be engaged in by the holder of the right of occupancy with the consent of the Governor as provided by the LUA. A 'holder', in relation to a right of occupancy, means a person entitled to a right of occupancy. It includes any person to whom a right of occupancy has been validly assigned or has validly passed upon the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-under lessee.[56] A holder, in relation to a right of occupancy, does not include a sub-lessee or under-lessee but is a person entitled to a right of occupancy.[57]

2. Customary rights of occupancy

The LUA defines the customary right of occupancy as the right of a person or community lawfully using or occupying land in accordance with customary law and includes a customary right of occupancy granted by the local government under this Act.[58] The local government in whose area the land is situated grants a customary right of occupancy.[59] A person with a customary right of occupancy is entitled to use the land in accordance with customary law.

Customary right of occupancy attempts to preserve the existence of customary law by creating a right based on customary law but imposing the local government as the grantor. A customary right of occupancy under the LUA specifically attempts to preserve communal land ownership under customary law, the latter is intimately linked with the custom of the people of the area. Limiting the grantor to the local governments, where customary law is largely applied, further creates the semblance of the preservation of customary law. However, what a customary right holder gets is a right of occupancy subject to the provisions of the LUA and not a right based on customary law.

B. Problems of the LUA

Despite addressing some issues that existed before its introduction, the creation of LUA has been considered to have ushered in several issues. Some of the problems are discussed below.

1. Inability to alter or amend the LUA

The LUA cannot be altered or repealed except in accordance with the provisions of section 9(2) of the Constitution.[60] The LUA requires an amendment of the Constitution for its provisions to be amended, and unless this happens, any Act of the National Assembly meant to regulate access to land, land tenure or land rights

56 *Ibid*. section 51.
57 Per Obaseki JSC in *Abioye* v. *Yakubu* [1991] 5 NWLR (Pt 190) 130.
58 Land Use Act 1978, section 50(1).
59 *Ibid*. section 6(1).
60 Constitution of the Federal Republic of Nigeria 1999, section 315(5)(d).

will be void and unconstitutional.[61] Amendment of the Constitution requires a two-thirds majority of all the members in the lower and upper legislative chambers that make up the National Assembly. It also requires the approval of no less than two-thirds of the Houses of Assembly of every state of the federation. There have been unsuccessful attempts to amend the LUA by the National Assembly in Nigeria, in 2017[62] and 2019.[63] The 2017 attempt involved expunging the LUA from the Constitution, while the 2019 attempt involved removing the authority of State Governors to grant a right of occupancy of land within their states. This difficulty has been expressed by scholars[64] and accounts for the lack of meaningful tenurial changes due to the stiff requirements of a constitutional amendment.[65] The LUA reduces the right of acquisition and ownership of land enshrined by the constitution to a right of occupancy.[66]

The recognition and maintenance of human dignity and the ideals of equality and justice enshrined in the Constitution[67] coupled with the provisions of sections 5 and 6 of the LUA, which require the Governor or local government to grant the statutory or customary right of occupancy to any person upon application, where an applicant applies for land in any territory of the state, suggest that the Constitution and the LUA guarantee the right to unrestricted access to own and enjoy land for every Nigerian. However, when issues like the lack of availability of land[68] are considered, it raises questions about the guarantee of unrestricted access to own and enjoy land provided by the Act and the Constitution. Factors such as size and cost of land also limit the availability to own and enjoy land in an unrestricted way. This is compounded by the lack of opportunity to challenge the refusal of a land allocation application.[69]

It is submitted that a right of occupancy, which is equivalent to a lease, does not translate to guaranteeing a right to acquisition or ownership of land, nor does it fully express the spirit of section 17(2) of the Constitution or sections 5 and 6 of the LUA. The LUA, in its issuance of occupancy rights, is contrary to

61 *Elegushi & 5 Ors.* v. *A.G. Federation & 2 Ors.* (FHC/L/CS/669/95).

62 Executive Briefing, 'Politics of Amending the Land Use Act' (1 August 2017) *ThisDay Newspaper* (Lagos) available at <https://www.thisdaylive.com/index.php/2017/08/01/politics-of-amending-the-land-use-act> (accessed 8 September 2023).

