THE TRUSTEESHIP POLICY IN SECTION 1 OF THE LAND USE ACT, 1978: A MODEL FOR SECURING THE RIGHT TO PROPERTY?*

Abstract

The Land Use Act was enacted in 1978 to centralize land administration, ensure equitable land use, and simplify complex land tenure systems. This article adopted the doctrinal method of research to examine the Trusteeship Policy in section 1 of the Land Use Act, 1978 (herein called 'LUA'), which vests all lands in the State Governor with clear directive that the lands shall be administered on trust for the benefit of all Nigerians. The precise import of Section 1 of LUA is however, subject of controversies thereby rendering it ambiguous and uncertain. Thus, the research question is, what is the trust model underlying the trusteeship policy that can guarantee and promote Nigerians' right to property under LUA? The objective of the research is to determine the trusteeship model which underpins the trusteeship policy. It was argued that controversies surrounding the position of the Governor have constituted the trusteeship policy as an albatross in the LUA. This article therefore called for the adoption of a trusteeship Model based on Obligation Theory by which LUA will be interpreted and construed in such a manner as to guarantee Nigerians' right to property and ensure that all Nigerians have access to land without discrimination.

Keywords: Land, Trusteeship Policy, Trust, Beneficiary, Property Right

1. Introduction

The Land Use Act which came into force on 29th March, 1978 not only replaced the land tenural arrangements in both the northern and southern parts of the country, but also introduced a system of land tenure, which is completely alien to the southern parts of Nigeria.[1] In the North, a system similar to what was enacted in the Land Use Act existed whereby all land in the North was vested in the British government, and subsequently all land in the North was declared to be Native land which was under the control and management of the colonial Governor.[2] Before the Land Use Act in 1978, land acquisition and use was governed by three major sources of land law. These include customary law which reflected the different customs and traditions of people of Nigeria, which varied from one locality to another. This was the reason for the diversity of land laws in Nigeria before the Land Use Act of 1978. The other sources of land law include received English law and local legislation.

There was also a duality of Land Use System in the Southern and Northern parts of the country. While the Parliament of the then Northern Nigeria passed the Land Tenure Law in 1962, which governed all issues concerning land. In Southern Nigeria however, Land tenure was administered based on customary system. Ownership of land was also vested in the communities, families and individuals in freehold. Land was therefore acquired either by inheritance, first settlement, conveyance, gift, outright purchase or long possession. However, despite the proliferation of these laws administering land use in Nigeria, problems of land tenure and land administration persisted in the country. Consequently, the Federal Military Government inaugurated series of panels to look for solutions to these problems created by land tenure and administration in Nigeria. The Land Use Panel of 1977 subsequently submitted its report upon whose recommendation the Land Use Decree No. 6 of 1978 was promulgated.

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[1] BA Mban, 'The Problems of Land Acquisition and Administration in the Public Sector', *Land Use Act Administration and Policy Implication: Proceedings of the Third National Workshop* held at the Nigerian Institute of Advanced Legal Studies, University of Lagos, from April 9-11, 1990, Department of Private and Property Law (University of Lagos Press, 1990) 93.

[2] TC Nwano and JB Bello, 'The Land Use Act of 1978: Reflections on its Objectives and the Imperatives for a Repeal,' *Journal of Contemporary Legal Issues*, [2013] (15), 178-179.

However, the objectives of the Act at present can be said not to have been realized to a greater extent because land is placed far away from the people. In fact, it is arguable that considering the rigorous process in obtaining the Governor's consent for a valid grant, it is harder to acquire land by an individual than it was before the enactment of the Act. Further, there has been series of allegations suggesting that some governors hide under the Act to victimize perceived political opponents in the issuance of title deeds. The aim of the research therefore, is to examine the trusteeship policy of the Act with the objective of determining the appropriate model that will secure the objectives for which Act was enacted.

2. The Concept of Trust

The concept of trust is very difficult if not impossible to define but its essential elements are reasonably easily described and readily understood. There have been very many attempts to produce a definition of a trust but such definitions are either long amounting to descriptions rather than definition or shorter but susceptible to criticisms.[3] Thus, no one has yet succeeded in giving an entirely satisfactory definition of a trust. In Underhill's Law of Trust, a trust is defined as 'an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *Cestui que trust*) of whom he may himself be one and any one of whom may enforce the obligation.'[4] However, this definition is not altogether satisfactory for it is not wide enough to cover trust for purposes rather than persons. Trust for charitable purpose (e.g for the repair of a church or the prevention of cruelty to animals) may lack human beneficiaries and yet be valid as trust, and there may also be other trusts which lack beneficiaries who can enforce them. [5]However, Professor Keeton seems to give a fairly satisfactory definition which includes all the significant features of a trust. He defined trust in the following words: [6]

> All that can be said of trust therefore, is that it is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed *cestuis que trust*) or for some objects permitted by law in such a way that the real benefit of the property accrues not to the trustee but to the beneficiaries or other objects of the trust.

This definition has been adopted by the Nigerian Supreme Court in the case of *Huebner vs. A.I.E. & P.M. Co. Ltd*[7] as the definition of trust, and being a decision of Superior Court of Record, it is as authoritative as legislation.[8] Difficult, however though it may be to give a simple, yet satisfactory definition of a trust, it is easy enough to grasp the general idea of it, which is that a trustee is one person in whom property is vested for the benefit of another person or for some purposes other than his own. It has been said, somewhat broadly, that all that is necessary to establish the relation of trustee and *cestuis qui trust* is to prove that the legal title was in one person while the equitable title is in another person.

