

THE CONTROVERSIAL LAGOS PROPERTY TAX- THE FLIP SIDE OF THE COIN

Introduction

The controversial Land Use Charge Law 2001 of Lagos State¹ popularly called the "Lagos property tax"² was praised in glowing terms in a recent article³. The learned writer who is the Honourable Attorney-General of Lagos State explained the policy underpinnings for some of the provisions of the law⁴ and concluded that the law is not an extra-ordinary invention but a viable tool used worldwide for social development. Hence, taxpayers should be ready for a changes.⁵ Many may not agree with the learned writer's conclusion. However, any objective reader should share his views on fundamental issues such as the general aversion to taxation, the need for a vigorous and efficient tax system and reform of the tax system in Nigeria, including property tax. But as far as the LUCL is concerned, several aspects of the law are still open to serious debate. The learned writer acknowledges the timeworn adage that there is a flip side to every issue when he said: "... In addressing the issue, it is the business of the government to make its case but also its responsibility to listen carefully to dissent. Somewhere in the din lies the key."⁶

This paper is written against this background, to present possible opposing arguments from the taxpayers' perspective to some of the issues involved in the LUCL. The paper identifies and discusses some of the flaws in the policy and letters of the law and their legal consequences. The paper calls on the Lagos State Government to quit its quick fix approach of reducing the rate of LUC in deference to the Organised Private Sector (OPS)⁷. Rather, a comprehensive reform of the tax through the appropriate constitutional framework should be undertaken in order to build a meaningful broad-based consensus involving, as much as possible, all the stakeholders.

The remaining portion of the paper is divided into five parts. Part one provides a highlight of the LUCL. Part two is devoted to the examination of the constitutionality of the LUCL and the delegation of the function of assessment by the local government councils to the Lagos State Government. Part three treats some specific aberrations in the administration of the tax even if the validity of the LUCL is assumed. Part four discusses certain developments that have occurred since the introduction of the LUC and some allied matters and concluded in part five with recommendations.

¹No. 11, Laws of Lagos State.

²The tax will hereinafter be referred to as either the LUC or Lagos property tax while the Law will be referred to as either the LUCL or the Law.

³ Y. Osibajo, "Property Taxation as Catalyst for Development - Land Use Charge Law of Lagos State" (2003) Vol. 22, JPPL, p.1

⁴Some of the policy underpinnings revealed by the writer include the reasons why the pre-existing land based rates/tax laws have not been repealed by the LUCL and why the coverage of the LUCL is presently low.

⁵Ibid., at p.21

⁶ Y. Osibajo, op cit. at p.2.

⁷The OPS consists of the Manufacturers Association of Nigeria (MAN), Lagos Chambers of Commerce and Industry, National Employers Consultative Association (NECA), inter alia.

1.0. The Land Use Charge Law

Although land based taxes and rates are not new in Nigeria, the term "land use charge" was introduced into our fiscal lexicography for the first time by the LUCL.

The LUCL⁸ was signed into law on 22nd June 2001 and commenced with immediate effect. LUC is payable annually on the value of all real property situated in Lagos, except those exempted under the law⁹. The law makes each local government authority the collecting authority within its territory. However, section 1(3) provides that each local government may by written agreement delegate the collection of rates and the assessment of privately owned houses or tenements to the State.¹⁰ The Commissioner of Finance is empowered to undertake or cause to be undertaken the assessment of chargeable properties through property identification officers, qualified assessors and other persons as he may consider necessary. Payment is required to be made at any of the designated banks within 30 days of the service of notice. Although the tax is imposed on the owner, it may be recovered in certain circumstances from the occupier or any person who may hold money on behalf of the owner or from whom money is due to the owner.

The tax shall be increased by the under listed percentages if delayed beyond 30 days:

- (a) between 45 days and 75 calendar days - 25 %
- (b) between 75 days and 105 calendar days - 50 %
- (c) between 105 days and 135 calendar days - 100 %

If payment is not made after 135 calendar days, the affected property shall be liable to receivership by the State until all outstanding taxes have been paid.¹¹

Section 12 empowers the Governor to establish an Assessment Appeal Tribunal consisting of not less than fifteen members. A taxable person may appeal to the Assessment Appeal Tribunal upon the condition that 50 percent of the assessed value has been paid, among other requirements.¹² The onus of proving over assessment lies on the taxpayer. The Assessment Appeal Tribunal may levy a fine of up to 25 percent of the LUC payable against a taxpayer¹³ if it considers the appeal frivolous.¹⁴ Any person who incites another to refuse to pay the tax shall be liable to a (maximum) fine of One Hundred Thousand Naira only (N100, 000.00) or a term of imprisonment for a period of three (3) months, on summary conviction.¹⁵

2.0 Constitutionality of the delegation

⁸The history of property taxation in Nigeria can be traced as far back as 1915. See S.A. Rabi, "Property Taxation: Problems and Prospects", *Tax Law and Tax Administration in Nigeria*, (1990), NIALS, ed. O. Akanle, p.179.

⁹ See ss.1(1) & 7LUCL.

¹⁰See s.1 (3) LUCL.

¹¹See s.20 LUCL.

¹²See s.15 LUCL.

¹³See s.14 (3) LUCL.

¹⁴See s. 13(d) LUCL

¹⁵See s. 19 LUCL.

The central question regarding the LUCL is a constitutional one - whether the local governments in Lagos State can lawfully delegate the assessment of tenement to the state government. This question relates more particularly to the constitutionality of section 1(3) LUCL which provides "that each local government may by written agreement delegate the assessment and collection processes to the State"¹⁶. Before we consider argument of the learned writer and our counter argument on this important issue, it may be useful to probe why there is so much ado about which level of government is charged with the collection of LUC.