63 'Why States May Kick Against Bid to Amend Land Use Act' (28 October 2019) *ThisDay Newspaper* (Lagos) available at <http://www.thisdaylive.com/index.php/2019/10/28/why-states-may-kick-against-bid-to-amend-land-use-act> (accessed 8 September 2023).

64 E.O. Ekhator, 'Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation', 21/1 *Annual Survey of International & Comparative Law* (2016): 43–91.

65 I.O. Smith, 'Sidelining Orthodoxy in Quest for Reality: Towards an Efficient Legal Regime of Land Tenure in Nigeria' (paper presented at the inaugural lecture series, University of Lagos, Lagos, 18 June 2008) p. 13.

66 Constitution of the Federal Republic of Nigeria, 1999, section 43.

67 *Ibid*. section 17 (2).

68 According to the World Bank, there has been a decline in the availability of forest land from 29% in 1990 to about 23% in 2020, available at <https://data.worldbank.org/indicator/AG.LND.FRST.ZS?locations=NG> (accessed 9 September 2023).

69 Land Use Act 1978, section 47.

the constitutional guarantee of ownership of immovable property, and as stated by Obaseki, JSC, the Act took away the right of ownership from every Nigerian.[70]

It is further submitted that the constitutional provision[71] rendering any law that is inconsistent with the provisions of the Constitution null and void can and should be applied to the LUA. Despite the Supreme Court[72] stating that the LUA is not an integral part of the Constitution[73] but an existing law of the National Assembly, and that where its provisions are inconsistent with that of the Constitution, those provisions shall be null and void to the extent of its inconsistency with the Constitution, it is impossible to alter or amend the provisions of the LUA.

2. A threat to absolute ownership of land under customary law

Omotola[74] identifies some of the problems of the LUA as problems with the interpretation of the provisions that consist of ambiguities, contradictions,[75] absurdities, invalidities and confusions; and the issue of validity due to the conflicting judicial views on matters involving the Act and the 1979 Constitution.[76]

Section 1 of the LUA vests all land in the Governor of the State, to be held in trust and administered for the use and common benefit of all Nigerians. According to Ogundare, JCA, the use of the word 'vests', had the effect of transferring to the Governor of the State the ownership of the land in that state,[77] ownership that was previously vested in communities or families. This cast doubt on the existence of absolute ownership of land, which previously existed under customary law. Ogundare's idea was supported by the Supreme Court in *Salami* v. *Oke*,[78] which held that absolute ownership of land is no longer possible since section 1 of the LUA vested all land rights in the Governor of the State. Omotola disagrees with this view and argues that the Act did not destroy existing land rights, based on sections 34 and 36 of the Land Use Act, which expressly preserve existing rights in land.[79]

70 *Savannah Bank (Nigeria) Ltd* v. *Ajilo* [1989] 1 NWLR (Pt 97) 2.

71 Constitution of the Federal Republic of Nigeria 1999, section 1(3).

72 *Nkwocha* v. *Governor Anambra State* [1984] 15 NSCC 484.

73 Albeit the 1979 Constitution but with similar provisions to the 1999 Constitution in relation to the LUA.

74 Omotola, above at note 44 at 11.

75 See IV.B.4 (Uncertainty over customary land tenure) below.

76 In *Chief R.O. Nkwocha* v. *Governor Anambra State* [1984] 6 SC 362, the Supreme Court acknowledged that although the LUA is not an integral part of the Constitution, it is entrenched in it. It, however, failed to rule on whether the provisions of the LUA would be valid if in conflict with the Constitution. In *Kanada* v. *Governor of Kaduna State and Anor.* [1986] 4 NWLR (Pt 35) 361 per Wali JCA at 378, the Court of Appeal held that any provision of the LUA which conflicts with those of the Constitution is void. *Dada* v. *Governor of Kaduna State* (FCA/K/12/3 of 30/11/84), took the same view as *Kanada*. In *Bola Adewunmi* v. *Ogunbowale* (HC-ID/115/3 of 28/5/82), the court held that the Constitution has precedence over the LUA and any provisions of the LUA that conflict with the Constitution will be invalid.

77 *Tijani Akinloye* v. *Chief Oyejide* (HCJ/9A/83 of 17/9/81).

78 [1987] 4 NWLR (Pt 63) 1 per Kawu JSC.