It is therefore better to say the trustee is the nominal owner of the property while the *cestuis que trust* is the beneficial owner.[9] The ownership of the trustee creates a special relationship (fiduciary in character) with respect to trust property. This relationship imposes on the trustee certain equitable

[3] N Stockwell and R Edwards, *Trusts and Equity* (Pearson Education Limited, 2002) 7.
[4] R Megarry and PV Baker, *Snell's Principles of Equity* (Twenty-Seventh Edition, Sweet & Maxwell Ltd, 1973) 87.
[5] *Ibid* (n 4).
[6] MI Jegede, *Law of Trusts, Bankruptcy and Administration of Estate* (MIJ Professional Publishers Ltd, 1999) 11; A Taiwo and O. Akintola, *Introduction to Equity and Trusts in Nigeria* (Princeton & Associates Publishing Co. Ltd, 2016), 199-200.
[7] [2017] 14 NWLR (Pt. 1586) 397, 442, paras. E-F.
[8] Y Aboki, *Introduction to Legal Research Methodology.* (Second Edition, Tamaza Publishing Company Limited 16.
[9] R Megary and P Baker, *op.cit* (n 4) p. 88.

duties and obligations, enforceable in equity against the trustee by a person (beneficiary under the trust) who has beneficial interest in the trust property. Along with the trustee's duties and obligations, there are vested in him certain powers and discretions the purpose of which is efficient control and management of the trust property. The trustee is absolutely responsible for the exercise of his powers (with some statutory restrictions) though in equity, he must exercise these powers in accordance with the instrument creating the trust and for the benefit of the beneficiaries.

The origin of the English law of trusts bristles with difficulties, and in the language of a modern Equity scholar, the ultimate origin of the concept of trust is still one of the controversial topics of jurisprudence.[10] The enforcement of trust by the Chancery is perhaps the most outstanding interference with the common law jurisdiction because the Chancery's exercise of its exclusive jurisdiction in the enforcement of trust is likened to legislative power, in the sense that the Chancery not only deprived the legal owner of property of all the benefits in the property, but also created a distinct title in the same piece of property in the beneficiary.[11] Such an act of ingenuity demonstrated by the Chancery cannot but be of interest to both early and contemporary Equity scholars. Broadly, there are two major schools of thought with respect to the origin of trust, and each of these schools has attracted eminent disciples.[12] Scholars like Blackstone, Spence and Story hold the view that English law of trusts evolved from the Roman *Fidei Commissum* which is disposition of property through inheritance.[13] On the other hand, the second School of thought believes that the origin of trust has no connection with Roman law. Rather, Maitland traced the English use or trust to the Law of Agency in England.[14] These rules of agency were later adopted in conveying land to the Borough Community to the use of Orders like Franciscan Friars who because of their vow of poverty could not own any property.[15] Thus, it has been contended that uses or trusts are natural outcome of ancient English elements, having their foundation in the common law rules of Agency.[16]

Holmes takes a view similar to Maitland. He traces the origin of Uses to Salman of the early German Law. Like a trustee to whom land was conveyed that he might deal with it according to his grantor's directions, Salman held to the use of the grantor, in grantor's life time, and later to be disposed of after grantor's death, according to grantor's directions.[17] The essence of the relation thus created from this transaction was the *Fiducia* or trust reposed in the *Fidelis Manus* who confirmed his obligation by an Oath or Covenant. The Salman was an executor, and in the early years of uses, there was little or no distinction between executor and foefee to use. Holmes concludes, because of the close connection between Anglo-Norman law and Frankish tradition that Uses must have originated from Salmon.[18] The foundation of the claim is the *fides*, the trust reposed and the obligation of good faith, and that circumstance remains as a mark of ecclesiastical origin of the jurisdiction. [19]It is not an easy task to discredit any of these theories about the historical origin of uses or trust. First, all the theories point to what may be the origin of use; and second there is difficulty of checking the various historical connections with the suggested origins. However, whatever may be the origin of trust, it is to the early Chancellors that the modern Anglo-American law of Trust owes its development. The progenitor of the trust was the Use (from the latin *ad opus*) which was developed as the response of equity to the shortcomings of the common law.[20]

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[10] MI Jegede (1999), o*p. cit. (n 6)* p.1.
[11] *Ibid* (n 6) pp.1-2.
[12] *Ibid* (n 6) p.2; MI Jegede, An Overview of the Concept of the Concept of Trust in Utuama AA and GM Ibru (eds.), *The Law of Trusts and Their Uses* (Malthouse Press Limited, 2004) 2.
[13] AK Usman, *Law and Practice of Trust and Trust* (Malthouse Press Ltd, 2014) 145.
[14] AK Usman, o*p. cit*. (n 13)p. 143.
[15] *Ibid* (n 13).
[16] Ibid (n 13).
[17] MI Jegede, o*p cit* (n 6) 5.
[18] *Ibid* (n 6).
[19] *Ibid* (n 6).
[20] G Watt, *Trusts and Equity,* (Third Edition, Oxford University Press Inc., 2008) 8.

Trustee is one who, having legal title to property, holds it in trust for the benefit of another, owes a fiduciary duty to that beneficiary.[21] This relationship imposes on the trustee certain equitable duties and obligations, enforceable in equity against the trustee by a person (beneficiary under the trust) who has beneficial interest in the trust property. Along with the trustee's duties and obligations, there are vested in him, certain powers and discretions the purpose of which is efficient control and management of the trust property. The trustee is absolutely responsible for the exercise of his powers (with some statutory restrictions) though in equity, he must exercise these powers in accordance with the instrument creating the trust and for the benefit of the beneficiaries.

3. Legal Theories of Trust

In essence, trust is a property relationship because it arises when legal title is held by a person for the benefit of beneficiaries. Equitable interest of the beneficiary is not peculiar to trust as it runs through property law; hence, equitable interest is called 'polar star of equity'.[22] Trust is, however, a hybrid property relationship comprised of proprietary rights and personal obligation owed by trustee to the beneficiary.[23] The crucial question is thus, when the Chancery decided to protect the institution of trust, did it recognize the beneficiary's right as a right in *rem* or right in *personam*? This is a jurisprudentially debatable point.