2.1. Does it matter which level of government collects a tax?

Assuming that the LUC is a tax, a question may be posed thus: why should it matter to a taxpayer which level of government collects a particular tax. If a tax is due should it matter whether it is collected by an agency of a local government or state? If employers, corporate bodies and government agencies are engaged as agents of collection of different taxes at source¹⁷ why should a taxpayer kick against a delegation of collection of a local government tax to an agency of the state government?

Ordinarily, in practice, this question may not be of practical importance to businessmen/taxpayers who want to do business and not argue or litigate, except where it is inevitable. However, the question is of immense constitutional significance, particularly in a federation such as our, where, the different levels of government are bound to keep within the scope of their powers and functions, failing which their action will be ultra vires, null and void. In a society governed by a democratically elected government under a written Constitution, any infraction of the provisions of the Constitution, no matter its salutary intention, should not be permitted. Once it is allowed to go unchallenged by whoever is affected, more serious infraction will soon be committed. In due course, the constitution is rendered irrelevant. That means a slide into authoritarianism. All these can come about just because the law and the constitution were not observed and the non-observance was connived at or acquiesced in.¹⁸

Besides the constitutional reasons, the rates of the LUCL are considered to be astronomical compared to what was payable under the preexisting laws. Not only that, the penalties are relatively very harsh while opportunities for evasion and avoidance under the pre-existing laws may have diminished. It may be easier for taxpayers to deal with local government tax officials than the presumably more sophisticated private tax consultants or state officials in charge of the LUCL. In this situation, the taxpayers in an adversarial system could conveniently and legitimately rely on the provision of the Constitution to contest the exaction in order to protect their enlightened self-interest. This explains why the big names in finance and industry seem to have "joined the ranks of human right activists."¹⁹

We now turn to the argument of the learned writer in support of LUCL.

2.2. Argument in favour of delegation.

¹⁶ See s.1 (3) LUCL.

¹⁷See sections 68-72 PITD and 60-63 CITA for the legal basis of withholding of personal income tax and companies income tax at source.

¹⁸See *Bamidele &ors. v Commissioner for Local Government and Community Development; Lagos State &ors.* [1994] 2 NWLR (pt. 328) 586.

¹⁹See Y. Osibajo, op. cit. p.4.

The learned writer forcefully argued that Item 9, Part B of the Second Schedule permits the House of Assembly to make any law that would impose a tax, fee or rate within the state "subject to such conditions as the House itself may prescribe"²⁰.

In setting the conditions under which the local government authorities will collect LUC, the State has provided in the LUCL that the function may be delegated. In sum, the Constitution permits the House of Assembly to make the LUCL and section 1(3) of the LUCL permits the local government authorities to delegate their collection functions.²¹ According to the learned writer, the provision of section 1(3) LUCL is an innocuous one which provides the statutory authority for local government authorities to delegate, if they wish. Where they have delegated, delegation can be revoked at any time²². Hence, the delegation under the provision of section 1(3) envisages a win-win situation which "ensures that the constitutional purpose is not truncated but achieved at a reduced cost".²³

The learned writer cited the statement of Uwaifor J.C.A. (as he then was) in *Bamidele & ors. v Commissioner for Local Government and Community Development; Lagos State & ors*²⁴ to support the delegation theory.

2.3. Missing links - Sections 1(3) and 7(5) 1999 Constitution.

It will be noted that the learned writer, in his argument, failed to address the provisions of sections 1(3) and 7(5), which would have shed more light on the correct position of the law. Also, Uwaifor J.C.A was quoted, in our view, out of context. It is submitted that the delegation under section 1(3) LUCL contravenes the clear provisions of section 7(5) of the Constitution and therefore *null and void* to the extent of its inconsistency according to section 1(3) of the 1999 Constitution.

Whilst it is true that Item 9, Part B of the Second Schedule vests the House of Assembly with power to make laws for the collection of any tax, fee or rate on any term which the House of Assembly may prescribe, the provisions, however, does not vest the House of Assembly with power to prescribe conditions that are inconsistent with express provisions of the Constitution. Otherwise, the House of Assembly would enjoy limitless power as far as the prescription of conditions for collection of taxes goes. Section 1(1) proclaims the supremacy of the Constitution.

If any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall be *null and void* to the extent of its inconsistency with the Constitution.²⁵ An express limitation to the power of the House of Assembly in this regard can be found in the combination of section 7(5) and Paragraph 1(j) of the Fourth Schedule of the 1999 Constitution which are reproduced below:

"7 (5) - The functions to be conferred by Law (by the House of Assembly) shall include those set out in the Fourth Schedule to this Constitution.

Item 1(j) - "The main functions of a local government council are as follows:

²⁰See Y. Osibajo, op. cit. pp. 4 & 12.

²¹Ibid., pp. 12-13.

²²Y. Osibajo, op cit. p.14

²³Y. Osibajo, op cit. pp. 14--15

²⁴ [1994]2 NWLR (pt. 328) 568.

²⁵See section 1(3) Constitution of the Federal Republic of Nigeria (CFRN), 1999.

(j) assessment of privately' owned houses or tenements for the purpose of levying such rates as may be prescribed by the House of Assembly.²⁶

If the above provisions are read together, it will be clear that the Constitution mandates that states should vest certain irreducible minimum functions on the local government including assessment of tenements. A State has no discretion in this regard and cannot prescribe conditions in any state law that will defeat or circumvent this purpose. Can it then be said that the Constitution envisages that a State could (first) confer the function of assessment on a local government in a law only for the same law to permit the local government to delegate the same power back to the State? Such interpretation would be most unnatural and artificial. To all intent and purposes, section 1(3) LUCL is an attempt to override the provision of the Constitution through the back door. More specifically, it is like inserting a proviso in item j of the Fourth Schedule thus: "provided that the assessment of tenement may be undertaken by the states on behalf and with the consent of the local government council".