79 Omotola, above at note 44 at 14.

Despite not completely destroying existing land rights, it altered the nature of pre-existing rights from before the introduction of the LUA. The LUA makes provisions for developed[80] and undeveloped urban and non-urban land. Under the LUA,[81] any developed urban land held before the commencement of the Act shall continue to be held by the holder as though it was held under a statutory right of occupancy issued by the Governor under the Act.

However, for undeveloped land, the right holder shall be entitled to a plot or portion of the land not exceeding half a hectare and this plot or portion shall continue to be held by the holder as though it was held under a statutory right of occupancy issued by the Governor under the LUA.[82] All rights formerly vested in the holder in respect of the excess of the land shall be extinguished after the commencement of the Act, and the excess land shall be taken over by the Governor and administered in line with the provisions of the Act.[83] Although the Act preserves the rights of existing landholders in relation to developed urban land, irrespective of the size of the land, this is not the case for undeveloped urban land in excess of a plot. This provision is not only unfair to holders of such undeveloped land but creates an issue for such rights holders. As land under customary law was held under communal or family ownership absolutely, there are issues regarding determining ownership of the plot permitted by the LUA or determining a sharing formula for the permitted plot held under customary law. For communal land owned by a community consisting of a sizeable number of people, who rely on the land for subsistence, there is the risk of discontent on the part of the community towards the Governor, and this can create other underlying problems resulting from the taking over of such communal land. This is exemplified in communal disputes over land between indigenous communities and the Governor of the State.

3. Alteration of existing customary rules on land

The LUA altered the existing rights of land held in non-urban areas and held under customary rights. The occupier or holder of non-urban land used for agricultural purposes shall continue to be entitled to use that land for agricultural purposes as if a customary right of occupancy had been granted to the occupier or holder by the appropriate local government. For the customary rights in existence before Act to be maintained, the land must be in a non-urban area and crucially must be used for agricultural purposes. The Act makes no provision for non-urban land[84] not used for agricultural purposes. Where the non-urban land is developed,[85] the land continues to be held by the person to whom it was vested immediately before the commencement of the LUA, as if the holder of the land were the holder of a customary right of occupancy issued by the local government. If the holder

80 Land Use Act 1978, section 51.
81 *Ibid*. section 34(2).
82 *Ibid*. section 34(5)(a).
83 *Ibid*. section 34(5)(b).
84 Or undeveloped non-urban land.
85 Land Use Act 1978, section 36(4).

or occupier of such developed land produces a sketch or diagram showing the area of the land so developed, the local government, if satisfied that that person, immediately before the commencement of the Act, had the land vested in them, registers the holder or occupier as one in respect of whom a customary right of occupancy has been granted by the local government. These grants to existing holders are deemed as grants under sections 34 and 36 of the Act.

It is further submitted that the LUA did not destroy existing customary rights but altered the period of grants. This is because a statutory right of occupancy granted under the provisions of section 5(1)(a) of the Act is for a definite term.[86] The section relates only to rights granted under section 5(1)(a) of the Act and does not relate to customary rights granted under section 6 of the Act and deemed rights granted under section 34 and section 36 of the Act. Therefore, customary rights of occupancy and deemed grants, which are not affected by section 8, can exist in perpetuity.

The nature of rights of occupancy under the LUA creates problems not just for landowners but for stakeholders generally. Whilst grants made under the LUA are clear in terms of occupancy, deemed grants and customary rights of occupancy that apply to lands which are situated in areas of the country with mineral resources create another layer of problems when it comes to ownership of and access to those resources. It also highlights the problems within a multi-legal system where provisions under the Act and the rules of customary law conflict.

4. Uncertainty over customary land tenure

Smith[87] addresses some of the problems of the LUA in relation to its effect on customary land titles. According to him, the enactment of the LUA merely threw confusion into the realm of the customary land tenure system, allowing strange propositions to emerge with drastic consequences. One example of these consequences was the wrongful decision in *Kasali* v. *Lawal*,[88] which held that customary land tenure had been swept away by the LUA; an anomaly which the Supreme Court had to correct in subsequent decisions.[89] Smith also highlights the insecurity of tenure introduced by the LUA in relation to a holder of a statutory right of occupancy as another problem. He considers the import of section 8 of LUA that states that 'statutory right of occupancy. . . shall be for a definite term and may be granted subject to the terms of any contract which may [be] made by the Governor.' He interprets this section to mean that it subjects an actual grant of statutory right of occupancy issued by the Governor to a fixed term. The term is usually expressed to be for the duration of 99 years. Since a fixed term will inevitably come to an end by effluxion of time, all rights appertaining to the land revert to the reversioner, that is the Governor, at the expiration of the term. As with a leasehold interest, the holder is expected to relinquish possession.