However, it is important to mention a simple but striking distinction between right in *rem* and right in *personam*: right in *rem* is a right in the thing or property while an equitable right is a right in *personam*, that is, against the person. A right which is capable of binding a third party is a 'proprietary' right. Whether an interest is capable of binding a third party depends on the nature and the protection provided by law or equity.[24] In this regard, there have been debates on the nature of the interest which the beneficiary has in a trust property. While some scholars have argued that it is a right in *rem*, others have argued that it is right in *personam*. A third view is that it is neither a right in *rem* nor right in person. It is observed that legal analysis of trust involves the consideration of these theories. Therefore, the concept of trust will be better understood if these theories are juxtaposed.[25]

3.1 The Obligation Theory

This theory of trust considers trust as an equitable obligation (right in *personam*) whereby the trustee is bound to deal with the property for the benefit of the beneficiary. This is the basis of the right of the beneficiary to enforce the trust and make the trustee accountable.[26] At the inception of trust, the beneficiary was only able to enforce trust against the trustee.[27] This makes the interest of the beneficiary to be right in *personam*. This constitutes the most important principle of equity because of the jurisdiction of the court to act *in personam* by which the court is concerned with the conscience of the individual.[28] Consequently, trust gave rise to an obligation on the trustee breach of which renders him liable to be sued by the beneficiary.

The great legal historian, Frederick Maitland posited that equitable rights are not universal because they cannot be enforced against certain class of persons such as innocent purchasers of the property for value without notice of the equitable interest.[29] He argued that equitable interest should be regarded as personal since they do not bind purchasers automatically as legal interests.[30] This theory

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[21] BA Garner (Ed), *Black's Law Dictionary*, (Ninth Edition, Texas: West Publishing Co, 2009) p. 1553.
[22] RJ Smith, *Property Law* (Pearson Education Limited, 2006), 114.
[23] A Husdon, *The Trust as an Equitable Response* (Queen Mary, University of London, 2002) 8. Retrieved from: Http://www.alastairhudson.com/equity/The%20trust%20as%20an%20equitable%20response.pdf, accessed on 15/3/2022 at 1:52 am.
[24] D Chappelle, *Land Law* (Sixth Edition, Pearson Education Limited, 2004) 8.
[25] D Sheehan, 'Express Trusts, Private Law Theory and Legal Concepts', *Canadian Journal of Law and Jurisprudence (*2021) 1-2.
[26] TTZ Wei, ' The Irreducible Core Content of Modern Trust Law', *Trusts & Trustees (*2009) (15)(6), 478-479.
[27] JG Riddall, *Introduction to Land Law* (Third Edition, Butterworths, 1983) 76.
[28] A Husdon, *Understanding Equity and Trusts* (Cavendish Publishing Limited, 2001) 31.
[29] EC Zaccaria, 'The Nature of the Beneficiary's Right under a Trust: Proprietary Right, Purely Personal Right or Right against a Right?' *Law Quarterly Review*, [2019] 3-4.
[30] RJ Smith, *op. cit*. (n 22) p. 25.

later received support of Prof. Hayton who posited that at the centre of trust is the duty of confidence imposed on the trustee with regard to a property and is enforceable in a court of chancery.[31] Although the beneficiary's interest depends on the legal title of the trustee, it is not comprised of the legal title.[32]

The Obligation Theory regards the interest of the beneficiary a converse of the obligations owed by the trustee to the beneficiary. Therefore, while the proprietary right is vested in the trustee who can deal with the property in any manner, the interest of the beneficiary is the right to compel the trustee to exercise his rights over the property for the benefit of the beneficiaries.[33] In this regard, some reasons have been given as justification for the Obligation Theory. Firstly, the trustee is the owner of the property because the legal interest is vested in him. Therefore, there cannot be two conflicting owners of the same property. Secondly, equity does not act in *rem*; rather it acts in *personam*. Thirdly, purchaser of trust property who buys it for value without notice of the trust takes free of the trust.[34] However, the Obligation Theory has been criticized on the ground that it is not in tandem with modern analyses of the nature of the beneficiary's trust.[35] Thus, some writers such as Austin Scott argued that rights in *personam* are in no worst position than right in *rem* because rights in *rem* are defeasible in one way or the other.[36]

3.2 Property Right Theory

There is no doubt that a trustee owes an obligation to the beneficiary under a trust but this has not explained the nature of the interest of the beneficiary. The orthodox view was that the interest of the beneficiary was proprietary. This was so because the beneficiary can trace the trust property into the hands of a recipient who received the property in breach of trust. This view was dominant when trust was considered as an aspect of land law, and trust of land was common.[37]This theory considers trust as a mechanism of property by which a transfer of property is affected by settlor to beneficiaries. In a nutshell, this theory underscores the requirement of trust property and the need to separate the proprietary right from the equitable interest. Prof. Austin Scott relied on tracing as a basis for his position that the interest of the beneficiary is proprietary.[38] Tracing is 'neither a claim nor a remedy'; it's the process of 'tracking' the value inherent in the original equitable proprietary interest into other forms of property.[39]Therefore, if a third party acquires trust property without giving consideration, equity will compel the third party to restore the property to the trustee.[40]

Moynihan argued that the beneficiary's right is so similar to rights in *rem* that for practical purposes, it should be treated as rights in the land-specie of ownership.[41] Similarly, Prof. Smith described the beneficiary's interest as proprietary right because equitable interests are generally enforceable against successors in title to the trustee.[42] The crucial point here is that the court will bind the

