EMINENT DOMAIN AND LAND USE CONTROL IN WEST AFRICA (GHANA AND NIGERIA) AND PAPUA NEW GUINEA: THE POLITICAL AND SOCIAL IMPLICATIONS

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INTRODUCTION

Implicit in the concept of sovereignty is the power to take property for public use without the consent of the owner.[1] But that the property should be taken in the interest of the public is a function of the legal system's recognition of a limitation on the exercise of the sovereign's power of appropriation. Public use, public purpose, general welfare, public good all express the same idea.[2]

The constitution of a liberal democracy recognises yet another limitation on the sovereign's power to take private property for public purposes. It requires the payment of compensation for the property so taken.[3] Professor Thayer says: 'The right of eminent domain is that attribute of sovereignty by which the state may take, appropriate, or divest private property whenever the public exigencies demand it, or according to the usual definition, it is the right to take private property for public purposes. And to this right the obligation always attaches of making just compensation for the property taken.'[4]

The origin of the doctrine has been traced to Hugo Grotius who wrote:

> The property of the subject is under the eminent domain (eminens dominium) of the state, so that the state or he who acts for it may use or even alienate and destroy such property, not only in the case of extreme necessity... but for ends of public utility... but it is to be added that when this is done the state is bound to make good the loss to those who lose their property.[5]

Puffendorf (1672) and Bynkershook (1737) both criticised Grotius' use of *dominium*. The former stated that *potestas* and the latter that *imperium* would have brought out more clearly the nature of the state's sovereign power than *dominium* had done.6 However,

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1. See *Nichols on Eminent Domain* (3rd ed. by Sackman, vol.1, New York: Mathew Bender & Co. 1977) Chap.1, see also *Scott* v. *Tolado* 36 F.385 (1888, and *Blackstone's Commentaries*, (1884) 297, T.O. Elias, *Nigerian Land Law*, (London: Sweet & Maxwell 3rd Impr. 1980) 63.

2. *Pollard* v. *Hagan* 3 How.212, 11 L.Ed. 565 (1945), *Filbin Corp.* v. *U.S.* 265 F.354 (1920).

3. See for example the Fifth Amendment of the U.S. Constitution; Sec.40 of the suspended 1979 Constitution of the Federal Republic of Nigeria; Sec.18 of the suspended 1979 Constitution of Ghana, and Sections 53 and 54 of the 1975 Constitution of Papua New Guinea.

4. *Cases on Constitutional Law*, (vol.1, Cambridge, Mass: Kent & Co. 1985) 953.

5. *De Jure Belli et Pacis*, Lib.III. c.20 (1965) quoted in *Nichols on Eminent Domain*, *op.cit.* 947.

6. *Nichols on Eminents Domain*, *Ibid.*

dominium prevailed, a measure of Grotius' scholastic standing. The usage has been adopted in the United States. It is a concept which is alien to the common law, its closest analogy here being compulsory acquisition of property.

Under customary law generally in West Africa since individual stool subjects in the case of societies with chiefs and clan members, in the case of societies without chiefs could appropriate as much land as their physical energy could permit and could be given just enough land by express grant from the chief or other community head or leader for building purposes, whatever a man has reduced into effective possession cannot be interferred with, not even by the chief. The subject or tenant's consent must be obtained before anything can be done with land in his possession. Therefore if a subject's land was required for public purpose, e.g. for the building of a palace, to create a cemetary, market, fetish grove or other public spot, the subject or tenant should be given an alternative land on which to settle. There was no question of payment of compensation for land taken from stool subject or clansman for a purpose in which all members of the community have an interest.[7]

I. COLONIAL POLICY AND STATE CONTROL OF LAND

The earliest legislation of the Colonial Administration designed to ensure popular control of land in West Africa was the Public Lands Ordinance[8] which applied to both the Gold Coast and Lagos Colony. In Lagos Colony this law was to have profound effect on the people when it was reenacted as the Public Lands Acquisition Act.[9] In the Gold Coast on the other hand, its effect was nil because of the defeat of the Lands Bill, 1897.[10] Thus it was that traditional leaders continued to wield absolute power in the disposition of land in the country until the eve of Independence.

Attempts to control alienation of land and to exercise proper control over lands over which the traditional authorities wielded power led to the introduction of a series of land legislations. One such law in the case of the Gold Coast was the Public Lands Bill, 1894, an Ordinance intended to vest 'Waste-Lands, Forest Lands and Minerals in the Queen.'[11] The main object was the control of exploitation of all unoccupied lands by vesting them in the Government. The belief at the time was that this could be done without infliction of hardship or injustice on anyone. Families and clans and tribes would continue to occupy, and most importantly use the land if they so wished but the chiefs were going to lose their right of outright alienation of land to strangers. Under the Bill concession grants over so called waste lands, forests and minerals would be the prerogative of the Crown, thus bringing to a halt problems generated in the past by the grant of concessions by chiefs. It was envisioned that future concessions would be properly defined and the grantees made to undertaken to work them within reasonable time an efficiently. A

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7. N.A. Ollennu, *Principles of Customary Land Law in Ghana*, (London: Sweet & Maxwell 1962) 110; Elias, *loc. cit.* note 1 supra.

8. No.8 of 1876.

9. Cap. 167.

10. First introduced in 1894, subsequently withdrawn and reintroduced in 1897.

11. See A.K. Kludze, 'The Ownerless Lands of Ghana,' (1974) 11 *U. Ghana L.J.*, 122.

grantee would thus be enabled to bargain with the Government for the improvement of transport facilities and perhaps most important of all, a guarantee of indefeasible title. But these were not to be, although the Colonial Office agreed that it was most desireable that the Government should be able to prevent the lands of the colony from falling into the hands of concession mongering chiefs for "a bottle of rum or gin."

In the Colony itself, however, since the Government was not seen as identifiable with the native people the object of the Bill was commonly interpreted as confiscatory.[12] It was argued that the Bill proceeded on three basic false assumptions; (1) What was called in the Bill "waste land" or "unoccupied land" in the Colony belonged in reality to a family or a chief (which was another way of expressing community ownership) and that such land could not without the consent and concurrence of a chief be occupied by a stranger; (2) The second objection to the Bill was basically procedural, i.e. the Bill proposed that persons to be designated Commissioners who were to be appointed by the Governor, were to be vested with power to deal with all concessions and this without following any definitely prescribed course of procedure. The *indigenes* wished that control over land be judicial not administrative or executive; (3) There was objection to the proposal that "land certificate" was to be governed by English law and not by native law and custom.[13]

As a consequence of the three-pronged attack on the Bill from intellectuals, chiefs and ordinary people - the Bill was abrogated and proprietary rights in land therefore remained unaltered. The Bill, however revealed the nature of future legislative antidote to the land problem.

In Nigeria, the Fulani invasion of 1804 brought the Hausa States of Sokoto, Kano and the Kanuri State of Borno under Moslem influence thereby disturbing the native land tenure system. For nearly one century this state of affairs remained unchanged. In 1900 however, a British expedition disloged Fulani domination of the north. The British stepped into the shoes of the vanquished Fulani and declared the area a Protectorate. While the lands which were originally under the control of the Royal Niger Company became "Crown Lands," the conquered areas were declared "Public Lands" through the promulgation of a series of legislations beginning with the Public Lands Proclamation of 1902 through a succession of Land and Native Rights Proclamations and Ordinances which culminated in the Land Tenure Law, 1962. The British thus succeeded in vesting in the State all lands in Northern Nigeria for and on behalf of the people who only had the right of occupancy.