2.4. Delegation of the executive function of assessment.

The argument that executive function of tax collection is delegable in the circumstances of the LUCL is tenuous because the local government does not have any legislative power impose any tax, including tenement. The role envisaged by the constitution for the local government with regards to assessment of tenement is executive in nature and that is exactly what the LUCL has permitted the local government to do. The issue, in our view, is not whether a statutory body can delegate any function, whether executive or otherwise which the Constitution prescribes should be performed by the body. The principle as correctly stated in the case of *A.G. Bendel State v A.G. Federation*²⁷ is that: "[n]either a State nor an individual can contract out of the provisions of the Constitution and the reason is that a contract to do a thing which cannot be done without a violation of the law is void".²⁸

The learned writer has argued that the construction of roads and maintenance of public conveniences through private contractors is commonplace and expedient and that without such delegation, it would be impossible for the local governments to perform the functions contained in the Fourth Schedule. In our own view, when a local government awards a contract to a contractor for road construction, the local government is actually executing the function itself based on the doctrine that he who acts through an agent acts himself. The government does not delegate functions to Julius Berger PLC when it contracts it to build a road or stadium.

This is a pure case of contract award and not delegation of functions. In any case, the exercise of such functions by the contractors could have been challenged, if they were asking the taxpayers to pay taxes or levies which the taxpayers consider disproportionate. This is different from a situation whereby the performance of such functions is delegated to the state or federal government which has power to levy or impose taxes and levies.

2.5. Basis of delegation should be sought in the Constitution.

Where a delegation of the collection of a tax by another level of government is permissible, the approach in Nigeria has always been to provide the basis for the delegation in the Constitution. For

²⁶Emphasis is ours. See section 7(5) and Paragraph 10) of the Fourth Schedule of the 1999 Constitution

²⁷(1981) NSCC 314

²⁸Atp.318.

instance, the constitutional basis for the collection of federal taxes such as personal income tax, capital gains tax and stamp duties, by the States is provided in item 7 of Part B of the Second Schedule to the Constitution thus:

"D-7 in the exercise of its power to impose any tax or duty on-

(a) capital gains, incomes or profits of persons other than companies and

(b) documents or transactions by way of stamp duties,

the National Assembly may subject to such conditions as it may prescribe, provide that the collection of any such tax or duty or the administration of the law imposing it shall be carried out by the Government of a State or other authority of a State".²⁹

Similarly, Item 9, Part B of the Second Schedule provides a constitutional basis for a state to delegate the collection of its (state's) taxes to the local governments.

In the absence of such express provisions, it is submitted that it is unlawful for State Governments in Nigeria to collect specified federal taxes³⁰ and for local government authorities to collect states' taxes. Hence, the basis for the delegation of collection of assessment of tenement must be sought in the Constitution and not a state law, as section 1(3) of the LUCL purports to do.

2.6. A valid excuse for circumventing a positive provision of the Constitution?

The learned writer stated the main reason for the delegation thus:

"This merger of rates and tax administration was considered necessary when the current administration in the State was sworn in. For the first few months after a return to civil rule in May 29 1999, the entire state was contending with the inability of the Local Government Authorities to discharge their basic constitutional duties, especially refuse disposal and road maintenance. Inevitably, the state could not feign lack of concern. In fact the state was directly concerned as all complaints and outcries were directed at the state government... In no time, it became necessary for State Government to shoulder Local Government responsibilities".³¹

While one appreciates the enormity of the pressure on the Lagos State Government this is however a constitutional arrangement which can be addressed constitutional restructuring. The fiscal arrangement vesting the assessment of tenement in the local government is a carryover from the 1979 Constitution. The learned writer acknowledged the logic behind the arrangement as sound where he noted that "[c]learly, the principal reason why the Constitution confers on Local Government Authorities the power to assess and collect tenement rates is to assure them that steady and autonomous source of revenue."³²

If the logic for the arrangement no longer holds good, there was an opportunity to review it in 1999 but this was not done. It must then be presumed that the drafters of the 1999 Constitution duly appreciated

²⁹See item D-7 Concurrent Legislative List

³⁰Item 59 of the Exclusive Legislative List of the 1999 Constitution vests taxation of income, capital gains and stamp duties on the Federal Government.

³¹Y. Osibajo, op. cit., p. 3

³²Ibid. p.14.

that the local government can effectively discharge the functions allocated to them. In any case, the fact that a level of government cannot efficiently perform a functions assigned to it under the Constitution does not justify the delegation of such level of government in the absence of an express provision to that effect for instance, there are functions which the Federal Government of Nigeria has become too weak and corrupt to efficiently perform today,³³ yet, does this give the federal government the power to delegate such functions to the state or its agencies without running afoul of the provisions of the Constitution?

Until the Constitution is amended the best that the State could do with regard to tenement rates is to plug the loopholes in the law and administration of tenement and provide necessary legal framework for the local government revenue. Since local governments are bereft of legislative responsibility of the state government to make appropriate laws that would improve the fiscal position of the local governments. This is a responsibility which the State Government should be prepared to discharge not because it desire to share out of the revenue accruing from the venture. Even, if, the overall administration of tenement rate were to be coordinated at the state level, the next revenue should be for the exclusive use of the local government. Lagos State government should have exploited other viable mean of improving its independent revenue without invading that of the local government.

Furthermore, the extent to which the arrangement under LUCL guarantees the local government a "steady and autonomous source of revenue" as claimed by the learned writer is not clear since the terms of delegation are not made public. The LUCL merely mandates the Commissioner to establish and maintain a Land Use Charge Collection Fund instead³⁴ of establishing the Fund and spelling the manner of its management more precisely. Of particular interest such as the ratio for sharing the revenue between the two tiers of and among the local governments.³⁵ Interestingly, the learned writer revealed in his article that the proceeds of LUCL are administered by independent (private sector) trustees. These are all matters of vital public interest that ought been expressly provided in the LUCL. The present revenue sharing arrangement under the LUCL may easily be subjected to political manipulations by the state to the detriment of the local governments. Useful lessons may be learnt from the gradual manipulation of the Federation Account to the detriment of levels of government over the years.³⁶ Once the statewide administration tenement becomes established, the share of the local government will gradually shrink in future.³⁷

Also, the present arrangement whereby the Lagos State Government distributes the revenue from tenement between itself and the local government falls short of ideal autonomous revenue for the local governments. There are obvious advantages if tenement rates are collected directly by the governments. First, a local government will be able to determine the rate of the tax to be charged vide

³³For instance, the police power.