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[31] TTZ Wei, *op. cit*. (n 26) p. 478.
[32] Available at <http://classic.austlii.edu.au/au/journals/nswjschol/2010/10.pdf.>, accessed on 15/3/2022.
[33] J. Wall, 'Taking the Bundle of Rights Seriously', *VUWLR*, [2019] (50), 739-740, available at <https://www.google.com/url?esrc=s&q=&rct=j&sa=U&url=https://ojs.victoria.ac.nz/vuwlr/article/download/6308/5416/8535&ved=2ahUKEwjf8aLFw8b2AhXrzoUKHTLaCLIQFnoECAUQAg&usg=AOvVaw1XbcoUT2vemcLB7WQ9KOr>, accessed on 14/3/2022.
[34] AW Scott, 'The Nature of the Rights of the 'Cestui Que Trust', *Columbia Law Review*,[1917](17)(4), 275-278.
[35] RJ Smith, *op. cit*. (n 22) 25.
[36] FH Lawson, *Introduction to the Law of Property* (Oxford University Press, 1958) 45.
[37] H Dagan and I. Samet, 'The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime' (2022), Available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050514, accessed on 15 March 2022.
[38] RA Zhang, 'Better Understanding of Dual Ownership of Trust Property and its Introduction in China through Corporative Studies, (Unpublished) DCL Thesis Submitted to McGill University, ,(2014) 37, available at <https://escholarship.mcgill.ca/downloads/2f75rb89n>, accessed on 15 March 2022.
[39] J Dietrich and P Ridge, 'The Receipt of What'? Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment', *Melborne University Law Review*, (2007) (31) 53.
[40] JH Langbein, 'The Contractarian Basis of the Law of Trusts', *The Yale Law Journal*, [1995](105) 647.
[41] CJ Moynihan, *Introduction to the Law of Real Property* (West Publishing Co., 1962) 175.
[42] RJ Smith, *Property Law* (Pearson Education Limited, 2006) 25.

successors in title to the trustees. Thus, with the rules relating to notice, equitable interest became more than rights *in personam*; they are now specie of property rights like right in *rem.*[43] In conclusion, both the trustee and the beneficiary's interest in the property are proprietary in nature and therefore rights in *rem*.[44]

3.3 Theory of a Persistent Right

It seems difficult to situate the nature of the interests of the beneficiary within rights in *rem* or rights *in personam*. Historically, Trust started when the Chancery compelled a person who had undertaken a trust to carry it out because he had bound himself by his promise. But situations arose where a trustee died, had financial challenges, parted away with the property by sale or gift. For these reasons, the scope of trust had to be extended to make it enforceable not only against the trustee but also his heirs, successors, creditors and persons who purchased trust property with knowledge of the trust.[45] Therefore, what was originally right *in personam* gradually became right in *rem* in view of classes of third parties that it could be enforced against.

However, the beneficiary's right cannot be in *rem* because the beneficiary does not have a claim against an innocent purchaser of the trust property for value without notice of the trust. Conversely, the right is not merely in *personam* against the trustee because the beneficiary can also trace the trust property into the hands of third parties.[46] It is this paradoxical but complex situation that gave rise to the theory which postulates that the interest of the beneficiary's interest in the property is neither proprietary nor personal. That is, it is neither a right in *rem* nor right in *personam*. The argument of the proponents of this theory is that the right of the beneficiary does not attach to the trust property because it is *sui generis* right, which the beneficiary has against the right of the trustee.[47] Therefore, if a third party causes damage to trust property, the beneficiary does not have the right to claim against the third party because his interest is not a right in *rem*. But the beneficiary can trace trust property into the hands of third parties who acquired it with knowledge of the trust.

Nevertheless, equitable interests are more of rights in *rem* than rights in *personam*. Although they can be regarded as rights in *personam*, it is probably best to treat them as 'hybrids'; neither completely right *in rem* nor completely right *in personam*.[48] Although the equitable interests have not attained the status of right *in rem*, the classes of persons against whom they can be enforced are so large for right *in personam*.[49] This prompted a question to be asked, how could a system based on conscience have developed a right that operate in *rem*? The question whether a right is *in rem* or *in personam* must be distinguished from the question whether a remedy is in *rem* or in *personam*. Thus, if a person has possession of a land, his remedy against a trespasser will be in *personam*, that is, an action for damages. On the other hand, a purchaser of land will have a right against the vendor if he does not convey the land. His remedy will be specific performance which operates on the land by giving him title to the land and thus it is right *in rem*.[50]

At the final analysis, it has been posited that if beneficial interest is considered 'proprietary', 'proprietary' in this context must be understood in less limited sense than general.[51] It must be borne in mind that the nature of the beneficiary's interest cannot be understood by reference to one theory. Therefore, situations may arise which will determine what theory to adopt. For instance, where the

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[43] HWR Wade, *The Law of Real Property* (Fifth Edition, Stevens & Sons Ltd, 1984) 114.
[44] G Gretton, 'Trusts Without Equity,' *International and Comparative Law Quarterly*, [2000] (49), 600.
[45] GW Hinde, DW McMorland and PBA Sim, *Land Law* (Butterworths, 1978) 39.
[46] GW Paton, *A Textbook of Jurisprudence* (Oxford University Press, Oxford, 1972) 301-302.
[47] Available at <Https://bura.brunel.ac.uk/bitstream/2438/16806/5/FullText.pdf.>, accessed on 14 March 2022.
[48] R Megarry, *A Manual of the Law of Real Property* (Fourth Edition, Stevens & Sons Ltd, 1969) 58.
[49] *Ibid*.
[50] FH Lawson, *op. cit*. (n 36) 45.
[51] S Agnew and B McFarlane, 'The Paradox of Equitable Proprietary Claim', available at <https://discovery.ucl.ac.uk/id/eprint/10060084/3/Agnew_and%20McFarlane%2023.pdf>, accessed on 15 March 2022.

situation involves legal relationship between the trustee, beneficiary and a third party, the approach is to adopt the Proprietary Theory. However, if the situation involves trustee, beneficiary and trust property, the Obligation theory may supply the logical explanation and possible answers to an issue.[52]

4. The Philosophy underlying the Trusteeship Policy of the Land Use Act

The Trusteeship policy of the Land Use Act is stated in section 1 of the Act. Section 1 of the Land Use Act provides that:

> Subject to the provisions of this Act, all land comprised in the territory of each state in the federation are hereby vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.