British success in Northern Nigeria in land matters was repeated in Northern Gold Coast where the Land and Native Rights Ordinance, 1931 (Cap.147) declared the whole of the lands of the Protectorate native lands,[14] and brought same under the control of the Governor who was empowered by the Ordinance to hold and administer them 'for the common benefit, direct or indirect of the natives.'[15] No title to the occupation and use of any such lands was valid without the Governor's consent.[16] and it was illegal for any

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12. *Ibid.*

13. Minutes of the Legislative Council, May 27, 1897.

14. Sec.2.

15. Sec.4.

16. Sec. 17(I)(a).

native to purport to alienate 'Any estate, right or interest in, or with respect to any land lying within the Protectorate to a non-native'[17]

Even in the Southern Pretectorate, of Nigeria the policy of prohibiting aliens from acquiring land was pursued. The idea was to prevent inequitable bargains and imprudent and indiscriminate alienation of land by natives. Thus the Native Land Acquisition Proclamation[18] prohibited the acquisition of land by a non-native from either a native or fellow non-native without the consent of the Governor. At the present time all a non-native can acquire in Lagos State is a lease of 25 years[19] and in the rest of Western Nigeria, a lease of 99 years.[20]

Togoland, the area now included in the Volta Region of Eastern Ghana came under British rule after World War I and was held and administered under a League of Nations' Mandate and later as a United Nations' Trust Territory.[21] Article 8 of the United Nations' Trusteeship Agreement for the Territory of Togoland under British Administration provides:

> In framing laws relating to the holding or transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs, and respect the rights and safeguard the interests both present and future, of the native population. No native lands or natural resources may be transferred, except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources in favour of a non-native may be created except with the same consent.[22]

Pursuant to this Agreement the Administration (Togoland under United Kingdom Trusteeship) Ordinance,[23] was passed providing for the application of the law for the

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17. *Ibid.*

18. No. I of 1899.

19. Acquisition of Lands by Aliens Edict, 1971.

20. Native Lands Acquisition Law, 1958, Cap.80; see also C Olawoye, *Title to Land in Nigeria,* (London: Evans Brothers 1st Repr. 181) 158.

21. See A. Kludze, *Ewe Law of Property,* (London: Sweet & Maxwell, 1973) 140.

22. (1947) 8 *U.N. Treaty Series,* 156. Commenting on similar provision in the Agreement on Cameroon which enabled the British to administer the Ex-German territory east of the Southern Protectorate as part of the colony of Nigeria Dr C.K. Meek, said by this provision:

> The alienation of land to non-natives, for example, had been so strictly controlled that at least nine-tenths of the lands in any given territory have remained the property of the native inhabitants and have been recognised as such.
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> *Land Tenure and Land Administration in Nigeria and the Cameroons,* (London, Her Majesty's Stationery Office, 1957) 370.

23. Cap. 112 (924).

time being in force in the Northern Territories to the Northern Section of Togoland, and for the application of the law for the time being in force in the Colony to the Southern Section of Togoland. The Ordinance like its counterpart applicable to the Northern Territories made unlawful the alienation of 'any estate, right or interest in, or with respect to, any land lying within (Togoland) to a person who is not a native of (Togoland)' without the previous consent of the Governor. Also any conveyance, grant, mortgage, transfer of possession, lease, bequest, or other instrument or transaction (whether in writing or not) which purports to effect an alienation in contravention of the provisions of the Ordinance was declared to be void.[24]

It appears, therefore, from the foregoing that unlike the lands of Britain which in 1066 vested in William I, the result of his invasion of Britain from Normandy with his retinue of nobles, lords and barons, and which vested in his successors thereafter, thus making English Kings the absolute owners of the lands of Britain,[25] most of the lands of the Gold Coast (Ghana) and Nigerian were not at any time declared vested in the British Crown with the exception of the few cases (Northern Territories of the Gold Coast, Kumasi Town land, which was later returned to the King of Ashante, lands acquired for public service and the areas in and around Accra and in Nigeria, the area included in the Northern Protectorate and Bennin lands after the conquest in 1896 but which were returned to the Oba of Bennin after his reinstatement in 1916. This state of affairs made it difficult for any Government of the day to control land resource distribution in West Africa in a manner which would be beneficial to the entire nation.

Beginning from 1952 government effort in the Gold Cost was intensified towards a more effective control of stool lands. In the past the Colonial Government's handling of the problem of the control of Stool lands had generally been the adoption of a cautious stance following the defeat of the Lands Bill, 1897. It was felt that if stool lands could not be brought under the general control of the Government, they should at least be controlled by a more representative body of the people themselves than by chiefs and their few handpicked elders. The State Councils Ordinance[26] introduced the concept of popular control of stool lands for the first time in the history of land tenure in the country.[27] Henceforth any purported alienation or pledge of stool land 'without the consent of the State Council concerned... shall for all purposes be null and void.'[28] As a follow up, the Municipal Councils Ordinance[29] was passed creating new urban and local councils. The

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24. Sec.4(2) and (3).

25. G.C. Cheshire *The Modern Law of Real Property*, (10th ed. London: Butterworths, 1967), 12-14.

26. No.3 of 1952.

27. State Councils (Ashanti) Ordinance, 1952 (No.4): State Councils (Northern Territories) Ordinance, 1952 (No.5) State Councils (Colonies and Southern Togoland) Ordinance, 1952 (No.8). A "state" was in fact the equivalent of a district; a "state council" was therefore a council (Local) for the district as set out in the Schedule to the Ordinance in question and "recognised as such by customary law". A State Council determined its membership which was constituted by chiefs within the territorial area. The Head Chief or Paramount Chief was the President of the Council.

28. Sec.24(1) - Ashanti, Sec.15(1) - Northern Territories, and Sec.16(1) - Colony and Southern Togoland.

29. No.9 of 1953.

Ordinance must be read in conjunction with the Local Government Ordinance which came into effect on January 29, 1952 and which created the Local Government system for the country.[30] The management of stool lands was vested in the new urban and local councils.[31]

The Ordinance stated that the legislation should not be deemed to affect the ownership of stool lands. Stool lands remained under the jurisdiction of the Stools concerned except that a grant of stool land by the stool or any other person was invalid without the consent of the State Council concerned. The effect of the new legislation was therefore that while the absolute ownership remained vested in the stools or their communities, title could pass only if the stool and its management committee granted the land, and if the transaction received the subsequent approval of the appropriate local or urban council. A prospective land owner was therefore faced with the problem of approaching two authorities in respect of one land transaction - a very cumbersome affair. It should have been possible to simplify the procedure by the institution of a scheme which would require that the concurence and registration functions be performed by the same institution.

Another weakness in the law at this time was that while the Local Councils took over the management of stool lands no provision was made for the administrative aspects of land management for example, instituting in each district a systematic recording system or registry of titles, a problem which was to plague landowners right to the present; no provision was made also for requirements connected with the approval of layouts and cadastral surveys.

The Law was a significant advance on the past situation however, because the fact was brought home for once to the chiefs that the Government had many ways in which it could curb their presumed and hitherto unfettered right to disposition of community lands. The Nkrumah Government would carry the new policy even further.