³⁴See s. 16 LUCL.

³⁵The ratio for sharing the revenue from the Value Added Tax (VAT) among the t government is expressly stated in the VAT Decree. See s. 36 Value Added Tax D 1993.

³⁶The manner in which the federal government is managing the Federation Account has been subject of litigation recently. See for instance, A.G. Federation v A.G. Abia State & W.L.R. p.1

³⁷It will be recalled that there was a time when 50 percent of the amount of revenue accruing to the Federation Account from natural resources was given back to the states (then regions) on the basis of derivation. The derivation percentage was gradually reduced over to 3 percent before the commencement of the 1999 Constitution which mandated a minimum of 13 percent.

its bye law based on the level of services it hopes to provide or is providing. Second, when necessary, it may take initiatives administrative matters to reinvigorate the assessment and enforcement, *inter alia*.³⁸ Third, local governments will not have to wait for the distribution by states before it can apply the revenue. Fourth, suspicion and acrimony relating to the management of the joint account or fund could be avoided.

2.7. Where is the incentive to opt out of LUCL?

The learned writer based his argument that delegation of assessment under the LUCL is lawful on the premise that delegation is voluntary and could be withdrawn at any time by any local government.³⁹ This is nowhere stated in the LUCL and such inference cannot be drawn from entire provisions of the LUCL.

All powers and functions to be performed under the LUCL are vested in the Commissioner for Finance and the Governor. Apart from section 1(2) and (3) LUCL which relate to imposition and delegation, no other function is vested in the local government. Hence, there are no provisions in the LUCL that will allow a non-participating local government to assess and collect LUC. Hence, any local government that opts out of the LUCL would be left to operate the Tenement Rates Laws with all its attendant flaws, which the learned writer had correctly identified. Where then is the incentive for a local government to opt out? A clear choice would have been provided if the Tenement Rate Law had also been reviewed with a view to plugging some of the loopholes.

2.8. Putting Uwaifo's JCA) statement in perspective

The learned writer quoted the statement of Uwaifo (JCA) (as he then was) in *Bamidele & ors. v. Commissioner for Local Government and Community Development; Lagos State & ors.*⁴⁰ in support of his argument that delegation under the LUCL is lawful. The statement of Uwaifo and the argument of the learned writer are reproduced below:

.... It will be unconstitutional for any other person or authority to purport to exercise that function on the state of the law. The function has been given to the Local Government. It has a duty to perform it. It may do so directly or by **lawful delegation. It cannot be deprived of it nor can it surrender it.**⁴¹

This dictum makes it clear that a function, such as the one in question here, can be lawfully delegated and such delegation does not amount to a deprivation or surrender.⁴²

The inference drawn by the learned writer from the above statement is not as clear as he claimed. If delegation to the State Government is lawful in certain circumstances, then delegation to the Federal Government should also be lawful assuming the LUCL permits it. Then, such latitude in the power of delegation would be symptomatic of the total failure of the local government system in Nigeria.

³⁸For instance, local government will be able to discipline erring staff or official. Under the present arrangement all the initiatives has to be at the behest of the State Government.

³⁹Y. Osibajo, op cit. pp. 5 &14.

⁴⁰[1994] 2 NWLR (pt. 328) 568.

⁴¹Y. Osibajo, op. cit. p.13.

⁴²See Oxford Advanced Learner's Dictionary, 6th ed., p.340.

What is clear from the statement of Uwaifor, in our view, is that local government can neither be deprived of its functions under the Fourth Schedule nor surrender them. The word "surrender" literally means to "give yield, to give up possession of something/somebody when somebody over.

Furthermore, the phrase "b lawful delegation" contained in the statement by Uwaifor can only be logically interpreted, in our view, to mean that local government can delegate the performance of its functions to its agency, officials, private agents or contractor and not a higher level of government such as the State and Federal Governments. This is because, in the normal course of things, delegation is from a higher authority to a lower authority. The statement of the learned Justice should be read within the overall context in which it was made. In that case, attempt was made by the Lagos State Government to regulate the day-to-day running of the Alayabiagba Market within the Lagos Island Local Government. The Court of Appeal declared the action as unconstitutional and held, inter alia:

"By the Local Government Edict No. 16 of 1976 of Lagos State Section 63(a) thereof, Local Governments were given exclusive responsibility and power to make bye-laws for markets and motor vehicle Section 7(5) of the 1979 Constitution provides for the functions Local Government Council in the 4th Schedule of the Constitution, among which as stated in paragraph 1(e) thereof, is the establishment, maintenance and regulation of markets, motor parks and public toilets.

It will be unconstitutional for any person or authority to purport to exercise that function on the state of the Law. The function has been given to the Local Government. It has the duty to perform it. It may do so directly or by lawful delegation. It cannot be deprived of it nor can it surrender it.

Any person who shows sufficient interest can take action to ensure that only the local government and no other continues to do or take responsibility for that duty".⁴³

Uwaifor C.J.A was particularly irked by the fact the purported usurpation was done during a civilian regime. The learned Justice went on to lampoon Lagos State Government in the following words:

"If we must practice democracy at the stage and on the "platform of due process and the rule of law, we must learn to know the limits of our powers and acknowledge the extent of the powers of others. The first lesson is that institutions which ensures democracy must not be allowed any other form and be personalized. If they are, they become open to grave abuse."⁴⁴

The case of Bamidele shows that the history of the attempt by civilian government in Lagos State Government to encroach the fiscal turf of the local government is not recent. The only difference here is that none of the local government has approached the court to challenge the LUCL.