86 *Ibid*. section 8.
87 Smith, above at note 44 at 28.
88 [1986] 3 NWLR (Pt 28) 308.
89 *Salami & Ors.* v. *Oke* [1997] 4 NWLR (Pt 63) 1.

Where there are no improvements on the land, no issue arises as to the status of the holder for a holder owns not the land but only any improvements made thereon. However, where the holder owns improvements on the land, which they retain at the expiration of their term, the question is whether, based on known legal principles, their rights over the improvements do not become extinguished.[90] The subjecting of an actual grant of statutory right of occupancy to a fixed term evidences the uncertainty over customary land tenure.

5. Complexity regarding ownership of minerals

The existence of two sets of rights of ownership: common law and customary law, create legal conflicts for different aspects of land ownership. These issues range from the nature of rights to land under customary law and under the LUA to the ownership of mineral or natural resources found under the surface of such land. Ownership of minerals is important due to the economic value and the financial benefits derivable from its sale. This latter aspect was addressed by the Act, which made explicit reference to the oil industry where it provides that a right of occupancy can be revoked for 'overriding public interests' and this includes the 'requirement of the land for mining purposes or oil pipelines or for any purpose connected therewith.'[91] This provision raises further issues.

Firstly, the term 'for purposes connected therewith' is unclear and ambiguous as it can be interpreted to incorporate a wide range of activities not associated with mining or oil pipelines and therefore not intended by the Act. Secondly, approval for land acquisition by oil companies is only made to the Governor of the State and not the tribal or community leader where the land is. This leads to prolonged negotiations over land governed by different indigenous communities with multiple customary laws. Additionally, section 28 of LUA further imposes an obligation on oil companies to pay ground rents to the Governor for the acquisition of land and in doing so, indigenous communities are not acknowledged or adequately compensated for land acquired within their communities. A right they believe they have due to the existence of customary law as it pertains to land.

The existence of different customary rules raises other socio-cultural issues with not just the payment of ground rents but the payment and distribution of compensation to various community leaders or family heads who may hold such customary land in trust for members of their community or family. This creates a complex rule in relation to compensation payments. On the one hand, a State Governor is empowered to fix and receive rent for land[92] and, on the other hand, the payment of compensation is made to the chief or leader of the community where land is compulsorily acquired or funds are specified by the Governor for the benefit of the community.[93] It is submitted that the option

90 Smith above at note 44 at 20–21.
91 Land Use Act 1978, section 28. The LUA provides for payment of compensation, Land Use Act, section 29.
92 *Ibid*. section 16.
93 *Ibid*. section 29(3)(a)–(c).

of disbursing compensation payments to the community leader or Governor, although it acknowledges customary ownership, suggests that the community leaders no longer hold these lands. But making payments to them suggests they hold the land in trust for the community, a key part of ownership under customary law and therefore a conflict between two systems of land ownership, especially because the LUA does not extinguish customary law.[94] The issue of ownership of mineral resources, although vested in the federal government, is in conflict with the customary rights to the same mineral resources because of land ownership under customary law.

V. CONFLICT BETWEEN CUSTOMARY LAW AND THE LUA

A major reason for the conflict between customary law and the LUA is legal pluralism. Legal pluralism is defined as the existence of multiple sources of law (both state and non−state) within the same geographical area.[95] Corrin[96] notes that the co-existence of plural legal systems, especially where they are based on very different norms, throws up complex practical dilemmas, such as how to resolve conflicts between constitutionally enshrined individual rights and customary laws, which are not easily resolved by reference to the recognition provisions. This complexity is further compounded where diverse customary rules exist, therefore creating another layer of complexity. This is the case in Nigeria, which is considered a federal pluralistic nation[97] in terms of ethnicity, religion and laws, and the pluralistic nature of the country is evident in the heterogeneous ethnic character existent in the country. The legal pluralism existing in Nigeria not only incorporates different ethnic tribes but creates various avenues for conflict.