Similar developments in governmental effort to ensure accountability in the management of community lands... were taking place in Nigeria also culminating in Western Nigeria for example, in the promulgation of the Communal Land Rights (Vesting in Trustees) Law.[32]

Just as in the case of Britain's West African possessions, the colonial history of Papua New Guinea was not characterised by a policy of land plunder on the part of the colonialists. Indeed Commander Erskine's Proclamation of 1884 included an assurance that the land of the people would not be seized and that it would be secured to them.[33] The Independent State of Papua New Guinea is an amalgam of the former British Territory of Papua and the German possession of New Guinea. A dual system of law must *per force* be contended with here. In the Territory of Papua, the Administering power recognised the land rights of the indigenes and their right or power to alienate

30. No.29 of 1951 repealed by the Local Administration Act, 1971.

31. See also the Local Government Ordinance No.29 of 1951, Secs.74 and 75.

32. Cap.29 (1959).

33. See C. Lyne, *New Guinea: An Account of the Establish ment of the British Protectorate Over the Southern Shores of New Guinea*, (London, 1885) 5, also *Administration* v. *Guba* (1973) P.N.G.L.R. 603.

same either to the British Crown or to private foreign enterpreneurs. This fact was given legal backing in 1889.[34] However, in the area of land use control, it was not initially clear whether the British Crown had the power to do this, but as usual the British got round this dilemma through their colonial policy of paternalism expressed in the philosophy of the preservation of native land rights from unscrupulous land hungry concession hunters. Certain lands were declared as "waste and vacant" i.e. land not required or reasonably to be required for building, agricultural or other industrial purpose by the natives of the Territory of Papua. This provision was repeated in the Land Ordinance of 1906. As we have noted, this argument about land being vacant or waste or ownerless was rejected in West Africa.[35] As to be expected no compensation was payable in respect of such lands as they had not been acquired for any purpose in which the community at large had any direct beneficial interest. The declaration of land as waste and vacant occasionally worked, ironically, to the detriment of the natives as their sacred places, such as burial grounds or fetish groves came under alien supervision.[36] Further, British paternalism did not prevent purchases of large tracts of land by foreign interests for the settlement of plantations.

In respect of the power to acquire property for public purposes, however, beginning from 1889, this power has been exercised through legislation.[37] Todate, some communities believe they had been unfairly treated on the issue of the adequacy of compensation paid by the acquiring authorities for land compulsorily acquired from them.[38]

In the case of New Guinea under German Administration, land use control was accomplished under the device which characterise certain lands as "ownerless" which meant those lands came under the control of first, the New Guinea Kompagnie which was given the original Imperial Charter to administer the Territory,[39] and later the German Government when it took over the administration of the territory from the New Guinea Kompagnie.[40] In respect of the power to acquire land compulsorily for public purposes, right from the inception of the colony, there was no doubt about the Administering power's right to do so. The Imperial Charter expressly conferred on the New Guinea Kompagnie the power to acquire, dispose of vacant land, and negotiate with the natives to acquire land. The Imperial Ordinance of 1899 which vested the Kompagnie's power in the territory in the German Government similarly provided for the acquisition of land 'in the public interest... in return for compensation.'[41]

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34. See the Land Regulation Ordinance, 1889.

35. See note 11 supra.

36. See G.M. Muroa, *The Legal Aspects of Compulsory Acqui sition of Land in Papua New Guinea* (LL.M. Thesis, University of Tasmani, 1987), passim.

37. See the Land Ordinances, 1906, 1911, the Land Acquisistition Acts, 1914, 1952 and the Land Act 1962.

38. *Administration* v. *Guba*, note 33 *supra.*

39. Imperial Charter, May 17, 1885.

40. Imperial Ordinance, 1899.

41. *Id.* sec.1

The attempt to introduce a uniform system of land use control was accomplished for the first time in 1962 with the promulgation of the Land Act. The exercise of the power of copmulsory acquisition might sometimes depend on whether the land was held under customary tenure or was alienated.

At the approach of independence only 3% of the total land mass of country was under foreign control as alienated land, 97% being still held by the natives under customary tenure. The holders of the 3% of land in the country acquired their title either through the government's compulsory acquisition scheme[42] or private purchases; and while it could be correct to assert that some of the land transactions at this time were unfair bargains from the point of view of the natives, and were therefore subsequently repudiated by them, there would seem to be nothing manifestly illegal about the acquisitions.[43] It must however be noted that the 3% land which came under foreign control happened incidentally to comprise the most cultivable and agriculturally most productive of the country's land, a situation which was to generate a lot of resentment and anger against plantation owners on the eve of independence. In the view of the nationalists the indigenisation of the plantations was a condition precedent to the achievement of political independence and nationhood.[44]

II. NATIONHOOD AND THE POLITICS OF LAND[45]

A nationalist and mass-mobilisation government of the type which Ghana experienced at independence under Dr. Nkrumah and his Convention People's Party - the ruling - was not likely to patronise the parochial system of land tenure which the country had

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42. See note 37 supra.

43 See the *Guba* case, note 38 supra.

44 While British colonial policy in West Africa frowned on the inauguration of the plantation system as a means of protecting the land of the natives from ruthless exploitation by foreign capital, in East Africa on the other hand it vigorously encouraged the establishment of plantations in places such as Keny Zimbabwe, Tanzania and Malawi. The congenial weather in these places may not be unconnected with this contradiction in British colonial policy. See generally R.K. Udo, 'Sixty Years of Plantation Agriculture in Southern Nigeria', (1965)4 *Economic Geography* 356.

45 The phrase "the politics of land" is borrowed from the Report of the Ralph Nader Study Group on Land Use in California (USA) *Politics of Land;* New York: Grossman & Co. (1973): Columbia University Press, 1966) Both works stress how political considerations determined the use to which certain lands in California and New York were put. The Ghanaian case... *Tsiboe* v. *Kumasi City Council* (1959) G.L.R. 253 is instructive in this respect. The appellants, Kumasi City Council illegally demolished the respondent's vocation institution, because the respondent allegedly did not comply with the appellants' building regulations. The High Court - Per Murphy (J) - awarded seven thousand pounds damages against the appellant City Council for their unlawful act. The respondent was known to be a staunch patron of the Opposition Party (NLM). The CPP Government of the day therefore hastily passed the Kumasi Municipal Council (Validation of Powers) Act, 1959 legalising the appellants' act and indemnifying their servants against liability to pay compensation or damages in respect of the demolition of appllant's property

known.[46] Dr. Nkrumah had been charged with exhibiting impatience in his desire to transform Ghana into a modern state. He had said himself that Ghana had centuries of damages to repair and that what took the advanced countries centuries to accomplish should be achieved by Ghana in a matter of one generation.[47] Henceforth the people would be jet-propelled" by forced marches to hasten the millennium of economic paradise through rapid industrialisation.[48]

With independence, therefore, emerged a new concept of the proprietorship of land. It was a radical concept which dramatically swept away like a glacial avalanche some of the traditional concepts of land ownership which Ghanaians had known. It was the concept of the State's absolute ownership of land, and all the Government needed at the time was a cause to introduce and institutionalise the concept. The traditional leaders' i.e. the chiefs' intrusion into national politics offered just that opportunity. Two powerful chiefs, the Asantehene, Sir Agyemang Prempheh II and the chief of Akim Abuakwa Nana Ofori Atta II had been observed by the Government not only to be sympathetic to the view of the Opposition Party, the United Party (UP) but also to have contributed financially to the support of the said Party. Since Ghanaian stools derive their wealth from stool lands, the Government's observation was translated into an indictment that revenue accruing from stool land was being used to finance the Opposition, i.e. for purposes completely unconnected with the stools in questions.[49] The answer to the problem was the Ashanti Stool Lands Act 1956[50] and the Stool (Revenue) Act 1958.[51] Henceforth beneficiaries of stool land revenue were not only to be the so-called stool family but also the community in this sense all persons within the jurisdiction of the stool including persons not members of the stool family. The Government through the Governor-General and later the President of the Republic held "in trust for the Golden Stool ... all such property, rights and interests as the Asantehene possesses in Kumasi town lands as well as power exercisable by the Asantehene concerning them."[52] In

