



## A legal analysis of the distinction between statutory right of occupancy and customary right of occupancy in Nigeria

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### Abstract

This article provides a comprehensive legal analysis of the dual land tenure system operating in Nigeria, focusing on the critical distinctions between statutory rights of occupancy and customary rights of occupancy as established under the Land Use Act 1978. The research examines the historical evolution of land tenure in Nigeria, the revolutionary impact of the Land Use Act, and the operational framework governing both categories of occupancy rights. Through detailed examination of judicial precedents, statutory provisions, and practical applications, this study reveals the fundamental differences in the creation, administration, transfer, and enforcement of these rights. The article analyzes key case law demonstrating how Nigerian courts have interpreted and applied these distinctions, while also exploring the socio-legal implications of maintaining this bifurcated system. Particular attention is given to the different regulatory frameworks, consent requirements, compensation mechanisms, and dispute resolution procedures applicable to each category. The analysis concludes that while both rights emanate from the same legislative source, their operational differences reflect Nigeria's attempt to balance traditional land holding customs with modern administrative efficiency, though this balance remains imperfect and continues to generate legal complexities.

**Keywords:** Distinction, statutory, customary, occupancy, right, nigeria

### Introduction

The land tenure system in Nigeria underwent a radical transformation with the enactment of the Land Use Act (LUA) in 1978, which was subsequently incorporated into the Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended) <sup>[1]</sup>. This legislation fundamentally altered the ownership and administration of land throughout the federation by vesting all land in each state in the Governor of that state to be held in trust for the people <sup>[2]</sup>. Prior to this landmark legislation, Nigeria operated a complex and fragmented system of land tenure characterized by different regimes in different parts of the country, including English common law principles in urban areas and customary law in rural communities <sup>[3]</sup>.

The Land Use Act introduced two distinct categories of occupancy rights: the statutory right of occupancy and the customary right of occupancy. Understanding the distinction between these two forms of land holding is fundamental to comprehending land law and property rights in contemporary Nigeria. This distinction affects millions of Nigerians in their daily transactions, from simple residential holdings to complex commercial developments, and continues to be a source of litigation and legal debate <sup>[4]</sup>.

This article examines the conceptual, legal, and practical distinctions between these two forms of occupancy rights, analyzing their creation, characteristics, transfer mechanisms, and the judicial interpretations that have shaped their application in Nigerian jurisprudence.

### Historical Background

Before colonial intervention, land in Nigeria was held under various customary law systems that varied across the different ethnic groups and communities <sup>[5]</sup>. Under these indigenous systems, land was generally viewed as communal property held in trust by the community head or family head for the benefit of the community or family

members. Individual rights were typically usufructuary in nature, permitting use and cultivation but not absolute ownership in the Western sense <sup>[6]</sup>.

The Yoruba system, for instance, recognized family land (ile), community land, and sacred land, with the family head (Olori-ebi) or community chief (Oba) exercising administrative authority. Similarly, among the Igbo, land was held by the Umunna (extended family) or the village community, with allocation rights vested in the Okpara (eldest male) or the council of elders.

The colonial administration introduced significant modifications to indigenous land tenure systems. The Public Lands Ordinance <sup>[7]</sup> and subsequent legislation brought certain categories of land under Crown control <sup>[8]</sup>. In Northern Nigeria, the Land and Native Rights Proclamation of 1910 vested all land in the Governor, creating a system where natives held occupancy rights rather than ownership, a precursor to the modern Land Use Act.

In Southern Nigeria, English land law principles were gradually introduced, creating a dual system where educated elites in urban areas could acquire freehold interests while rural populations continued under customary tenure. This dichotomy created inequalities and administrative complexities that persisted until 1978.

The LUA was promulgated on March 29, 1978, by the military government as Decree No. 6 of 1978 <sup>[9]</sup>. The Act sought to address several perceived deficiencies in the pre-existing system, including land speculation, difficulty in land acquisition for development purposes, and inequitable distribution of land resources <sup>[10]</sup>.

Section 1 of the Act provides the foundational principle: "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 <sup>[11]</sup>."