Ownership of land reflects the cultural values of Nigeria and therefore, customary rights to land is an important aspect of life in Nigeria and should be properly reflected as part of the legal system. Tamanaha[98] argues that the multiple, uncoordinated, coexisting or overlapping bodies of law (statutory/formal and customary/traditional) make competing claims of authority and often impose conflicting norms. This potential conflict generates uncertainty or jeopardy for individuals, firms and social groups, who cannot be certain in advance about which legal regime might be applied to their case, be it a civil dispute or serious crime. It also creates, he suggests, opportunities for individuals and groups to strategically invoke or pit one legal order against another.

Two key reasons are adduced for the conflict between customary law and the LUA. Firstly, there is a difference in perception of how laws should operate.

94 The LUA acknowledges the existence of customary law under section 24; on the devolution of rights of an occupier upon their death and under section 51, where it defines customary right of occupancy as occupancy in accordance with customary law.

95 S.E. Merry, 'Legal Pluralism', 22/5 *Law and Society Review* (1988): 869–96.

96 J. Corrin, 'Plurality and Punishment: Compensation Between State and Customary Authorities in Solomon Islands', 51/1 *The Journal of Legal Pluralism and Unofficial Law* (2019): 29–47.

97 B.O. Nwabueze, *A Constitutional History of Nigeria*, C. Hurst & Company (1982).

98 B.Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', 30/3 *Sydney Law Review* (2008): 375–411.

The *Volksgeist* theory supports this position. The theory considers a nation as a community of people linked together by historical, geographical and cultural ties[99] and therefore, the perception of law-making will inevitably be different from that of persons who do not share the link that exists in the community. Before the introduction of the Act, customary law rules governed land ownership. The introduction of legislation on land was a deviation from the known and accepted rules that applied to land ownership, and it would inevitably lead to a clash of ideas and practices on how land is held. The result of this conflict can be seen in the different ideas of land ownership and alienation of land. Secondly, the creation and enforcement of legislation that does not take the pre-existing customary laws, interests and concerns of indigenous communities into account, undoubtedly creates a clash of interests which inevitably creates conflicts.

VI. AN UNWORKABLE SYSTEM

It is submitted that the dual system of land ownership under the LUA and under customary law is unworkable for two key reasons.

Firstly, rights of occupancy under the LUA are a distinct proprietary interest in land, different from rights under customary law. A right of occupancy granted under the LUA is for a definite term,[100] while the term offered under customary law is permanent. For example, family and communal ownership of land under customary law is in perpetuity, so long as the rights holder is a family or community member of the land governed by customary law.

Secondly, the concept of trust and consent operates differently within both systems. Under the LUA, land is held in trust by the Governor on behalf of the state and they have the exclusive right to grant a right of occupancy to anyone without the need to obtain consent from family members or members of the community. Under customary law, communal lands are often held in trust by a council of elders constituted from within the community or by the village head, who holds the land in trust for the people of the community,[101] and any sale or transfer of the land must be with the consent of the community. For community land, the village head or council are barred from transferring such land unilaterally. In *Omagbemi* v. *Numa*,[102] the court held that Olu of Warri never owned Itsekiri land as an individual because the land belonged to the community and Olu was a trustee vested with the land. The court nullified the purported transfer of the land without the consent of the community. In relation to family land, consent is required in relation to its sale. For family land, the consent of most principal members of the family is required and not the consent of every member of the family.[103] Similarly, the head of the family and principal members

99 Dias above at note 9 at 378.
100 Land Use Act 1978, section 8.
101 *Achibong* v. *Achibong* [1948] 18 NLR 117.
102 [1923] 5 NLR 17.
103 *Akayede* v. *Akayede* [2009] 11 NWLR (Pt 1152) 217 at 249 (SC).

of the family must consent to any sale, allocation or alienation of family land before such can be valid.[104]

Consequently, the incompatible nature of the two systems subjects them to conflict and therefore requires a resolution.

VII. OPTIONS FOR RESOLVING THE CONFLICT BETWEEN CUSTOMARY LAW AND THE LUA

To deal with the gaps in the research on legal pluralism and land management in Nigeria, this article offers several options for resolving the conflict between customary law and the LUA.