The Supreme Court, also, has strenuously guarded the exclusive jurisdiction of local government over tenement in *Knight, Frank and Rutley (Nig.) Ltd. v Attorney -General of Kano State*.⁴⁵ In that case, Kano State Government engaged the estate valuation firm of the appellants to assess the rate able value of private residences in the State for the purpose of levying tenement rates on them. At that point in time,

⁴³Supra, at p.220.

⁴⁴Supra, at p.586.

⁴⁵ [1990] 4 NWLR (Pt. 143) 210.

both parties did not advert their minds to the fact that under the 1979 Constitution and the Kano State Local Government Edict No.5 of 1977, only local government had the power and authority to levy tenement rates.

Consequently, after the Appellant had partly carried out the survey and assessment and had been paid an initial sum of N100,000, the Respondent discovered the mistake and repudiated the contract. The Appellant contested the act at the High Court and lost. It then appealed unsuccessfully to the Court of Appeal and finally to the Supreme Court. It was held that the contract was void. Mohammed J.C.A. (as he then was) declared in the lead judgment that:

"Once a state passes a legislation assigning the function of valuation of tenement rates to the local government as the constitution has directed, only the Local Government Council will have the power to deal with the subject matter. The State has no power to deal with the matter and the Local Government Council cannot even if it wants to, divests itself of these powers".⁴⁶

It is clear from the last sentence in the above statement that a local government cannot even divest itself of the power to assess tenements. "Divest" means "to take something away from somebody or something"⁴⁷ Delegation under section 1(3) LUCL has the practical effect of taking away the power of the local government council in respect of assessment of tenement. This is because once an assessment is undertaken under the LUCL, it can no longer be done under the pre-existing laws⁴⁸. It is immaterial that a local government voluntarily acquiesces in the delegation.

It suffices to say at this stage that the implication of the cases of *Bamidele and Knight Frank* is that the cases that are presently pending in court on the LUCL may not be finally resolved until they get to the Supreme Court. This explains why more taxpayers have continued to seek redress in the law court despite the existence of a final judgment of Lagos State High Court, which upheld the constitutionality of the LUCL.⁴⁹ The parties to the cases that are presently pending must therefore have the spirit of a long distance runner.

2.9. Maladministration

Assuming, without conceding that the LUCL is constitutional, there are aspects of the administration of the law that may be called to question. First, the enumeration and valuation of the properties, which are very critical to the LUCL, were done under the Property Identification Exercise (PIE) before the commencement of the Land Use Charge Law. The implication of this is that the PIE officials were not constrained by law when these important exercises were carried out. It is therefore submitted that any enumeration and assessment undertaken before 22 June 2001 cannot be used as a basis of assessment under the LUCL in the absence of an express provision in the law giving retroactive effect to PIE.

Second, the process of valuation is by taking photographs and measuring the area of properties. The owner or occupier of premises is not in any way involved, for instance, to answer relevant questions

⁴⁶At P: 220. Emphasis supplied

⁴⁷Oxford Advanced Learner's Dictionary, 6th ed. 340.

⁴⁸For instance, section 22 LUCL provides that the three existing laws "shall cease to operate in respect of a property once the LUC is levied" on it. See s. 22 LUCL.

⁴⁹*Shell Petroleum Development Company of Nig. Ltd. v Governor of Lagos State*, Suit No. M/721/2002 delivered on 31st May 2001

relating to the correct boundaries. There are significant distinctions between the procedure for determining the value of a property under the Tenement Rate Law and the LUCL. Under the Tenement Rate Law, notice is given in the State Official Gazette or in any widely read newspapers. After the preparation of the Valuation List, the list will be available for inspection for twenty one days. Thereafter, the owner of each tenement is served with an assessment notice showing the assessed value.⁵⁰ However, under the LUCL, a taxpayer has no way of knowing the value ascribed to his property until he is served with assessment notice.

Third, the assessment notices do not indicate all the elements or indices contained in the formular for calculation of the land use charge under section 5. Section 5 is worth reproducing:

5-(1) The following formular shall be used to determine the annual amount of the Land Use Charge payable for any property under this Law -

$$\text{LUC} = \text{M} \times [(\text{LA} \times \text{LV}) + (\text{BA} \times \text{BV} \times \text{PCR})]$$

Where

LUC = annual value of the Land Use Charge in Naira.

M = The annual charge rate expressed as a percentage of the assessed value of the property and which may, at the State Government's direction vary between owner occupied residential and commercial (revenue generating) property.

LA = the area of the land parcel in square meters.

LV = the average value of a land parcel in the neighborhood, per square metre in Naira.

BA = the total developed floor area of building on the plot of land in square meter, or the total floor area of apartment unit in a building where apartment has a separate ownership title.

BV = the average value of medium quality building in the neighborhood, per square metre in Naira.

PCR = the Property Code Rate for the building and which accounts for the building being of higher or lower value than the average building in the neighborhood and which also accounts for the degree of completion of construction of the building.

$(\text{LA} \times \text{LV}) + (\text{BA} \times \text{BV} \times \text{PCR})$ = the assessed value of the property.

The assessment notices ought to have clearly stated the amount of M, and LA and LV, and BA etc. so that a taxpayer could see clearly how his chargeable tax was arrived at. All the requisite information in this regard have not been provided for the taxpayer, yet the onus of proving over assessment is placed on him by the law.

3.0. Issues in LUCL

⁵⁰See s.9 Tenement Rate Law, Cap 186, Laws of Lagos State, 1994

There are other specific issues, other than the foregoing, relating to the LUCL that merit some comments. Some of them are on the developments that have occurred since the commencement of the law while others touch on policy underpinning some of the provisions of the LUCL.