The above provisions have vested absolute title to lands in the state in the Governor, and an individual can only acquire possessory title, statutory or customary.[53] Thus, it has been repeated in many decided cases that the lands are vested in the Governor in trust for the common benefit of his people.[54] However, the Supreme Court held in *Ogboni v. Ojah*[55] that the vesting of radical title in the Governor has not totally obliterated the character of land ownership or holding in a family or community. The Land Use Act did not abolish all existing titles and rights to possession of land despite the fact that all lands in the state have been vested in the Governor.[56] Thus, notwithstanding the enactment of the Land Use Act, the Court may make orders and give effect to communal land holdings under customary tenure.[57]

Consequently, the exact import of the provisions of section 1 of the Land Use Act has attracted divergent interpretations from judicial authorities and writers as the exact nature of the interest of the Governor remains controversial.[58] It has been stated by the Supreme Court that where the intention of the legislature is clear and unambiguous, the courts have always interpreted the provision of the legislation to reflect such intention.[59] The Nigerian Supreme Court in the case of *Kolo v. Lawan*[60] held that all lands comprised in the territory of each state shall be vested in the Governor to be held in trust and administered for the use and common benefit of all Nigerians. The question thus is what is the philosophy that underpins the position of the Governor in section 1 of the Land Use Act?

For answers to the above question, it is necessary to turn to the philosophy of the Act as encapsulated in the Preamble and Section 1 of the Act. There is no doubt that the provisions of the preamble and Section 1 of the Act set out the trusteeship policy of the Act, which appears to designate the Governor as a trustee of the land vested in him for use and benefit of Nigerians. The provision of Land Use Act should be interpreted in a manner that it should mirror the social accentuation of the society and also meet the needs of the society.[61] Therefore, the position of the Governor must be construed in a way that will be beneficial to Nigerians. Thus, it has been argued that Land Use Act establishes a statutory trust by which it gives the legal but not the absolute ownership of lands to the Governor.[62]The implication of this position is that the Governor's wide statutory powers may be curtailed, and he may

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[52] J Wall, *op cit.* (n 33) 741.
[53] *Ogualaji v Attorney- General* [1997]5 SCNJ p.240 at p.249.
[54] *Orianzi v A.G., Rivers State* [2017] 6 NWLR (Pt.1561) p.224 at p.272, para.F; *Huebner v. A.I.E. & P.M.Co. Ltd* [2017]14 NWLR (Pt. 1586) p.397 at P. 435, para. B.
[55] [1996] 6 SCNJ p. 40.
[56] *Kolo v Lawan*(supra),520,paras.B-D.
[57] *Ogboni v. Ojah* (supra) pp.157-158.
[58] Taiwo, A, The *Nigerian Land Law* (Abala Press Ltd, 2011), 205.
[59] *Kusamotu v APC* [2019] 7 NWLR pt. 1670 p.51 at p.62, paras. A-C.
[60] [2018]13 NWLR pt.1637 p. 495 at p.517, paras. c-f.
[61] *A.G., Fed. v A.G., Lagos State* [2013]16 NWLR (Pt.1380, p. 249, p. 380, paras.D-E.
[62] KG Kingston, 'The Nigerian Land Use Act: A Curse or A Blessing to the Anglican Church and the Ikwere Ethnic People of Rivers State', *AJLC*,[2016](6)(1),150.

be held accountable for a failure to carry out his fiduciary duties under the trust which are the granting of consent to applicants wishing to sell, alienate, mortgage or otherwise transfer possession or property rights to landed property.[63] Unfortunately, Nigerians do not have the right to approach the court to compel the Governor to grant consent to any alienation.

The starting point for a careful analysis of the concept of trust in section 1 of the Land Use Act is by consideration of the question whether non-Nigerians are entitled to benefit from the trust created under the Land Use Act. It has been contended that non-Nigerians are entitled to benefit from the governor's trusteeship since section 1 is subject to other sections of the Act which authorize the grant of a right of occupancy to 'any person' which includes non-Nigerians.[64] However, the Nigerian Supreme Court has recently held in *Huebner vs. A.I.E. & P.M.Co. Ltd*[65] that section 1 of the Land Use Act specifically limits its benefits to Nigerians, and thus, a foreigner cannot apply for a statutory or customary right of occupancy because ownership of land is limited to Nigerians and does not include aliens.[66]

Tobi stated that the legal effect of section 1 read with the provisions relating to the right of occupancy is that it is no longer possible to own land allodially; what is capable of ownership is not the land itself but the right of occupancy.[67] What the Act has done has been to substitute for the concept of absolute ownership of land that of modified ownership.[68] The trusteeship concept in section 1 of the Act emphasizes that the Governors are not the beneficial owners of the land in the states but they hold the land in trust for the benefit of Nigerians.[69] He cautioned however, that the trust concept is not by the nature of the technical institution of the received English law but it implied principles necessary to ensure that land is administered for the benefit of all Nigerians. The author however did not state what principles are to be applied to ensure that land is administered for the benefit of Nigerians.