A. Codification of Customary and Statutory Laws

To avoid conflicts between legal systems, countries with dual or multi-legal systems have adopted different approaches. One method of resolving the conflict is the codification of the conflicting legal systems. However, as noted in a 2007 UN report,[105] legislation aiming at the codification of customary and statutory law across the board has now lost its appeal in most contexts. Harper[106] endorses this finding and suggests that whilst the codification of customary law may enhance predictability, it may curtail the very flexibility, negotiability and relevance to local context which act as customary law's principal benefits. Whilst this position is accurate, it is submitted that the codification of customary and statutory law has been proven to work if such is done in a national constitution. The rationale for this is the binding nature of a national constitution. Whilst codification may have lost its appeal, it is still a useful tool for reducing or eliminating the conflict between land ownership under customary law and the LUA.

B. Harmonization of Both Systems

A second way of reducing or avoiding the conflict is to harmonize both systems. This approach is supported by Knight[107] who identified seven important things that must be considered in other to successfully harmonize statutory and customary land rights. Knight's suggestions offer a broad approach to resolving conflicts between customary law and statutory law, and based on that, should be adopted by Nigeria. Harmonization of legal systems is a solution noted by Merwe,[108]

104 *Lukan* v. *Ogunsosi* [1972] 5 SC 40; *Akanni* v. *Makanju* [1978] 11–12 SC 13; *Atunrase* v. *Sunmola* [1985] 1 NWLR (Pt 1) 105; *Babayeju* v. *Ashamu* [1989] 9 NWLR (Pt 567) 546.

105 UN Women, UNICEF and UNDP, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*, UNDP (2007), p. 18.

106 E. Harper, *Customary Justice: From Program Design to Impact Evaluation*, International Development Law Organization (2011), p. 43–54, available at <https://www.idlo.int/publications/customary-justice-program-design-impact-evaluation> (accessed 8 August 2023).

107 R.S. Knight, 'Statutory Recognition of Customary Land Rights in Africa: An Investigation Into Best Practices for Lawmaking and Implementation', (FAO Legislative Study, 2010): 215, available at <http://www.fao.org/3/a-i1945e.pdf> (accessed 8 September 2023).

108 C. van der Merwe, 'The Origin and Characteristics of the Mixed Legal Systems of South Africa and Scotland and Their Importance in Globalisation', 18/1 *Fundamina* (2012): 91–114.

who notes that irrespective of the type of legal pluralism or mixed legal systems that exist, whether common law and civil law or common law and customary law, there can be peaceful harmonization as one united legal system of a truly hybrid character. An alternative to harmonization is the abolishment of one legal system to have a sole legal system. For instance, an option is the abolishment of customary law. However, this would result in more complex situations than currently exists. Abolishment of customary law will amount to eroding the ways of life of indigenous groups.

C. Constitutional Review

A constitutional review will involve incorporating provisions relating to customary law into the Constitution. These should express customary law as a source of law and acknowledge its importance to land management. It also serves to highlight the importance of customary law amongst indigenous people that apply its rules. Of the thirteen mentions of customary law in the current Nigerian Constitution, twelve relate to the requirement for qualification as a Court Of Appeal or Customary Court Of Appeal Justice and the last relates to the formation, annulment and dissolution of marriages under customary law. None relate to issues on land ownership.[109] This clearly demonstrates the minimal importance ascribed to customary law issues in the Nigerian Constitution. Secondly, it must amend the definition of law to include customary law, which embodies the customs of indigenous communities in Nigeria. This definition must acknowledge both written and unwritten law. The latter is a reference to customary law and keeping its unwritten character. And finally, it must acknowledge customary law as a source of law. This will ensure any new legislation on land incorporates customary law principles or customs in its provisions.

Crucially, a constitutional review must incorporate tribal recognition within its provisions. The current Constitution makes no reference to any indigenous communities in Nigeria.[110] Tribal recognition acknowledges the existence of all Nigerian tribes and creates a sense of inclusion amongst members of these tribes. It also aids the acknowledgement of tribal rights to land and resources. It ensures constitutional protection on issues pertaining to various tribes, particularly the customary law on land matters.

To effect this change, the following suggested wording should replace the preamble to the Constitution:

> We the people, consisting of indigenous tribes and communities of the Federal Republic of Nigeria. Having firmly and solemnly resolved to recognize the existence of customary law as a source of law of various indigenous tribes and communities, to live in unity and harmony as one indivisible and indissoluble sovereign nation under

109 Constitution of the Federal Republic of Nigeria 1999, sections 237 (2)(b), 245(1), 247(1)(b), 266 (3)(a)(b), 267, 281 (3)(a)(b), 282(1), 288(1), 288(2)(b).