3.1. Harmonisation or Multiplicity of taxes?

Since the avowed objective of the LUCL is to consolidate the taxes and rates *hitherto* payable under three land-based laws,⁵¹ it is remarkable that it [LUCL] has not repealed the three pre-existing laws. Rather, section 22 of the law merely provides that the three existing laws "shall cease to operate in respect of a property once the LUC is levied" on it.⁵² The justification for this policy is that a repeal of the pre-existing laws would have foisted a position of *fait accompli* on all the local governments to participate in the new arrangement under the LUCL. By leaving the pre-existing laws intact, a local government who refuses to delegate its power of assessment of tenement can then fall back on the pre-existing laws. According to the learned writer:

"While the Law seeks to consolidate all existing property charges and rates in the state and, to make that effective, clearly envisages a delegation to the central collection agency of the state, it still provides for the event of non-delegation. This provision is inevitable as any LGC may opt out of the scheme or revoke powers earlier delegated to the State Government.

.... Thus a non-participating Local Government Authority is fully entitled to continue with the collection of tenement rates within its territory while the State Government continues to apply other (state controlled) property rates and charges in the same territory ..."⁵³

The implication is that we now have four laws instead of one. It is an aberration, in our view, for a consolidating statute not to repeal the pre-existing ones.⁵⁴ When the value added tax (VAT) was introduced to replace sales tax, section 41 of VAT Decree specifically repealed the pre-existing Sales Tax Act.⁵⁵ It is incongruous to have two or more laws imposing the same or similar taxes for any reasons. This may give room for corruption, discrimination and selective justice in the administration of the tax. For instance, an unscrupulous tax official may levy the tax (if at all) that will confer the greatest advantages on his properties in which he has interest.

3.2. Soaking the rich?

Although the LUC is imposed on all the properties in Lagos State, the implementation has been selectively pursued against properties in highbrow areas owned mainly by companies and few rich individuals. Hence, most of the properties in the state have not been served with assessment notices under the LUCL. Since the coverage is presently limited, the policy might be to collect as much as possible from the few properties against which the LUC had been levied. According to the learned writer:

⁵¹See the Preamble to LUCL.

⁵²See s. 22 Land Use Charge Law No.11 of 2001 of Lagos State.

⁵³See Y. Osibajo. op. cit. p.5.

⁵⁴C/ f Companies and Allied Matters Act No. 1990 which consolidated the provisions of Companies Act 1968, Land Perpetual Succession Act and Business Name Registration Act.

⁵⁵See section 41 Value Added Tax Decree No. 102, 1993.

"For instance, the rates may be high at the initial stages in view of the startup capital costs, initial low coverage and the relatively high cost of collection. But as the law becomes more firmly established and more properties are brought within the net, the rates will fall in response to the lower collection costs and higher yield".⁵⁶

Obviously, the Lagos State government did not expect the resistance of the Organised Private Sector (OPS) to persist this long. It must have reasoned that it is easier to get companies to pay taxes than individuals, forgetting that companies are also, sometimes, able, to mobilise opposition against perceived bad tax policies.

The present situation whereby the LUC is levied against few properties might give the impression that LUC is a tax to "soak the rich" corporate bodies and individuals. If the state desires a wealth tax, it should clearly do so. Ideally, assessment of all the taxable properties should have been done at the same time in each local government. If this cannot be done under the LUC, then, where is the proof of the "state of the art mapping and database software, computers and other equipment, and well trained personnel"⁵⁷ which the tax collection agency is said to have? In our view, the magnitude of the scope of the exemption granted is indicative of the helplessness of the capability of the agency to administer the LUCL in respect of all the properties in Lagos or an acknowledgement of the reality that most of the property owners cannot afford to pay the LUC. If this is correct, then, the right policy would be to charge lower rates and apply the law in respect of all properties with few narrowly defined exceptions. With a broader base and lower rates, more revenue would have accrued to the state from the tax both in the short and long run.

3.3. Abdication of legislative responsibility

The legislature has a unique role in the making of tax laws. For instance, at the federal level, the National Assembly must approve any bill for raising or cutting of taxes.⁵⁸ This is the proverbial 'power of the purse' by which the legislature can effectively assist the executive to raise taxes as appropriate or check arbitrary imposition.⁵⁹ Although, these are not expressly provided in the constitution with regards to the House of Assembly, there is no gainsaying the fact that the House of Assembly owes the executive and the general public a duty to thoroughly scrutinise the policy and letters of any tax bills before enacting them into law.

The centre of gravity of the LUCL is undoubtedly the Commissioner for Finance.

Surprisingly, the Commissioner does the determination of the rate under the LUCL.

This will be revealed by a close examination of section 5 of LUCL. The LUCL does not categorically state the rate of the tax. Rather, section 5 merely provides for a formula which represents M as the annual charge rate expressed as a percentage of the assessed value of the property while section 5 (2) goes ahead to provide thus:

⁵⁶Y. Osibajo, op. cit. pp. 6-7

⁵⁷Y. Osibajo, op. cit. p. 11

⁵⁸Section 59(1)(b) 1999 Constitution.

⁵⁹Also, at the federal level, where we have a bi-camera legislature, tax bills can only emanate from the House of Representatives, which is believed to be more representative of the people than the Senate

"5(2) The value of the annual charge rate for the financial year in which this law comes into force, and in each subsequent financial year shall be set by the Commissioner for Finance, and shall be published in the State Government Official Gazette and in one or more newspapers circulating within the State".