This revolutionary provision abolished private ownership of land in its traditional sense and substituted it with a system of occupancy rights, creating two distinct categories that form the subject of this analysis.

### Statutory Right of Occupancy

Section 5(1)(a) of LUA empowers the governor to grant a statutory right of occupancy <sup>[12]</sup>. This seemingly simple definition belies the complexity of the legal regime governing such rights. A statutory right of occupancy is essentially a grant from the state government, through the Governor, conferring rights to use and occupy land, typically in urban areas or areas designated as urban for purposes of the Act <sup>[13]</sup>.

The grant of a statutory right of occupancy is governed by sections 5 to 19 of the Land Use Act, which provide detailed provisions regarding application procedures, grant conditions, terms, rent payment, and other incidents of such rights <sup>[14]</sup>. Statutory rights of occupancy apply primarily to “urban areas,” which section 51 of the Act defines as including “such areas as are declared to be urban areas by the Governor by order published in the State Gazette <sup>[15]</sup>.” This definition grants Governors considerable discretion in determining which areas fall under the statutory regime, though in practice, state capitals, major towns, and areas designated for commercial or industrial development are typically classified as urban <sup>[16]</sup>. In the case of *Savannah Bank of Nigeria Ltd v. Ajilo* <sup>[17]</sup>, the Supreme Court emphasized that the classification of land as urban or non-urban is determinative of whether a statutory or customary right of occupancy applies, and this classification lies within the Governor’s prerogative subject to published declaration. The creation of a statutory right of occupancy follows a formal administrative process. Section 5(1) empowers the Governor to grant statutory rights of occupancy to any person for all purposes. The applicant must submit a formal application to the state’s land use and allocation committee, which considers the application and makes recommendations to the Governor <sup>[18]</sup>.

Upon approval, a certificate of occupancy is issued as documentary evidence of the grant. Section 9(1) provides that a holder’s right of occupancy shall be sufficiently described in a certificate under the Governor’s hand. This certificate serves as the primary evidence of title and is crucial for proving ownership in legal proceedings.

Statutory rights of occupancy may be granted for definite or indefinite terms. Section 6 provides that such rights may be granted for a term of years or in perpetuity, subject to the provisions of the Act <sup>[19]</sup>. The terms typically specify

1. The annual rent payable
2. Development covenants requiring the holder to develop the land within specified timeframes
3. Permitted use of the land (residential, commercial, industrial, etc.)
4. Other conditions as the Governor may deem fit

The flexibility in duration allows for various commercial and residential arrangements, though most grants for residential purposes are effectively perpetual subject to compliance with conditions.

A holder of a statutory right of occupancy enjoys several rights and privileges

1. **Exclusive Possession:** The holder has the right to exclusive possession of the land for the duration of the

grant, protected against interference by third parties and, to a significant extent, against the state itself <sup>[20]</sup>.

2. **Right to Develop:** Subject to planning laws and development covenants, the holder may develop and improve the land
3. **Right to Transfer:** Section 22 permits the holder to transfer or assign the right, though this requires the Governor’s consent.
4. **Right to Mortgage:** The holder may create mortgages or charges over the right as security for loans, again subject to consent requirements under section 22.
5. **Protection Against Arbitrary Revocation:** Section 28 provides that statutory rights can only be revoked for specified reasons including public interest, breach of terms, or non-payment of rent, and even then, fair compensation must be paid.

### Customary Right of Occupancy

Section 6(1) of the land use Act empowers the local government to grant customary rights of occupancy in respect of land not in urban area <sup>[21]</sup>.

This definition recognizes two sources of customary rights: those existing under traditional customary law prior to the Act (deemed granted rights), and those formally granted by Local Government authorities pursuant to the Act (express grants).

Customary rights of occupancy apply to land outside urban areas, essentially covering rural and agricultural land throughout Nigeria. Section 6(1) specifies that customary rights relate to land in non-urban areas, and vests the administration of such land in Local Government authorities rather than the Governor. It should be noted that customary rights of occupancy are the predominant form of land holding in rural Nigeria and represent the continuation of indigenous tenure systems under the new statutory framework.