110 Constitution of Nigeria 1999, section 55, refers to the use of four languages in the National Assembly and makes no attempt to acknowledge other languages or tribes.

> God, dedicated to the peaceful co-existence of all recognised tribes within Nigeria, promotion of inter-African solidarity, world peace, international co-operation and understanding. And to provide for a Constitution for the purpose of promoting the good government and welfare of all persons and indigenous tribes and communities in our country, on the principles of freedom, equity, equality and justice, and for the purpose of consolidating the unity of all our people. We do hereby make, enact and give to ourselves the following Constitution.

Constitutional review must include an interpretation clause that defines customary law to mean the rules of law which by custom are applicable to tribal communities in Nigeria and a schedule containing a list of all the tribes in Nigeria.

Furthermore, a constitutional review must include the creation of a National House of Chiefs in the National Assembly and a State House of Chiefs for each state, each consisting of individuals knowledgeable in the customs of their indigenous communities. This will not only acknowledge the existence of customary law but also guarantee its future. This stems from the idea of customary law being an integral part of the people and existing as binding amongst various ethnic tribes. This currently exists in the constitutions of several African countries and works effectively. For example, Sierra Leone follows a similar system. Section 72 (1) of the Sierra Constitution 1991 provides for the Institution of Chieftaincy as established by customary law and usage. Its non-abolition by legislation is guaranteed and preserved by the Constitution. Section 7 (e) of the Constitution of the Republic of the Gambia 1997 acknowledges the existence of customary law. It provides that the laws of the Gambia consist of customary law so far as concerns members of the communities to which it applies. Section 211 (1) of the Constitution of the Republic of South Africa 1996 recognizes the institution, status and role of traditional leadership according to customary law. Traditional leaders deal with matters relating to traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law. Finally, Section 271 (1) of the Constitution of the Republic of Ghana 1992 specifically guarantees the usage and preservation of customary law through the Institution of Chieftaincy.

To effect this change, an inclusion of a National and State House of Chiefs must be contained in the Nigerian Constitution.

D. Introduction of a Lands Act

The LUA distorted traditional land use and cultural practices that people were accustomed to. In the Niger Delta region, a region which contains most of Nigeria's crude oil, the Act aroused strong public feelings and tended to further alienate the oil communities from the traditional and cultural resources upon which their livelihood depended, especially as it related to the expansion of the

oil industry.[111] The Act also denied benefits in the form of compensation from any company exploring and extracting mineral resources from the community's land. As a result of the numerous distortions and inconsistencies with the Constitution, several scholars have made public calls for the reform of the LUA. Otubu[112] calls for a review of LUA provisions and recommends a uniform right of occupancy, single administrative structure for land administration in the state and a repeal of the Governor's adjudicatory powers in the LUA.[113] Essang[114] identifies political, constitutional and economic reasons for a review of LUA.

Despite the call for a review of the LUA, to date there has been little agreement by legislators on reviewing the provisions of the Act. Whilst there is a general agreement amongst scholars on the need for a review of the LUA, there are very limited or no suggestions on the form and content of the review needed. The key reason for this is that the suggestions for review still focus on the LUA and therefore do not go far enough. Furthermore, there needs to be a change in approach from reforming the current LUA to replacing the LUA.

To deal with this gap in legislative approach, this article proposes a repeal of the LUA and a replacement with a Lands Act (LA). The new LA must recognize and incorporate the principles and usage of customary law on land ownership. It must ensure the principles of family and community ownership of land are maintained. To achieve this, the National Assembly should ensure that the authority of State Governors to grant some form of right to land within their state is maintained. An attempt to remove this authority of State Governors led to the failure of the 2019 amendment of the LUA. In addition to this, the LA must ensure that any land commission shall include representatives from the National and State House of Chiefs, consisting of indigenous chiefs from all tribes within each state. This will guarantee that there are contributions from people knowledgeable in customary law on issues of land ownership and allocation within their state.