The above provision vests the Commissioner for Finance, an appointed officer, with power to solely determine the rate of the tax! It is quite obvious that the rate of a tax and nothing more pretentious is the tax. It is arguable that the determination of the rate of a tax, especially a direct tax, is a legislative function, which cannot be delegated. Hence, the determination of the rate of the LUC by the Commissioner for Finance is an aberration in tax law and policy, which smacks of abdication of legislative power. This, without more, is sufficient to render the LUC void.⁶⁰ While, this writer agrees that it may be expedient to leave the rate of LUC flexible, the better approach is for the legislature to set the initial rate and vest the power to determine future rates to a Review Board subject to the approval of the legislature. This presupposes that the members of the House of Assembly did not even know the rate of the LUCL at the time of passing the law!⁶¹

3.4. Rate reduction galore

As said earlier, the controversies generated so far by the LUCL have compelled the drastic reduction of the rate thrice. Special considerations have been granted for factory buildings while certain categories of privately owned property are out rightly exempted. The last review drastically reduced the rates by a further rebate of 30 percent. Furthermore, the amount required to be deposited before appeal has been reduced by half.⁶² The rate reduction can be tabulated thus:

	Property	2001 rate	2002 rate	2003 rate
1	Commercial property	2.5%	1.75%	0.375%
2	Residential property	0.65%	0.65%	0.125%
3	Industrial premises	unknown	0.5%	0.0375%
4	Owner-occupier property	0.15%	exempt	exempt
5	Owner-occupier pensioner's property		exempt	exempt

In terms of tax expenditure, the reduction of the rates commercial property from 2.5% to 0.375% shows that the Commissioner for Finance had unilaterally reduced the anticipated revenue under LUCL by more than 70%! The extent of this "tax cut" is huge enough to make mockery of the present tax policy of President G. W. Bush of United States of America!⁶³ And what is more, without any need whatsoever for

⁶⁰See A.G. Bendel State v A.G. Federation, Supra.

⁶¹They could however have been orally informed during the presentation of the bill that the rate would be "just" 2.5 percent or something of the assessed value of the property. It is doubtful if the members of the House of Assembly could have imagined that the tax will be as huge as it turned out to be otherwise, they would have been tempted to exempt the properties of "Honorable members of the House", knowing the self-serving nature of most of our elected officials and their concern for their welfare.

⁶²Y. Osibajo, op. cit. p 9

⁶³The President of United States of America, George Bush has proposed to cut various taxes over a period of 10 years by about 1.3 trillion U.S dollars. The proposal has generated heated debate between the Democrats and the Republicans and the public. The Congress fearing the viability of the policy to reinvigorate the economy as promised by the President has been cutting back on the amount of tax approved for the President.

legislative approval!! It is doubtful if the legislature could have intended to vest such a sweeping power on the Commissioner.

3.5. Legislative approval for the rate reduction

From purely legal standpoint, the new rates cannot take effect until they have received the approval of the House of Assembly. In this regard, section 5(3) of LUCL which provides:

"5(3) The values of the Property code Rate shall be set by the Commissioner for finance on the date when this law comes into force and shall, from time to time, be revised by the Commissioner, **subject to the approval of the House of Assembly**". (Emphasis supplied)

Hence, the 'reduction' is a mere proposal or an indication of what the law might be until they are approved by the legislature. Although taxpayers are not likely to complain about this since the reduction confers benefits on them, it is however, still more assuring for the reduction to be given a legal framework. It is however remarkable that the executive has not bothered to seek legislative approval as required by law before implementing the rate reduction. This is either an indication that the legislature has totally compromised its roles as far as the LUCL is concerned or there is cooperation between the executive and legislature in this regards. While, we pray that it is the latter, there is still the need for such cooperation to be done within the parameters of the law.

3.6. Liability of a property to receivership

Undoubtedly, one of the most controversial provisions of the LUCL is section 20(2), which renders a property liable to receivership if the LUCL remains unpaid after 135 calendar days. While the penalty of receivership may not be strange under property taxes elsewhere, it is usually not exercised until all avenues to recover the tax due have been exhausted. The LUCL provides for two methods of recovering taxes due. The tax authority may sue to recover the tax or appoint a receiver in respect of the property of the taxpayer. Although, it is not an express requirement of the law, it is logical to expect the tax authority to first sue for recovery before resorting to the appointment of a receiver. The approach could have ensured a slow but steady growth in the rate of compliance compared to the present approach where the enforcement mechanism is bedeviled with much haste but less speed

3.7. Withdrawal of the assessment notices for 2001

The withdrawal of the assessment notices for 2001 was not, in our view, based on charity or benevolence on the part of the government. Rather, it must have been due to the futility of legally defending the 2001 assessment in the law court.⁶⁴

Although the LUC is an annual tax,⁶⁵the tax commenced on 22nd of June 2001, almost the middle of the year (when some taxpayers claimed they had already paid taxes to the relevant authorities under the

⁶⁴It is unlikely that any government that manifests desperation for revenue like the Lagos State government, no matter how benevolent, would forgive a tax for a whole year for reason of mere compromise.

⁶⁵The LUC is not expressly described as annual tax. However section 5 gives an indication that the tax is charged annually by representing LUC in the formular for assessment to mean the "annual amount of Land Use Charge in Naira". Furthermore, section 9 provides that the "Commissioner for Finance shall cause to be issued in each Financial Year a Land Use Charge Demand Notice ... "**Financial Year**" is defined in s.23 as "any period of twelve months beginning from January 1 and ending on the subsequent December 31"

old laws).⁶⁶ Hence, to enforce the payment of the LUC in such circumstance would not only give the law a retrospective effect but amounted to double taxation⁶⁷. Shell Petroleum Development Company of Nigeria specifically raised this issue in the suit filed in the Lagos High Court before the meeting between the OPS and the government began. Although not many taxpayers could truly claim that they have paid the taxes due under the pre-existing laws, it is not unlikely that most of the members of the OPS who were the initial target in the administration of LUCL would have paid. In anyway, the fiscal year of 2001 was almost coming to an end and it might be unrealistic to expect taxpayers to pay such huge amounts being demanded under the LUCL within few months left and the commencement of another fiscal year. All the foregoing consideration must have compelled the government to withdraw the assessment notices for 2001 fiscal year and substitute them for those of 2002 fiscal year as the year began.⁶⁸

3.8. Establishment of Assessment Appeal Tribunal

It is noteworthy that the Assessment Appeal Tribunal referred to in section 12 is yet to be established. This is surprising since the law prescribes a period of 30 days within which to appeal against assessment. It would have been better if the law had established the Tribunal and then vest the Executive with the power to constitute the membership. As a matter of fact, the Tribunal should have been constituted at the commencement of the law. The present *ad hoc* procedure for the review of assessment may create opportunity for corruption and arbitrariness.