Customary rights of occupancy arise in three primary ways:

1. **Deemed Grant:** Section 36(2) of the Land Use Act provides that any person in lawful occupation of land on the commencement of the Act, whether under customary law or otherwise, shall be deemed to have been granted a customary right of occupancy <sup>[22]</sup>. This provision effectively recognized and preserved existing customary holdings, ensuring continuity and protecting established rights.
2. **Express Grant by Local Government:** Section 6(1) empowers Local Governments to grant customary rights of occupancy for agricultural, residential, or other purposes. Applications are made to the Local Government, which may grant such rights subject to applicable customary law.
3. **Customary Law Evolution:** Rights may also evolve through traditional processes of land allocation by family heads, village chiefs, or community councils in accordance with applicable customary law, though these should ideally be registered with the Local Government.

Customary rights of occupancy possess several distinctive characteristics:

1. **Informality:** Many customary rights exist without formal documentation, relying instead on traditional evidence such as community recognition, family testimony, and acts of possession.
2. **Community Context:** Customary rights often exist within a communal framework, where individual rights coexist with broader family or community interests in the land.
3. **Customary Law Governance:** The content and incidents of customary rights were significantly shaped by applicable customary law, which varies across Nigeria's diverse ethnic groups, although with the presence of the land use Act that position has changed.
4. **Agricultural Focus:** These rights predominantly concern agricultural and residential use in rural contexts rather than commercial development.

In *Idundun v. Okumagba* [23], the Supreme Court recognized that customary rights of occupancy retain much of the character of traditional customary tenure, modified only to the extent necessary to fit within the Land Use Act framework.

#### Fundamental Distinctions Between Statutory and Customary Rights of Occupancy

Perhaps the most fundamental distinction concerns the administrative authority responsible for each type of right. Statutory Rights are granted and administered by the Governor of the state. All applications, consents, revocations, and other administrative actions concerning statutory rights fall within the Governor's exclusive jurisdiction under sections 5-19 of the Act. While customary Rights are granted and administered by Local Government authorities. Section 6 vests in Local Governments the power to grant customary rights and manage non-urban land.

This bifurcation of administrative authority reflects the Act's attempt to balance centralized state control over valuable urban land with local administration of rural areas where customary law considerations remain paramount. The Supreme Court in *Nkwocha v. Governor of Anambra State* [24] emphasized that this distribution of authority is fundamental to the scheme of the Act and cannot be circumvented.

Both types of rights require consent for transfer, but the consent authority and procedures differ significantly.

**Statutory Rights:** Section 22 requires the Governor's consent for any alienation (transfer, assignment, mortgage, or sublease) of a statutory right of occupancy. The procedure involves formal application, often with significant fees, and processing through the state ministry responsible for lands. Alienation without consent is void and may result in revocation under section 28.

In *Alhaji Ajadi Ayinla v. Johnson Elesho* [25], the Supreme Court held that a purported transfer of a statutory right of occupancy without the Governor's consent confers no legal rights on the transferee and is absolutely void.

**Customary Rights:** Section 21 requires the consent of the Local Government (and in some cases, the appropriate

traditional authority) for alienation of customary rights. The procedure is typically simpler and less costly than for statutory rights, reflecting the rural, agricultural nature of most customary holdings.

The Court of Appeal in *Chief S.O. Osho v. Foreign Finance Corporation* [26] distinguished the consent requirements, noting that while both serve similar policy purposes (preventing land speculation and ensuring proper land use), the simpler procedure for customary rights acknowledges the need for flexibility in rural agricultural communities. It should be noted that, evidentiary requirements for proving each type of right differ substantially.

**Statutory Rights:** Section 9 provides that a certificate of occupancy under the Governor's hand is the primary evidence of a statutory right. Without this formal documentation, proving a statutory right becomes extremely difficult. The certificate specifies the terms, conditions, and extent of the grant, and courts generally require its production in litigation concerning statutory rights.

**Customary Rights:** While certificates of occupancy may be issued for customary rights under section 6] their absence does not necessarily defeat a claim to a customary right.