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46. The term "nationalist government" as applied to the CPP is employed in the sense that the CPP was the only truly national political party. The remaining parties which were later compelled to coalesce to form the United (Opposition) Party (UP) were tribally or territorially based

47. Kwame Nkrumah: *Autobiography* (London: Panaf Books 1973, vii; Nkrumah, 'African Prospect' (1958/1959 37 *Foreign Affairs;* 45 Anglin, 'Whither Ghana?' (1957/1958; 13 *Inter Journal* 41 Arden-Clarke 'Gold Coast into Ghana: Some Problems of Transition' (1958) 34 *Inter Affairs* 49

48. F.A. Drah, 'Some Thoughs on Freedom in a Post-Colonial African Setting', (1968) 12 *Econ, Bulletin of Ghana* 34.

49. See Denis Austin, *op.cit* 259-285; H. Harvey, *Law and Social Change in Ghana,* (Princeton PUP 1966) 121; & G. Woodman, 'Land Law and the Distribution of Wealth', in *Essays in Ghanaian Law* (Accra: Ghana UP 1978), 8-10.

50. No.28 of 1958. By the Stool Lands Control Act, 1959. (No.79 of 1959) the power of the State to control stool lands was extended to the rest of Ashanti.

51. No.28 of 1959.

52. Ashanti Stool Lands Act, Sec.41(1). In *Ahenkora II* v. *Kumah* (1963) 1 GLR 77 where the issue turned on who was the proper authority to sue in respect of the stool's accrued (unpaid) tributes, it was held that since Sec. 18 of the Ashanti (Stool Lands) Act 1958 delegated the supervision of Ashanti stool lands to the Ashanti Local Councils, the appropriate Local Council was the proper authority to sue for rents in respect of stool lands under its jurisdiction and not the incumbent stool occupant as was the practice in the days before the passage of the Act. The High Court made it

respect of Akim Abuakwa, a Receiver was appointed and charged with the responsibility of collecting all stool revenue of the state.[53]

The important provisions of the two Acts may be summarised as follows: (1) the State was constituted trustee of lands of the two stools for the use of, first the stools themselves and secondly the community, (2) the Government became the administrator of revenue accruing from the stool lands, and (3) stool lands revenue was to be disbursed between the state, the Local Authority and the stool and the method of disbursement was provided for by the Acts.

The assumption of the State of the fiduciary position of trustee of stool lands for and on behalf of the stools and the communities in question created the anomalous situation of two fiduciary relationships in respect of the same property due to (1) the principle of customary law that a stool holds land in trust for the stool and the subjects of the stool, and (2) the State's new trusteeship arising from the operation of the Acts. It has been held long ago that there cannot be "a use upon a use."[54]

The success of the State's intervention in the exercise of proprietary rights by the stools of Ashanti and Akim Abuakwa in the lands under their respective jurisdiction encouraged the State to extend the principle to the rest of the country. The Stool Lands Act, 1960 (Act 27), 'an Act to enable stool lands to be vested in the President as trustee if the public interest so requires' was enacted to effect this extension. The Act enabled the President "where it appears... that it is in the public interest so to do... by executive instrument declare any stool land to be vested in him and accordingly it shall be lawful for the

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clear however, that the Ashanti (Stool Lands) Act did not extinguish the titles of the various stools and that where a stool was obliged to prove its title to land, then the joint institution of a suit by the stool and the Local Coun- cil would be a categorical imperative. See also, *Agyemang Badu* v. *Ababio* (1967) C.C. Par.54.

53. Akim Abuakwa (Stool Revenue) Act, Sec.14. In *Amoako Atta IV* v. *Nuamah* (1963) 1 GLR 432 the High Court held that the combined effect of Sec.75 of the Local Govern- ment Ordinance was to make the concurrence of the receiver of Akim Abuakwa Stool revenue a condition precedent to the effectiveness of any disposition of any in- terest or right in Akim Abuakwa Stool land. A concession grant made without such concurrence was therefore held invalid.

54. *Tyrell's* case (1557) 2 Dyer 155, cited in Cheshire, *op. cit.* note 24, *supra.* p.57; Megarry & Wade, *The Law of Real Property* (4th ed. London: Stevens & Sons 1975), 160. Here, Jane Tyrell bargained and sold by deed a piece of land to her son to the use of herself for her life and then to the use of her son in tail. It was held that the Statute of Uses 1535 executed the first use which operated to vest the property in her son; all subsequent uses were therefore void and the son therefore took the fee simple both at law and in equity.

We have noted the limit of the application of the trust concept at customary law. But the admixture of the English Statutory Trust and the customary law trust adds further dimension to an already intractable problem. Similar problems were to be encountered in Nige- ria with the passage of the Land Use Act, 1978. See Omotola. *Essays on the Land Use Act, 1978,* (Lagos: Lagos UP 1980), 6.

But see E. Acquaye, 'The Administration and Development of Stool lands in Ghana.' (1969) *Rev. G.L.* 174; also S.K. Asante, 'Interests in Land in the Customary Law of Ghana' (1965) 74 *Yale L.J.* 848; S.K. Asante, 'Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana' (1965) 14 *ICLQ* 1144.

President on publication of the instrument, to execute any deed or do any act as trustee in respect of the stool land specified in the instrument."[55]

It is to be observed that Act 27 did not apply directly to any particular stool land. However, it gave the State inchoate authority to intervene as trustee in repsect of any stool land. The power to assume control of any stool land under the Act was thus virtually unlimited. Thus for instance when the size of Ashanti was reduced at independence by the creation of the Brong Ahafo Region which was hived off from it, by virtue of Executive Instrument No.46 (1961) made under Act 27 all Ahafo land became vested in the President in trust for the people of the Region. Ahafo, a region which had developed from scattered hunting camps into a prosperous cocoa-farming area was being claimed by the chiefs of Kumasi who asserted proprietary rights in the land.[56]

With the attainment of Republic status the need was felt for the removal of certain anomalies in respect of the State's property rights. Hitherto all the property rights of the Gold Coast Government were vested in Her Majesty, the Queen of England. By the State Property and Contracts Act, 1960 all property rights which formerly vested in the British Crown became vested in the Republic of Ghana. The importance of this Act lies in the fact that by implication, all rights in mineral lands are now vested in the State of Ghana as from the date of its enactment and no longer in a foreign sovereign. The Administration of Lands Act, 1962 (Act 123) was to carry farther the principle of state control of the lands of Ghana. It was intended 'to consolidate with amendment, the enactments relating to the administration of stool and other lands.' It applies throughout the entire country; it places all lands wherever located in the nation and subject to whatever right of ownership into one and the same compartment to ensure a uniform system of land tenure through the nation. Henceforth the collection of all stool land revenue would be the responsibility of the State which would disburse it in the manner prescribed by the Act;[57] and while previously control over transactions concerning stool lands was exerted by the appropriate Local Authority, now the State has assumed

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55. Sec.1.

56. See J. Dunn and G.A. Robertson, *Dependence and Opportunity: Political Change in Ahafo* (Cambridge: Cambridge University Press, 1973) Chap.6. Recently the Korsah Commission probed the issue whether Ahafor was part of the Asanti State - i.e. whether the chiefs of Ahafo regarded the Asantehene as their overlord and paid alleginace to the Asante Stool in the past.