The new LA must contain provisions that revoke the right of occupancy system and replace it with ownership regimes based on customary law. It must remove control of land from state and local governments and vest them in a customary committee comprising indigenous persons from each recognized ethnic tribe. Crucially, it must not subject a change or amendment to a constitutional amendment. In terms of the substance of the law, the preamble to the LA must confirm customary law as the source of law and note it as being superior to any other law on land matters in Nigeria.

111 E.C. Emordi, B.E. Oseghale and O.M. Nwaokocha, 'Government's Response to the Niger Delta Crisis' in I.O. Albert (ed.) *A History of Social Conflict and Conflict Management in Nigeria*, University of Ibadan (2012), p. 377.

112 A.K. Otubu, 'Land Administration in 21st Century Nigeria and the Land Use Act: Need for Reforms' (2017), available at <https://ssrn.com/abstract=3078068> (accessed 10 August 2023).

113 *Ibid*.

114 S.M. Essang 'Reflections on Some of the Provisions of the Land Use Act 1978' in J.A. Omotola (ed.) *The Land Use Act Report of a National Workshop*, University of Lagos (1981), p. 10.

VIII. CONCLUSIONS

This article has examined the tension that exists between customary law and the LUA regarding land ownership. It traced the origin of this tension to legal pluralism. It highlighted the importance of customary law within indigenous communities and the key role it plays in the lives of the people, a role that determines how land is owned. It also highlighted the provisions of the LUA regarding land use and examined the problems with the LUA. It has concluded that the existence of the two legal systems of land ownership in Nigeria is unworkable. Separating the people from their culture is impossible, and irrespective of the provisions of the LUA on land ownership, customary law will always apply to the land matters of indigenous communities. This is because of the historical, geographical and cultural ties that exist amongst them, ties that determine how land is held under customary law. Ties intrinsic to the existence of a people. Ties underpinned by the *Volksgeist* theory. This article proffers a number of solutions that can resolve the conflict between customary law and the LUA on land ownership in Nigeria. Despite being a solution, codifying customary law does not go far enough as the fundamental issues remain. Codification of customary law does not eliminate the tension between the two systems of land ownership, but instead makes customary law accessible in written form and therefore changes its fundamental unwritten characteristic. Harmonization of both systems, as a solution, reduces the conflict by creating a hybrid solution to the tension between both legal systems. However, it does not go far enough and therefore is not the best solution. An alternative solution is an abolishment of customary law. Despite being a drastic option that will eliminate the tension between customary law and the LUA, the impact will be long lasting as the elimination of customary law will see customs and customary laws gone completely. It will also see the ways of life of indigenous communities eliminated in favour of a legal system that is perceived as alien to them. This will create an even more dire system and therefore is not viable.

The solution to reducing or removing the tension is a legal one. One involving a review of the legal framework on land ownership in Nigeria, one that fully recognizes customary law ideas of land ownership. This involves a two-pronged legal solution, the first involves tribal recognition within the Constitution and incorporating provisions in the Constitution that acknowledge the existence and binding nature of customary law. These will have far-reaching implications through the recognition of customary law at a fundamental level. A constitutional review that includes the creation of a National and State House of Chiefs will provide recognition, acceptance and development of customary law at the national and state level. This also recognizes customary law as being an integral part of the people and its binding nature amongst indigenous tribes. The experience of similar African countries further demonstrates its strong viability as an effective method of resolving the tension created by legal pluralism and land ownership in Nigeria. The second viable legal solution involves repealing the LUA and replacing it with the LA. This solution addresses the gap in the literature on legal pluralism and

land ownership in Nigeria. Despite the scholarship in this area of law, the previous approach has been focused on reviewing the legislation rather than repealing and replacing it with a more viable option. The introduction of a new LA seeks to change the approach to resolving the tension between legal pluralism and land ownership in Nigeria. The LA proposal for the revocation of the current system for granting rights of occupancy in favour of ownership regimes based on customary law further demonstrates the recognition of customary law in relation to land ownership in Nigeria.

The various issues faced in reviewing the LUA and, most importantly, the length of existence of the current LUA, demonstrates the enormity of the problem of land ownership in Nigeria. It therefore requires a change in approach from a review of the current LUA to replacement with a new LA. Whilst the journey to a new act may be difficult, it is one that guarantees the recognition of customary law and its application on land matters. It also serves as a basis for review of other areas governed by customary law.