Traditional evidence remains admissible, including

1. Testimony of family members or community elders
2. Evidence of long possession and cultivation
3. Traditional acts of ownership such as planting economic trees
4. Community recognition of ownership

In *Adesubokan v. Yunusa* [27], the Supreme Court held that customary rights could be proved through traditional evidence even without formal certification, provided the claimant could demonstrate lawful possession in accordance with customary law prior to the Land Use Act or proper grant thereafter.

**Statutory Rights:** Typically granted for diverse purposes including residential, commercial, industrial, and mixed-use developments. The formal nature of statutory rights makes them suitable for significant investments, mortgage financing, and commercial transactions [68].

**Customary Rights:** Primarily serve agricultural and residential purposes in rural contexts. While commercial use is not prohibited, the informal nature and consent requirements make customary rights less attractive for major commercial investments.

**Statutory Rights:** Apply exclusively within urban areas as defined or designated by the Governor. This includes state capitals, major towns, industrial areas, and specifically declared urban zones [28].

**Customary Rights:** Apply to all non-urban land, covering the vast majority of Nigeria's land mass, particularly in rural and agricultural regions [29].

The Supreme Court in *Chief Adisa Akinremi v. Chief Gbadebo Abolade* [30] clarified that this geographical distinction is fundamental and jurisdictional—a purported statutory right over land in a non-urban area would be invalid, and vice versa.

### Judicial Interpretation and Application

Nigerian courts have extensively interpreted the nature of both forms of occupancy rights. In *Salami v. Oke* [31], the Supreme Court held that both statutory and customary rights of occupancy are interests in land recognized and protected by law, albeit with different characteristics and incidents.

An important question concerns whether and how customary rights may be converted to statutory rights, particularly when rural land is incorporated into expanding urban areas.

In *Abioye v. Yakubu* [32], the Supreme Court held that the Governor's declaration of an area as urban does not automatically convert existing customary rights into statutory rights. The holders must apply for and be granted statutory rights, though they should receive priority consideration based on their existing customary rights.

### Challenges

The prevalent right of occupancy system faces significant challenges of which inter alia include

1. **Complexity:** The dual system creates confusion, particularly in peri-urban areas where the distinction between urban and non-urban becomes blurred.
2. **Documentation Gaps:** Inadequate documentation of customary rights creates insecurity and facilitates land grabbing, particularly as urban areas expand into traditionally rural zones.
3. **Consent Bureaucracy:** Consent requirements for both types of rights create administrative bottlenecks, delays, and opportunities for corruption, though this affects statutory rights more severely due to the higher values involved.
4. **Access to Finance:** The difficulty of using customary rights as collateral limits agricultural development and perpetuates rural poverty.

Various scholars and policy makers have proposed reforms geared towards strengthening the system and these include

1. **Enhanced Documentation:** Systematic documentation and registration of customary rights to provide security and facilitate commercial use while maintaining their essential character.
2. **Streamlined Consent:** Simplification of consent procedures or elimination of consent requirements for certain categories of transactions to reduce bureaucracy and corruption.
3. **Equitable Compensation:** Harmonization of compensation provisions to ensure customary right holders receive fair treatment comparable to statutory right holders.
4. **Peri-Urban Management:** Clear policies and procedures for managing land in transitional zones between urban and rural areas.
5. **Technology Integration:** Use of modern technology including digital land registries, GIS mapping, and blockchain to improve administration of both types of rights.

### Conclusion

The distinction between statutory rights of occupancy and customary rights of occupancy represents a fundamental structural feature of Nigerian land law. While both forms of rights derive from the Land Use Act 1978 and share the common characteristic of being use rights rather than absolute ownership, they differ substantially in their administrative frameworks, evidentiary requirements, transfer mechanisms, compensation provisions, and practical applications.

The dual system reflects Nigeria's attempt to balance modernization with tradition, centralized control with local autonomy, and commercial development with agricultural sustainability. While this balance remains imperfect and the system faces significant challenges, the fundamental distinction between statutory and customary rights of occupancy continues to structure land holding and land transactions across Nigeria.

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