57. Sec.17-22 Woodman gives some indication as to the proportion and modality of the distributio taking as his source the Law Reform Commission Paper No.8 (RC.8/75) 1975. He says that according to this source the Government retains 10 per cent for administrative expenses, 45 per cent goes to the local or district council of the area, and 45 per cent goes tothe traditional authority and the stool of the area. It is therefore obvious that districts whose stool lands do not yield revenue cannot benefit from revenue generating lands of other places. The parochial nature of the allocation of revenue from stool lands has detracted from the national or universal purpose of the law, since the system of revenue allocation could lead to disparity in development at the local level. See Woodman, *op.cit.* note 49 *supra* 14.

responsibility for controlling such transactions.[58] The Act declares void the following land transactions unless consummated with the consent of the Government:

(a) grant of stool land by a stool to a person who is not a stool subject;

(b) grant of stool land by a member of the land-owning group who acquired his interest under customary law, to a person who is not a subject of the stool in question.[59]

The first category of the prohibited land transactions consists of transactions which the stool itself through the stool occupant and the stool's management committee or stool elders purports to effect. The second category consists of those which stool subjects could effect without reference to the stool.[60]

The power to determine stool land boundaries now resides in the State.[61] The State now certainly has an increased stake in community lands over which the stools wield jurisdiction.

We may conclude, therefore, that the Administration of Lands Act is the most revolutionary legislation in connection with land in Ghana. It aims at the regulation of dealings with stool lands, and also at ensuring that stool land revenue is utilised in accordance with the political, economic and social policy of the State. It constitutes a bold effort to control land use in the interest of the nation as a whole. This move could be made only by a strong government.[62] The new land policy also means people traditionally attached to ancestral lands could lose their rights in those lands - a difficult proposition in Ghana given the people's socio-cultural connections with land and their concepts of land.[63]

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58. Sec.8(1). It must be emphasised that the power of control and management of stool lands which Act 123 conferred on the Minister of Local Government did not include any right of ownership: *Ntorih* v. *Lagos* (1964) GLR 647. In *British Petroleum (West Africa) Ltd.* v. *Boateng* (1963) 1. GLR 232, 237, Akainyah (J) said: That power was limited to the keeping of records of existing grants made by the stool, the concurrence of the local council in new grants and the collection of rents and other stool revenue fixed by the stool through the state council but did not include the right in the said local council itself to make any dispositions of stool lands nor to vary the terms or conditions of grants made by the stool through the state council'. Thus if the State is not the owner of stool lands but merely a controller of such lands, then the Land Administration Act does not stand on the same pedal as the Nigerian Land Use Act - 1978 which makes the State the ultimate owner of all lands in the States of the Federation.

59. Sec.8(1)(a) and (b).

60. Sec.26.

61. Sec.3(1); 29(1)(b).

62. A strong government is not necessarily dictatorial: See G. Mydal, 'The "Soft State" in Underdeveloped Countries', (1967) 15 *UCLA Law Rev.* 1102.

63. The Government of the National Liberation Council (NLC) which succeeded the Government of the First Republic in its opposition to what it considered the absolutism of the predecessor government introduced a proviso to Sec. 1(1) of Act 125. It reads: 'Provided that where the National Liberation Council is satisfied that special circumstances exist by reason of which it appears to the Council to be expedient that any particular land which is subject to Administration

In this way all unoccupied stool lands or lands which are not being put to any immediate use in areas where the concept of stool land does not exist would come under the State's jurisdiction for redistribution in a manner which the State may deem conducive to the nation's economic progress.[64] This was what the infamous Lands Bill sought to do in the colonial past.[65]

There appears to be a logical inconsistency about the notion that although Ghana is a unitary state,[66] a citizen should be put to a disadvantage or given preferential treatment by virtue of his relationship to the stool on whose land he happens to be. If he is a subject of such a stool he may put up a house on the stool's land without difficulty; and with regard to farm lands, he may, according to precepts of archaic customs, cultivate as much land as he is physically capably of appropriating. But if he is not a subject of that stool, he is considered a stranger and denied the right to do those things which his fellow citizen is capable of doing with respect to the stool land. This certainly smacks of discrimination.[67] With the introduction of mechanised farming it cannot be argued too strongly that this state of affairs is inimical to the nation's overall economic advancement. Agricultural land must be redistributed on a basis which takes into account the nation's social and technological advancement rather than on a person's relationship with a stool. And building lands must be allocated on a basis which in the context of planning regulations enhances the economic value of urban property rather than on a person's connection with the owner of the allodial title.

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of Lands Act, 1962, (Act 123) should be declared under this subsection to be land required in the public interest, the Council may by writing declare that it is so satisfied and thereupon it shall be lawful for the said land to be declared under this subsection to be land required in the public interest and the Administration of which an executive instrument has been made in accordance with this subsection". NRCD 234, Sec.2.

64. See generally, H.C. Dunning, 'Law and Economic Development in Africa: The Law of Eminent Domain', (1968) 68 *Columbia L.R.* 1288.

65. Dr. Asante decries the State's intrusion into the regime of stool property. Although Dr. Asante hails the disintegration of traditional political authority of the chiefs and agrees that the chiefs shamelessly misappropriated proceeds from the alienation of stool or community lands, yet he sees in the State's egalitarian policy a threat to security of tenure. It is submitted that the charge of wide State power of control of stool land under the Administration of Lands Act is a gross exaggeration of the facts. See his *Property law and Social Goals in Ghana,* (Accra; Ghana U.P. 1976) 168, 207. Beyond making it impossible for the tradi- tion rulers to do as they please with lands under their jurisdiction, the State's control of stool land is a mere illusion. As Dr. Asante himself properly points (Id.215) out although the State administers stool lands presently, responsibility for the use and development rests with Stool, a fact which should dispel fears of absolutist tendency on the part of the State towards private property.

66. The Constitution of Ghana, 1960, Art.4(1), the Constitution of Ghana, 1969, Art.4(1).

67. On the position of the so-called stranger, Dr. Asante says: 'To give proprietary significance to ethnic differences by assigning a different and inferior type of a landed interest to strangers, runs counter to the current drive to integrate the various ethnic groups in Ghana into a united nation. Nothing is more discriminating against Ghanaian citizens on the basis of ethnic origin' Op.cit., note 65 supra 218. Notice, however, the affect of Frimpong v Poku (1973) 2 GLR 1 on the stool subject's unlimited right of appropriation of stool land.

In Nigeria, the Land Use Act[68] dealt a blow to this type of ethnocentricism by vesting all lands in every state in the respective state Governors "for the benefit of *all Nigerians*".

In Nigeria, we have already noted that as far as 1917, the Public Lands (Acquisition) Act conferred on the Government the power to acquire land compulsorily for public purposes.[69] Similar right could be exercised under the Town and Country Planning Act.[70] There were also Crown Lands which after 1963 became State Lands.[71] State Lands include lands "acquired by any authority of the Federation for any public purposes."[72]

Nigeria became independent on October 1, 1960 as a federation of three states - Northern, Eastern and Western States. In 1963, a fourth state, the Mid-western state was carved out of the Western and Eastern states. Land was thus a state matter in which the Northern state held the rest of the country to ransome landwise. It had a much larger land mass than the other states combined. When in 1967 the country was redivided into twelve states, it was to redress the inequity inherent in state land component of the nation.[73] Thereafter no further effort was made to further subdivide the nation. By 1978 after two incursions by the military into civilian politics, the abuses inherent in the land tenure system of the country had become so chrystalised that it became a matter of practical politics for the then Federal Military Government under General Obasanjo to enact the Land Use Act (then a Decree). The abuses inherent in the land tenure system were highlighted in the speech of the Military Governor of Lagos State, explaining the necessity for the legislation. These were (1) incessant feuding over land and the attendant loss of life and limb; (2) insecurity of tenure; (3) complexity of the system of indigenous system of land tenure; and (4) unavailability of land for development purposes.[74]

In Papua New Guinea at the approach of independence, it was manifestly obvious that something would have to be done about the plantation system, at least to minimise the ubiquitous presence of foreign landowners in a predominantly subsistence economy. A situation where the economy was dominated by a handful of foreigners who gave tobacco, or axes or other consumer items to unsuspecting natives in return for large tracts of land proved to be intolerable to a nationalist movement clamouring for political independence. The minority landlords not only lived ostentatiously, but also transferred

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68. No.6 of 1978. Sec.1.