If care is not taken, the Assessment Appeal Tribunal may become another Body of Appeal Commissioners, which exists only on paper under Companies Income Tax (CITA) and Personal Income Tax Decree(PITD).

3.9. Appeal procedure

Section 14 of the LUCL provides two grounds upon which a taxpayer may appeal to the Assessment Tribunal. It must be conceded that the requirement that 50% of the charge should be paid as a condition for appeal is not strange in tax laws.⁶⁹

However, the provisions of section 13(d) LUCL which vest the Tribunal power to impose a fine of 25% of the charge payable on an appellant, if his appeal is considered frivolous, is draconian to say the least and have no counterpart in any of our tax laws. It may be sufficient to strike out a frivolous suit while

⁶⁶It may be incorrect though to say payment of tenement rate will exhaust the obligation to pay land rates and neighbourhood improvement charges as the taxes are imposed on different persons and for different reasons. For instance, tenement rate is imposed on the "occupier" or "subsequent purchaser" while the land rates, neighbourhood improvement charges and the LUC are all imposed on the "owner". Hence, while it is arguable that payment of land rates, neighbourhood improvement charges will exhaust the obligation to pay the LUC, the same cannot be said of tenement rate except in cases of owner/occupier. Hence, it is submitted that only owner/occupier who have paid under the Tenement Law, Land Rates, Neighbourhood Improvement Charges Law can validly resist payment under the LUCL for the 2001 fiscal year.

⁶⁷Our constitution frowns at retroactivity of law and double taxation. See items D8 & 10 Schedule 2, Part 2 of the 1999 Constitution. "Double taxation is being used in a loose sense here. Strictly speaking, there is double taxation when the same level of government imposes two separate taxes on the same base during the same period

⁶⁸Unfortunately, this partial success of the Shell's case which gave all taxpayers some breathers from the imminent threat of receivership had gone unnoticed and unacknowledged. The case had been widely reported in the press as if Shell had lost on all the grounds in the entire proceedings. See the forthcoming edition of Nigerian Revenue Law Reports (NRLR) for the full report of the Shell's case and other LUC cases.

⁶⁹Section 33 of the Tenement Rate Law contains a similar provision.

aprevaling interest rate is charged on the amount. In addition, adequate provisions should be made to ensure a swift and efficient appeal procedure.

4.0. Delayed dividends of LUCL

The Lagos State Government must have convinced the local governments about the bright prospect of the LUC compared to the pre-existing regime when little was collected under the Tenement Rate Law. How else could one explain a situation where “[F]or the first time in Nigerian history, the organised private sector is fighting the cause of the Local Government Councils in the State without having even one of those councils on its side”.⁷⁰ Since the amount of the revenue collected so far under the LUCL has never been made public, one is not sure if, and to what extent the expectation of the local governments. As a matter of fact, in year 2002, some local government councils in desperate need of revenue still served assessment notices in respect of properties for which the LUCL had already been levied. Since, the amount being demanded by the local governments may begin tenement rate. Therefore, it is not unlikely that more local governments may begin to demand for lower rates under the Tenement Rate Law in the years ahead, unless the prospects of the LUCL brightens and the revenue target is reasonable met.

4.1. Conclusion

It is clear, from all indications, that the Lagos State government has not designed a good property tax law that can stand the test of time. There are a few questions begging for answers regarding the process of administering the LUCL. Since LUC is imposed on the entire properties in Lagos State, why is the administration being selective done against properties of the rich and corporate bodies? Ideally, assessment of all the taxable properties ought to be done at the same time in each local government. Is there any hope that LUC will ever be levied against an average home in Lagos without precipitating social upheaval? Why is the government holding talk with only the OPS on such matter of urgent public importance? It is quite obvious that whatever agreement is reached between the government and OPS is not binding on the members of the public. Similarly, the OPS cannot dictate to its entire members, including those who have cases pending in the courts to withdraw their case and pay the LUC.

What then is the role of the legislature in the unfolding drama? It is suggested that Lagos State House of Assembly should take a bold step to comprehensively review the LUCL. The public hearing should be well publicised in order to get the benefits of diversity of opinions⁷¹ on myriad of troubles plaguing the law. If some of the issues addressed in this paper are painstakingly and objectively considered, among others, Lagos State might possibly blaze the trail for an enduring reform of property tax in Nigeria. No one can seriously contest the power of the State to make property law, but such power must be exercised within the bounds of the Constitution.

This paper would conclude on the note of fiscal federalism. There is still logic in our view in the policy behind the constitutional provisions, which mandate that local government should be vested with the assessment of tenement. Unless and until the constitutional framework is changed, the correct approach will be for state governments to make appropriate laws that would reposition and improve

⁷⁰Y. Osibajo, op. cit. p. 11

⁷¹Opinions of ordinary taxpayers, professional groups such as CITN, academics, and other stakeholders.

the fiscal fortunes of the local government councils. Even, if, the administration of property tax is coordinated at the state level, the net revenue should be for the exclusive use of the local government councils. Rather than usurp the revenue base of the local government, Lagos State government should pursue other viable means of improving its independent revenue. If the State is protesting against federal value added tax (VAT), some of the local governments will also, sooner or later, protest against the LUCL. A government that is seeking fiscal federalism in its relationship with the federal government and other states should not conduct itself in a manner that is inconsistent with that commendable principled stance.

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