The view has been held that section 1 of the Act created a trust, and the Governor is a trustee of all lands in his state. Accordingly, the Act did not create new principle of trust as it is widely credited with; rather, it merely adopted the principle of trust under customary law by which the head of the family or community held land in trust for the family or community.[70] Thus, under the Act, the Governor became the new family or community head.[71] Similarly, it has also been argued that section 1 of the Land Use Act only creates a statutory trust by making the Governor the trustee of the land in his state but he is not the owner of the land.[72] However, Madaki and Agom have argued that before the introduction of the Act, power of control and management of land under customary law was vested in the family and community head but with the enactment of the Act, the powers have been transferred to the Governor.[73] They submitted that the trust created under section 1 of the Act is quite different from trust known under the English law because it is trust in an ordinary sense which requires the Governor to be honest and fair in his dealings in relation to land in his state.[74] It has been argued that the trusteeship policy of the Act, unlike the one adopted in the Land and Native Rights Ordinance that

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[63] U Modum, *Legal reform of the Land Use Act: Protection of Private Property Rights to Land in Nigeria,* (Unpublished Ph.D Thesis, University of Manchester, 2012),137.
[64] RN Nwabueze, 'Alienation under the Land Use Act and Express Declaration of Trust in Nigeria' *Journal of African Law*, School of Oriental and African Studies, [2009](53)(1) 65.
[65] [2017] 14 N.W.L.R. (Pt. 1586) p. 397.
[66] *Ibid*, (n 65).
[67] N Tobi, *Cases and Materials on Nigerian Land Law,* (Mabrochi Books, 1992) 32.
[68] *Ibid* (n 67).
[69] RW James, *Nigerian Land Use Act: Policy and Principles,* (University of Ife Press Ltd, 1987) 51.
[70] AK Usman, *op. cit*. (n 13) pp. 148-149.
[71] *Ibid*., (n 13) p.149.
[72] GD Oke, 'Interest in Land, A Multi-Facet Concept', *University of Ado-Ekiti Law Journal*, [2010](4), 132.
[73] AM Madaki and AR Agom, 'A Critique of the Governor's Power of Control and Management of Land under the Land Use Act. *Journal of Private and Comparative Law*, [2014](6),149.
[74] *Ibid*. (n 73) 152.

secured for member of ethnic groups the use and occupation of land and permitted discrimination against members of other ethnic groups, aims at securing the implementation of objectives of national policies and ends discrimination in land matters.[75]He stated that this was achieved by the provision of section 1 of the Act which vests all land in the state in the Governor to be used for the benefit of Nigerians.

Fabunmi holds the same opinion of Usman when he submitted that the idea of trust which is the underlying philosophy of family or communal land under customary law is also the underlying philosophy behind the Land Use Act.He distinguished the type of trustee under English law from the trustee under the Act, and concluded the Governor is a special kind of trustee.[77] Incidentally, this position was adopted by the Supreme Court in *Nkwocha vs. the Governor of Anambra State & Ors,*[78] where Irikefe, JSC said that the Land Use Act created a legal trust constituting every Governor as trustee in respect of land within the limits of his state for the benefit of all Nigerians. What it means is that the 'trust' contemplated is a legal type of trust and not simply a general or literal conception of trust.

James is of the view that section 1 of the Act creates a trust with the Governor as a trustee in exercising his powers of management and control of land.[79] This model however, has given rise to difficult questions concerning the nature of the Governor's title and the precise nature of trust created in section 1 of the Act. According to Taiwo, section 1 of the Act vests the radical title to the land in the Governor upon trust; the Governor is not beneficially entitled to the land so vested in him, but he is only a trustee of the land for the benefit of all Nigerians in that state.[80] In this regard, the Governor holds only nominal ownership of land because a trustee is not the real owner of a trust property but only holds nominal title in the land for the purpose of accomplishing the objectives of a particular trust.[81] , the Governor is a trustee for the purpose of achieving certain objectives of the Act for efficient management of land in the state.

Abugu argued that the Governor is no more than a replacement of the trusteeship of customary law such as *Oba* of Benin or head of family or community.[82] The vesting of radical title in the Governor presupposes the existence of other titles which may be less than radical titles which is vested in other persons.[83] The other titles can be described as the equitable title while the radical title which is vested in the Governor is the legal title. Thus, while the legal title has been vested in the Governor, section 34(2) and section 36(2) of the Act preserve the equitable right of possession, occupation and enjoyment of all previous owners, be it in urban or rural areas.[84]

Utuama argued that the Land Use Act has not in any way nationalized land because the import of the provisions is to vest the radical title in the Governor upon trust.[85] This means that the Governor is not beneficially entitled to the land so vested in him but he is constituted a trustee for the benefit of all Nigerians. Interestingly, there is overwhelming support for the trusteeship status of the Governor. According to Utuama, the implication of this trusteeship status of the Governor is that the Governor is

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[75] AM Madaki, 'The Land Use Act Policies: An Overview', *Journal of Private and Comparative Law,* [2006] (1)(1), 86.
[76] JO Fabunmi, *Equity and Trust in Nigeria* (University of Ife Press, 1986) 200.
[77] *Ibid*. (n 76) 202.
[78] (1984) 6 S.C. p.362 at p. 364.
[79] RW James, *Nigerian Land Use Act: Policy and Principles,* (University of Ife Press Ltd, 1987),33.
[80] A Taiwo, *The Nigerian Land Law* (Ababa Press Ltd, 2011), 205.
[81] *Ibid* (n 80).
[82] U Abugu, *Principles of the Land Use Act, 1978,* (Joyce Graphics Printers and Publishers, 2008), 13-14.
[83] *Ibid* (n 82), p. 14.
[84] *Ibid* (n 82).
[85] AA Utuama, *Nigerian Law of Real Property,* (Shaneson C.I. Ltd, 1989) 119.