69. See Note 8 supra. Earlier legislations had been passed between 1863 and 1908. See also other state laws for example, Public Lands Acquisition Law, 1959 of the for- mer Western Nigeria.

70. State Lands Act, Cap.45 (1964) Sec.2.

71. Sec.39; see also C.S. Ola, *Town and Country Planning Law in Nigeria*, (Ibadan: Oxford U.P. 1977) Chapt.4.

72. Sec.2.

73. See R.K Udo, *Implementation of the Nigerian Land Reform Law of 1978: Lessons from the Japanese Experience*, (Tokyo: Institute of Development Economics Monograph Series No.5., 1980), 7.

74. Omotola *op.cit.* note 54 *supra* p.3; *Report of the National Workshop on the Land Use Act*, (Omotola ed. Lagos 1982), 23.

their profits abroad to the total neglect of the development of the economy There would be political turmoil unless this trend of affairs was reversed and that very quickly.

This was the prevailing situation which led to the inauguration of the Commission of Inquiry into Land Matters (CILM) in 1973. The abuses inherent in the extant land tenure system which the CILM unearthed are a matter of history and need not to be reharshed here.[75] Suffice it to say that the CILM recommended to the government that land should be taken and returned to 'the traditional right-holders' in return for payment of compensation to those who would lose their title.

To arm itself for the task ahead, the government passed a number of legislations. For our purposes, the relevant ones are: Land Acquisition Act,[76] Land Distribution Act,[77] Land Groups Act,[78] and the Land Trespass Act.[79]

Thus while in Ghana and Nigeria the 'nationalisation' process was the work of nationalist governments directed at their own indigenous people, in Papua New Guinea on the other hand, it was directed at foreign interests.

III. PUBLIC PURPOSE REQUIREMENT

As indicated in the introduction, the taking of private property rests on the presumption that the use of the property would enure to the benefit of the public. The issue which usually comes into focus in this regard, is what constitutes public purpose.[80]

Ghana and Nigeria have something to learn from the Papua New Guinean approach to the solution of the first issue. Generally, legislations deliberately leave out any definition of the expression 'public purpose' preferring to leave the determination of the matter to executive discretion.[81] On the other hand if a definition is offered, it raises more issues

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75. See P. Eaton, 'Melanesian Land Reform: the Plantation Acquisition Scheme' (1980) 8, *MLJ* 134, M.Trebilcock and J. Knetsh, 'Land Policy and Economic Development in Papua New Guinea' (1981) 9 *MLJ* 89; P. Fingleton, 'Land Policy in Papua New Guinea', in D Weisbrot et al eds. *Law and Social Change in Papua New Guinea,* (Sydney" Butterworths, (1982), 110, and R James, *Land Law and Policy in Papua New Guinea* (Post Moresby Law Reform Monograph No 5 1985) *passim*

76. No.66 of 1974. The Land Acquisition Act empowers the government to acquire the plantations for redistribution under the Land Redistribution Act. It provides however for the payment of compensation to those who would be affected. The acquisition was limited to cocoa, coconut, and coffee. Tea and cattle farms were excepted.

77. No.62 of 1974.

78. No.64 of 1974.

79. No.53 of 1974.

80. Where the taking is done bona fide, this provides a clue to the public purpose requirement· *Mudge* v. *Secretary for Land* (1985) P.N.G.L.R. 387.

81. See, for example Sec.4 of the Ghana Administration Lands Act.

that offers answers. Again where there are several statutes, each offering its definition, this adds problems to an already intractable situation.

In Papua New Guinea, however, the Land Act[82] defines public purpose and following from this the Land Acquisition Act[83] and the National Land Registration Act[84] have extended the definition to include resettlement schemes, educational, social welfare or community purposes and urban development.

The Mining Act[85] has its own definition and so does the Land Settlement Schemes (Prevention of Disruption) (Amendment) Act.[86] Further, the Lands Acquisition (Development Purposes) Act[87] which was promulgated to facilitate the government's plantation redistribution programme defines public purpose broadly for the purposes of taking land from noncitizens for the use of automatic citizens.

The bend of judicial opinion in Nigeria however is that where land is compulsorily acquired by government and given to a proprietary corporation, this is illegal because it would not come under the constitutional requirement that the taking must benefit the entire public. Thus in *Ereku v. The Military Government of Mid-Western State,*[88] the Supreme Court of Nigeria held that the acquisition of land by Government for the needs of a private corporation was *ultra vires* the Government, and the taking was therefore, illegal. May be it is to lay to rest such controversies that the Nigerian Land Use Act makes a distinction between developed and undeveloped land.[89]

An important aspect of the Ghana Administration of Lands Act is that the State may authorise "the occupation and use" of any stool land presumably for public service.[90] It

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82. Cap.185 Sec.1 (1962).

83. Cap.192 (1970).

84. Cap.367 (1977).

85. Cap.195 (1976).

86. Cap.358 (1976).

87. No.52 of 1983.

88. (1974) 10 SC.59; see also *Commissioner Eastern Provinces* v. *Ononye* (1944) 17 NLR 142. See now Sec.28 of Land Use Act, No.6, 1978.

89. No.6 of 1978; See also 29(4)(5) on the import of 'improvements' and 'unexhausted improvement', and Sec.50.

90. Sec.10. It is not clear whether stool land acquired under this section confers on the State a leasehold or absolute interest. It is probable as Ansong argues that the Legislature intended to employ the power under Sec.10 for the appropriation of an interest lesser than the stool's allodial estate. But he notes, however, that in practice the power has been used to acquire the absolute interest, and gives as an example of the acquisition of land at Kassi, Kumasi the site on which stands now the factory and offices of Tomos (Ghana) Ltd: A.E. Ansong, 'Compulsory Land Purchase and Compensation', (1976) 8, *Rev. G.L.* 28. In Nigeria this would have been illegal: See *Ereku's* case, note 87 *supra.*

would seem to be a matter of indifference to the acquiring authority whether the land is vacant stool land or land actually under the use and occupation of a stool subject.

IV. NOTICE TO TREAT

It is not common to find in a compulsory acquisition legislation provision to the effect that the owner of property which has been targeted for acquisition should enter into negotiation with the acquiring authority. While most legislations invariably provide that a notice of some kind be pub lished, very often in the government Gazette, the Land Act[91] and the Land Acquisition (Development Purposes) Act[92] both of Papua New Guinea are unique in that they provide not only that the owner of property in question must be informed of the government's intention to acquire the property, but also must be given "notice to treat." "Notice to treat" is really a request for the owner of property to supply the government with particulars regarding the worth of the property or the amount for which he would be prepared to part with the property.[93] Presumably compulsory acquisition ensures only when a compromise bargain could not be struck.[94]

This approach, it is submitted, is healthy and indicates the awareness of government that in a democracy, property rights are truly sacrosanct and that people must not be forced to part with their heritage without the opportunity to make an informed judgement on the matter. Under the corresponding Ghanaian legislation,[95] the state does the assessment of the value of compensation.[96] The law also merely requires the publication of a notice on the expiration of which, without further ado, the property vests in the President for and on behalf of the state. Section 1 states:

> (1) Whenever it appears to the President in the public interest so to do, he may, by executive instrument, declare any land specified in the instrument, other than land subject to the Administration of Lands Act... to be land required in the public interest and accordingly on the making of the instrument, it shall be lawful for any person, acting in that behalf and subject to a month's notice in writing to enter the land so declared for any purpose incidental to the declaration so made.
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> (2) An instrument made under the preceding sub-section may contain particulars in respect of the date on which the land so declared shall be surrendered and any other matter incidental or conducive to the attainment of the objects of the instrument including an assessment in respect of compensation that may be paid.

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91. Cap.185, Sec.16.

92. Cap.192, Sec.8.

93. Cap.185, Sec.17 and Cap.192, Sec.7.

94. See James, *op.cit.* note 74, *supra,* p.74; also *Gumach Plantation Ltd.* v. *The Territory of Papua New Guinea* (1943) 67 CLR 544.

95. State Lands Act (Act 125) 1962.

96. Sec.1.

(3) On publication of the instrument made under this section, the land shall without any further assurance than this subsection, vest in the President on behalf of the Republic free from any incumbrance whatsoever.

The tone of the legislation is compulsive leaving the ordinary citizen helpless before the faceless institution called government. Ghana and Nigeria have something to learn from the Papua New Guinean approach.

V. THE REQUIREMENT OF COMPENSATION

Although national constitutions provide for the payment of 'just and prompt' compensation for land compulsorily acquired by the state, they hardly set out to explain the meaning of those words, or provide any principle for the assessment of compensation. Consequently the courts have been saddled with the problem of interpreting those words in particular instances in an effort to bring about a just result in each case.[97] Sometimes a statute may provide some guiding principles. Section 88 of the Land Act of Papua New Guinea provides for example that in assessing the quantum of compensation consideration should be given to: (1) the value of the land at the time of the acquisition; (2) damage resulting from severance; (3) appreciation or depreciation at the time acquisition.[98]

Sec 4 of the Ghana State Land Act provides for payment of compensation to those who would be affected by the State's acquisition of their land. In assessing the quantum of compensation payable, 'the market value of the replacement value of the land' shall be taken into account, but no account is to be taken of 'any improvement on the land made within two years previous to the date of the publication of the instrument....'[99]

The President is empowered to appoint a tribunal of three persons including a High Court Judge to determine lapses - the quantum of compensation, conflicting claims - arising from the application of the Act.[100]

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97. *Geita Sebea* v. *Territory of Papua* (1943) 67 CLR 544.

98. See also *The Minister of Land* v. *William Frame* (1980) PNGLR 433.

99. The difference in the payment of compensation under Act 123 and Act 125 must be noted. Under Act 123 as we have noted, the State pays what it considers appropriate. Under Act 125, however the State must pay the full market value. See *Abiodum* v. *Chief Secretary of the Government (Nigeria)* (1949) 12 WACA 550 where the Privy Council enunciated the principles governing the assessment of compensation on compulsory acquisition of land... etc.

100. Sec.3(1). It was thought that the decision of the Land Tribunal in all matters referred to it was final except that the Tribunal could refer questions of law to the Court of Appeal... Since this provision would seem to be ousting both the original and appellate jurisdic- tions of the High Court not only with reference to dispute concerning the quantum of claim but also issues of title, the State Lands (Amendment) Decree, 1974 (NRCD 307) was passed amending the law and conferring on an aggrieved party the right of appeal from the decision of the Tribunal 'on any matter referred to it under (the) Act' to the Court of Appeal: Sec.2 *Ibid.* It must be observed that proceedings which must take place here are those which *begin after* a claim for compensation has been instituted. Thus in *Ellis and Wood Families* v. *Baffour II* (1972) GLR 46, the High Court said, per Edward Wiredu (J): 'The nature of the proceedings envisaged under Sec.4(2) of Act 125

It has been observed that under the Lands Administration Act, the State may authorise "the occupation and use" of any stool land.[101] When this is done the State is under obligation to pay only such annual sums as appear to the State to be adequate having regard to the value of the land and the benefit derived by the people of the area in which the land is located.[102]

Acquaye takes issue with this provision of the law. He says: 'The stools are proprietors of land like individuals and they should be given full compensation for any land acquired just as is done with private land. There is no point in distinguishing between stool land and private land in the payment of compensation.'[103] He contends that where private land is acquired the amount of compensation payable is based on the open market value of land and therefore the payment of annual sums as determined by the state to be adequate to the stool under what he calls "the curious expression": "Authorising the occupation and use of land" is inequitable. He argues further that there is no reason why in computing the annual sums 'the benefits derived by all the people in the area should be taken into consideration, for the land belongs to a stool family and not to all the people in the area.'[104]

In equating compensation to an individual on the acquisition of individual property with compensation on acquisition of stool property, it would seem the learned Professor is confusing the stool's supervisory power over community land with proprietary right. Individual lands are more often than not fully utilised, most community land on the other hand which can be acquired under Sec.10 are fallow and there is no reason why the state should pay the full market price for land which is not being put to any immediate use and which is being taken to provide social services for the same people who need them most. In arguing as he does, the Professor like all "traditionalists" fails to take into account policy consideration in a piece of legislation. One of the causes of economic stagnation in Ghana arises from the underuse of land. Most lands which ostensibly are fallow suddenly have "owners" as soon as someone begins to put the land to some use. Since individuals are powerless in circumstances such as this, the Government has by this legislation armed itself with power to take unoccupied stool land and put it to use.

Since Ghana is now a modern state and no longer fragmented tribal entities, it is difficult to see why people who by virtue of employment or mobility find themselves in places other than on lands which belong to stools to which they are not traditionally subject but to whose maintenance they make contributions by way of local taxes should not benefit from such stool lands just as other subjects of the stools in question.

It is difficult to reconcile Professor Acquaye's arguments with the political realities of post-independent Ghana: independence ushered in a new social-economic and political awareness geared towards the use of the nation's hitherto under-used resources to the

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were the type of proceedings that were in respect of claims for compensa- tion subsequent to not prior to the acquisition of land by the government.'

101. Note 90 *supra.*

102. Sec.15.

103. Acquaye, *op.cit.* 174.

104. *Ibid.*

benefit of all Ghanaians and a nationalist government was not going to allow its efforts in this direction to be thwarted.

In Nigeria the question of disproportional compensation for land compulsorily acquired by the State led to the passage of the Public Lands Acquisition (Miscellaneous Provisions) Act[105] which fixed amounts payable by the State on compulsory acquisition of land.

Before the promulgation of the Federal Constitution of Nigeria, 1963 case law in Nigeria had developed a set of principles.