vested with land to the extent that it is necessary to administer the land in his territory for the purpose of achieving the objectives of the Act.[86]

The trusteeship policy re-affirms that nobody in the state apart from the state or federal government owns land, and the power of control and management is vested in the Governor who is a trustee and manager of land in his state.[87] The trusteeship policy underlying the Land Use Act ensures that the land vested in the Governor is not for his selfish or personal interest but for the benefit of Nigerians. To that extent, the governor is to hold the land with the attendant power of control in trust for the people. In *Chiadi v. Aggo*,[88] the Supreme Court held that:

> It is public policy that a state Government cannot sell state land. The state Government being a reversioner cannot sell its reversionary interest as fee simple. It only possesses a fresh freehold reversion and not a fee simple absolute. In this case, the sale agreement between the government of Rivers State (vendor) and the 1st Respondent (as purchaser) whereby the vendor agreed to sell to the purchaser the "unencumbered fee simple of the property Situate at N.199 Victoria Street, Port Harcourt for N10,000.00 is contrary to public policy. Further, the maxim *nemo dat quod non habet* applies to the transaction as no one can give or sell what he does not have.

The public policy, it is submitted, is based on position of the Governor as trustee which is intended to achieve certain objectives among which are: to secure for all Nigerians right to land for building, industrial, commercial and Agricultural purposes, to enable government unify and control the use to which land can be put in all parts of Nigeria and thereby facilitating physical planning and development of infrastructures, to prevent land speculation and to achieve a reduction in the incidences of land disputes in Nigeria. Dr. Madaki concluded that the 'trust' contemplated in section 1 of the Act implies the principles of fairness, and good faith that will ensure that the land is administered for the benefit of all Nigerians.[89] However, there is nothing to show that the Governors have actually held land in trust for the benefit of all Nigerians.[90]

Smith argued that there appears to be a mix up between the legal trust created under section 1 of the Land Use Act and the notion of legal estate.[91] Vesting all land in the territory of the state in the Governor of that state creates a trust ownership in favor of the Governor as opposed to vesting legal estate as such.[92] As a trust- owner, the ownership of the Governor "is a matter of form rather than of substance, and nominal rather than real".[93] In the words of the editor of Salmon on Jurisprudence, "if we have regard to the essence of the matter rather than the form of it, a trustee is not an owner at all but a mere agent, upon whom the law has conferred the power and imposed a duty of administering the property".[94] It is thus in this context that the position of the Governor in section 1 of the Land Use Act can be properly construed if the trust so created by the provision is to have any meaning.

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[86] *Ibid* (n 85).
[87] *Ibid* (n 85).
[88] [2018]2 NWLR pt.1603 p.175, p.221, paras.A-D.
[89] *Ibid* (n 88) 89.
[90] AM Madaki and SB Magashi, 'Availability of Land to Every Nigerian Under the Land Use Act: Rhetoric or Reality?, *Journal of Private and Comparative Law* [2016](9)(2), 363.
[91] IO Smith, 'The Land Use Act, Right of Occupancy and the Distinction between Legal Estate and Equitable Interest in Land: A Critical Review of *Kachalla v Banki & 2 Others*, *The Appellate Review*,[2009](1)(1),p.
[92] *Ibid* (n 91).
[93] *Ibid* (n 91).
[94] *PJ* Fitzgerald, *Salmon on Jurisprudence* (Tweveth Edition, Sweet & Maxwell, 1966), 256.

5. **Critique of the Trusteeship Policy**

Notwithstanding the differences of opinions among scholars, it is clear that there are certain statutes that impose trusts of which the Land Use Act is one.[95] It is no coincidence that section 1 of the Land Use Act specifically used trust as the basis of the interest vested in the Governor, and the preamble to the Act also emphasizes the fact that the land is vested in the Governor of the state who will hold same on trust. It has been stated in *Huebner v. A.I.E. & P.M.Co. Ltd*[96] that when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. By this principle laid down in *Huebner v. A.I.E. & P.M.Co. Ltd*[97], the intention of the drafters of the Land Use Act was to constitute the Governor as a trustee of the land vested in him while Nigerians remain the beneficiaries of the trust. This approach is consistent with the philosophy behind the development of trust in the Chancery which is to separate two interests (the legal title and beneficial interest) in a property and vest same in two distinct personalities or institutions.

It is also imperative to state that for a proper understanding of the position of the Governor, it is necessary to construe the office of the Governor as a creation of the Constitution. Section 176(1)(2)[98] of the Constitution provides that there shall be for each State a Governor who shall be the Chief Executive Officer of the State. In *Nkwocha v. Governor*[99], the Supreme Court held that the trust constituted under the Land Use Act is preserved by section 176 of the Constitution. In stating the position of the Governor in the Constitution, the Supreme Court in *Maihaja v. Gaidam*[100] held that 'to hold the office of Governor' as used in section 191 of the 1999 Constitution, means a kind of public trust till the expiration of the tenure of the Governor. Although the provisions of section 191 of the Constitution deal with when a Deputy Governor can hold office as Governor of a state, it is submitted that the same principle of trust applies to the office of the Governor. The constitutional approach to the office of the Governor is not peculiar to the Governor but it also applies to the Federal Government in the management of resources belonging to the Federation. The Federal Government has been described as a trustee for the state Governors and local government councils in respect of federation Account. It is therefore the duty of the Federal Government to keep proper account of the trust it administers while the states as beneficiaries have a right to call accurate information as to the state of the trust.[101]

In jurisprudence, a policy is a standard that sets out a goal to be achieved, especially economic, political or political goals.[102] The preamble of the Land Use Act therefore sets out these goals which are captured by the Trusteeship Policy. The Trusteeship policy of the Act seems to be a reflection of section 16(2) of the Constitution which provides for the Economic objectives as follows:

> The State shall direct its policy towards ensuring-
>
> (i) The promotion of planned and balanced economic development.
>
> (ii) That the material resources of the nation are harnessed and distributed as best as possible to serve the common good.
>
> (iii) That the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or a group; and

[95] R Edwards and N Stockwell, *Trusts and Equity*, (Fifth Edition, Pearson Education Limited, 2002),14.
[96] [2017] 14 NWLR Pt. 1586 p.397, p.419,paras.G-H.
[97] Supra (n 96).
[98] Constitution of the Federal Republic of Nigeria, 1999(as amended).
[99] (1984) 1 S.CNLR p.634, p.654.
[100] [2018]4NWLR pt.1610 p.454 at pp.493-494,paras.H-B.
[101] *Attorney-General, Bendel State v Attorney- General, Federation* [1983]1 SCNLR p.239,p.255.
[102] R Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (Sixth Edition, Oxford University Press, 2004), 124.

(iv) That suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for by all citizens.

There is no doubt that the Land Use Act has vested all lands in the Governor but it does not appear that the title vested in the Governor is absolute. It is worthy of note that the Constitution also guarantees right to own movable and immovable property to every Nigerian.[103] Therefore, the power of the Governor, for instance to acquire land under the Land Use Act is subject to payment of adequate compensation as provided in section 44 of the Constitution because the Constitution overrides the Land Use Act.[104]

More so, the power vested in the Governor by the Land Use Act cannot be exercised in a manner contrary to the spirit of the Constitution. It is trite that the office of the Governor is a creation of the Constitution, and the Governor acts *ultra vires* once he acts outside the provisions of the Land Use Act and the Constitution.[105] The philosophy underlying the trusteeship policy of the Land Use Act is to make land available to Nigerians by preserving their rights to property.[106] This is implicit in the Constitution and imposes certain duties on the Governor to manage land vested in him in a fair and equitable manner for the benefit of Nigerians- beneficiaries of the trust.[107] The Supreme Court held in *Ibrahim v. Obaje*[108] that " in construing a law like the Land Use Act,1978, it is always of considerable assistance to consider the history and also purpose of the law as enshrined in its preamble, and if possible the social objectives. The social objectives expressed in section 17(2) of the Constitution ensure that every Nigerian is given equal rights, obligations and opportunities before the law. More so, every citizen is given opportunity to secure adequate means of livelihood as well as adequate opportunity to secure suitable employment.[109] These Social and Economic objectives underpin the Trusteeship policy of the Land Use Act by which the Governor is designated trustee. The intention of the Land Use Act is to assert and preserve the rights of all Nigerians to the land of Nigeria in the public interest.

It is therefore in the public interest that the right of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof, to sustain themselves and their families should be assured, protected and preserved. Section 1 of the Land Use Act must be interpreted in a manner that it does not interfere with rights already vested in Nigerians and guaranteed by the Constitution. The use of 'trust' in section 1 of the Land Use Act shows that there was deliberate effort to constitute the Governor as a trustee of the land in the state for the benefit of all Nigerians. The purpose of the trusteeship policy is to protect the rights of Nigerians to land by vesting the land in the Governor who is capable of safeguarding and dealing with them for the benefit of Nigerians.[111]

6. Conclusion

This article argues that there is no legal definition of trust in the Land Use Act that will guide the courts in the interpretation of section 1 of the Land Use Act. Unless the definition of 'trust' is provided in the Act, it will be difficult to ascertain the import of 'trust' in section 1 of the Land Use Act. The

[103] Constitution of the Federal Republic of Nigeria (CFRN) 1999, SS 43 & 44.
[104] *Elf Pet.(Nig.) Ltd. v Umah* [2018] 10 NWLR pt.1628 p.428 p.443,paras.D-F.
[105] *Oni v Gov., Ekiti State* (2019)5 NWLR pt.1664 p.1 at p.23, para.E.
[106] TO Elias, *Nigerian Land Law and Custom* (Third Edition, Routledge & Kegan Paul Ltd, 1962) 118.
[107] CB Michael and DG Rachael, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Sixion Vision', *University of California Davis Law Review* [2012](44),47-48.
[108] [2019] 3 NWLR p.1660 p.389 at p.412, paras. E-F.
[109] CFRN,1999, S 17(3)(a).
[110] *G.C.M. Ltd. v Travellers Palace Hotel* [2019]6 NWLR pt. 1669 p.507 at p.533, para.F.
[111] PJ Fitzerald, *Jurisprudence*, (Twelfth Edition, Sweet & Maxwell, 1966) 256.

divergent views of the Courts and authors on the effect of trust in section 1 of the Act have obscured its meaning in the Act. More so, it is argued that the position that the Governor is not a trustee has rendered the trusteeship policy to be uncertain and hence an albatross in the Land Use Act. The article found that a more progressive approach is the Obligation theory which considers the Governor as a trustee with obligation to administer the land for the benefit of Nigerians. In this respect, the trusteeship Policy is inbuilt mechanism in the Land Use Act for regulating the interaction between the Governor and Nigerians to ensure that the objectives of the Land Use Act are achieved. In the management of land under the Land Use Act, the Governor ought to be considered as a trustee of the powers and lands vested in him and must accordingly exercise the powers with honesty and good faith in a manner consistent with the right to own property guaranteed by the Constitution. This article therefore calls for adoption of a Trusteeship Model based on the Obligation Theory by which both equitable and statutory obligations are imposed on the State Governor to administer the lands in the state for the benefit of Nigerians. This will ensure purposeful interpretation of the Land Use Act, effective implementation of the objectives of the Land Use Act, and realization of Nigerian Constitution's socioeconomic objectives of ensuring all Nigerians have access to land without discrimination, and that land is not concentrated in the hands of few Nigerians.