Where the land acquired is uniformly valuable a uniform rate is paid for it; if not a differential rate is payable in con -sonance with its varying quality.[106] The compensation must make up completely for the loss of the owner of the land. In *Administration for the Colony v. Thomas & George* [107] Berkeley (Ag. CJ) said the measure of compensation must be what the owner of the land expended in the acquisition of his land. *In Commissioner of Lands v. Adeleye* [108] Buttler Lloyd (J) laid down the rule that the compensation should reflect the 'amount which the land if sold in the open market by a willing seller might be expected to realise'. To arrive at this, the judge or other tribunal must consider the sale price of the land in the particular locality.[109] But in respect of building on the land acquired, account must be taken of depreciation in the value of the building for as was said in *Lahan v.A.G.*[110] 'no one will pay as much for the house some years old as he would pay for a new one precisely similar'.[111] Sometimes a claim is also made in respect of "disturbance" as where a business had to be moved to a new site from the old site.[112]

It has been held that a judge can certainly make his own valuation when assessing the amount of compensation,[113] but where an expert witness (e.g. Valuation Officer of the Lands Department) gives evidence for the Plaintiff the trial judge must not lightly disregard such evidence.[114]

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105. No.33 of 1976.

106. See *Abiodun's* case, note 99 *supra.*

107. (1930 10 NLR 71. See also *Horn* v. *Sunderland* (1941) 2 KB 26, Umeh, *Compulsory Acquisition of Land and Compensation in Nigeria,* (London: Oxford University Press 1966), 40-48.

108. (1938) 14. NLR 109.

109. *Id.* 110-111.

110. (1963) 1 All. NLR 399.

111. *Id.* 228. See also *LEDB* v. *Joye* (1939) 15 MLR 50.

112. *Maja* v. *Chief Secretary to the Government* (1954) 12 WACA 392, *Williams* v. *Kamson* (1968) 1 All NLR 399.

113. *LEDB* v. *Modile Chieftaincy Family.* Unreported Judgement of the Lagos High Court, Suit No. LD.393 1/2 65 cited in Elias, *op.cit.* p.61.

114. *Commissioner of Lands* v. *Daniel* (1939) 5 WACA 125.

Under the Nigerian Town and Country Planning Act compensation is payable only in respect of development - "unexhausted improvement".[115]

In Northern Nigeria where land has always been controlled by the State, compensation payable on compulsory acquisition was limited to either the value of unexhausted improvements[116] on the land or the market value of crops where such was the case. This meant that in the South, the State paid more for land on compulsory acquisition than it did in the North. The cost of land in the South continue to be prohibitive and got worse during the "short lived" oil boom period and immediately after the Biafran War; Land speculators bought land which they resold at cut-throat prices, the while national development was delayed due to the difficulty in obtaining land. In the North, however, it was comparatively easier to acquire land and the cost of land was infinitely cheaper.

The continuing controversy and uncertainty about the laws governing compulsory acquisition of land, the need to fashion a uniform land compensation rules for the entire country and also hold down the cost of land led to the promulgation of the Public Lands Acquisition (Miscellaneous Provisions) Act[117] which stipulates the modality of assessment and computation of compensation payable on the compulsory Acquisition of land whether under the State Lands Act, the Public Lands Acquisition Act, 'or any other enactment or law permitting the acquisition of land compulsorily for the public purposes of the Federation or of a State'.[118] The Act divides Nigeria into zones, i.e. A, B, C, and D.[119] Zone A comprises Lagos metropolis and the maximum compensation payable is pegged at N7,500 per hectare of land. Zone B comprises Lagos State and includes also other State capitals in the Federation and the maximum compensation payable here is fixed at N3,750. Zone C is made up of other urban and semi-urban areas in the Federation and compensation payable is N1,5000. Finally Zone D covers the rest of Nigeria (rural?) and compensation is fixed at N1,250.

However in the Northern States where no compensation was payable for land *per se*, the state governments decided to regard compensation as being in respect of "disturbance". The governments of the Northern States also thought the rates fixed by the Public Lands Acquisition (Miscellaneous Provisions) Act, 1976 were too high and that they would not be in a position to pay such sums, and by a resolution agreed to fix the following rates:

(1) N2,000 per hectare of land in any State Capital.
(2) N1,000 per hectare of land in other urban areas.[120]

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115. *Soleye* v. *LEDB* (1951) 19 NLR 62, *Oloto* v. *A.G.* (1959) 2 FSC 74.

116. Land Tenure Law, 1962.

117. No.33 of 1976.

118. Sec.1.

119. Sec.2.

120. R.K. Udo, *Implementation of the Nigerian Land Reform Law of 1978: Lessons from the Japanese Experience* (Tokyo: Institute of Developing Economics Visiting Research Fellow Monograph Series No.76, 1980), 10-11.

With the passage of the Land Use Act, 1978 new problems have been generated.[121] Under Sec.28 a right of occupancy may be revoked either for public purposes or for mining and oil pipelines purposes. In each case Sec.29 provides for payment of compensation. In the case of revocation for overriding public purpose considerations, compensation shall be payable for only "unexhausted improvements"; (1) if it is land, then the yearly rent which such land attracts; (2) if it is a building, then the cost of replacement; and (3) if it is crops, then the value of the corps.[122]

Unexhausted improvements is defined as capital or labour expenditure which results in the affixation of anything of quality to the land and which increases the productive capacity of the land such as fencing, walls, roads and irrigation.[123]

But where the revocation is for purposes of oil pipelines, compensation shall be based on the provisions of the Minerals Act, or the Mineral Oils Act or any other legislation replacing these.[124] The Petroleum Act[125] has repealed the Mineral Oils Act, but while the Mineral Oils Act made provision for the payment of compensation, the Petroleum Act which supercedes it is silent on the matter of compensation. The question then is: where does the affected citizen go for redress?

Matters have not become any clearer under the 1979 Federal Constitution which provides for the payment of "prompt compensation"[126] on compulsory acquisition of land where the 1963 Constitution provided for payment of "adequate compensation." It is not clear whether the two expressions mean one and the same thing.

Trebilcock and Knetsh *op.cit.* note 75 *supra* have suggested that the State in Papua New Guinea must identify all compensable interests and develop a schedule of rates of compensation. The Nigerian example may offer a model in this regard.

121. Sec.31 provides that acquisitions made before the coming into force of the Land Use Act, 1978 shall be governed by the 1976 Act; those made after March 29, 1978 shall be governed by the Land Use Act, 1978.

122. Sec.29(4).

123. Sec.50.

124. Sec.29(2).

125. No.51 of 1969.

126. Sec.40.

CONCLUSION

While the Ghanaian Land Administration Act and the State Lands Act merely gave the government the power to regulate land use and reserved ownership to the traditional owners, the Nigerian Land Use Act on the other hand divested the traditional owners of their right and vested the same in the State - a nationalisation act.

Ghana and Papua New Guinea do not have the equivalent of the Nigerian Public Lands Acquisition (Miscellaneous Provisions) Act thus giving the state a free hand in determining whether compensation is payable or not in each case. It is not too clear why the Nigerian Land Use Act contains provisions on compensation on revocation of a right of occupancy in view of the existence of the Public Lands Acquisition (Miscellaneous Provisions) Act. One thing is clear however, viz, compensation on revocation of a right of occupancy for mining and oil purposes brings the law closer to the position of the Northern States which pay compensation only for "unexhausted improvement". The Land Use Act is necessary if for no other reason than that it has introduced a unified land tenure system throughout Nigeria, a thing which the Nigerian Public Lands Acquisition Act could not accomplish, and which the Ghanaian Land Administration Act could not similarly accomplish for Ghana. Neither Ghana nor Papua New Guinea has a uniform system of land tenure.

All told, compulsory acquisition inevitably aids the Government to acquire land by purchase from unwilling land owners. It enables the Government to go ahead with development schemes and projects while the issue of compensation is being negotiated or litigated; this eliminates long periods of delay and waiting associated with land purchase from private owners. National policy is thus inextricably intertwined with politics.