THE QUEST FOR DEVELOPMENT IN CHAOS: WHAT CRISIS EVENTS REVEAL
ABOUT NIGERIA’S LEGAL SYSTEM

by

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Abstract

The relationship between law and economic development continues to perplex generations of scholars. This thesis adds to the query by embracing the iterative relationship between legal systems and markets as postulated by Milhaupt and Pistor; thereby, departing from law and finance theory which argues that past adopted legal systems are crucial for economic development. Law and finance theory is criticized based on the causal and proxy indeterminacy of law in achieving economic development, its discrepancies with corporate law practice, and various incoherent claims on juries and law in the twenty-first century. Milhaupt and Pistor’s framework grounded on the organization of a nation’s legal system, the functions of law in support of capitalist activity, and a state’s political economy embodying the supply and demand of law is used to understand how law is wielded in Africa’s giant quest for development.

Institutional autopsies are conducted on pivotal corporate governance crisis events in Nigeria’s financial and petroleum sectors—Nigeria’s 2009-2010 banking crisis and the case of Moni Pulo v Brass—to understand Nigeria’s legal system and likely path to variation. Nigeria is revealed to be a centralized legal system, where the principal role of law is to coordinate market activity and one in which personal relationships play a vital part in her governance structure. The autopsies show there is a growing role played by state approved actors resulting in increased centralized and coordinative features of Nigeria’s legal system. It is hoped that this work assists in understanding the dynamic relationship between law and economic development in developing economies and serves as a foundation for future research on Nigeria’s political economy.
Lay Summary

This thesis attempts to explain the complicated relationship between law and economic development in the world’s poorest continent—Africa. The current perceived relationship based on a country’s initial legal system; English common law, French civil law, German civil law and Scandinavian civil law is found to be skewed and unhelpful in practice. To aid perceptive analysis of the incessant changing relationship between law and market activity in Nigeria, Milhaupt and Pistor’s framework is used to evaluate moments of corporate governance crisis to understand the workings, characteristics, vulnerabilities and path to change of Nigeria’s legal system. This work helps in appreciating the dynamic relationship between law and economic activity and Nigeria’s twenty-first century political economy.
Preface

This dissertation is original, unpublished, independent work by the author, Temitayo Olarewaju.
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List of Symbols

£: British Pound

N: Nigerian Naira

$: United States Dollar
List of Abbreviations

AMCON: Asset Management Corporation of Nigeria
CAMA: Companies and Allied Matters Act
Camac: Camac Energy Services Limited and Camac Energy Resources Limited
CBN: Central Bank of Nigeria
CEO: Chief Executive Officer
DPR: Department of Petroleum Resources
EFCC: Economic and Financial Crimes Commission
Guidelines: Guidelines and Procedures for Obtaining Minister’s Consent to the Assignment of Interest in Oil and Gas Assets
HDI: Human Development Index
IOCs: International Oil Companies
LLSV: Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny
Minister: Minister of Petroleum Resources
NCCG: National Code of Corporate Governance
NDIC: Nigeria Deposit Insurance Corporation
NNOC: Nigerian National Oil Corporation
NNPC: Nigerian National Petroleum Corporation
NSE: The Nigerian Stock Exchange
OML: Oil Mining Lease
OPL: Oil Prospecting License
PetroSA: Petroleum Oil & Gas Company of South Africa (Nigeria) Ltd and Petrosa Brass Ltd
PIB: Petroleum Industry Bill

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Dedication

To Him who I will always delight in.
Chapter 1: Introduction

We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.
- UN Millennium Declaration

We bring to this inquiry a lawyer’s attention to institutional detail and (we believe) a sophisticated sense of how law actually operates in the world, as opposed to the role it plays in theoretical models and regression analyses… many who comment on this important question (economists, in particular) fail to see law for what it is- the product of human interaction- and fail to perceive the functions that legal institutions actually play in support of markets, the perpetual (if uneven & unpredictable) process by which these institutions are formed & reformed, and the ways in which every society, from the most to the least highly developed in economic terms, supplies substitutes for legal institutions so that markets and economic organizations can be formed.
- Milhaupt and Pistor

1.1 Introduction

A major aim of national governments and the international community is to ensure that a minimum living standard is achieved by eliminating poverty. To achieve this aim it is necessary to attain development—a goal described as the “elusive quest” by William Easterly. Since its inception, the elusive quest is yet to achieve the sole goal and continues to remain out of reach. However, as the pursuit borders on the essence of our humanity, it must proceed. The quest invariably leads to questions that require answers such as, what exactly is meant by the term development? How is development measured? Is there a relationship between legal systems and

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development? How can such a relationship be explained? What can legal practitioners contribute to this inquiry? What can developing countries learn from the experiences of developed countries to fast track the development process?5

Over time, there has been wide variation in rates of development achieved by various regions of the world. For example, development is believed to have resulted in substantial decrease in poverty rates in South Asia and East Asia & Pacific Regions, while, lack of development in sub-Saharan Africa precipitated minimal rates of poverty reduction over the same time frame.6 Sub-Saharan Africa has consistently lagged behind in development efforts, leading to a dire state in the region—a glimpse of which can be gotten from the United Nations Development Report (UNDP), which classifies countries based on a Human Development Index (HDI) rated as very high, high, medium and low.7 The 2015 UNDP report reveals that of developing countries the region of Sub-Saharan Africa has the lowest aggregate HDI of 0.518, a figure which is 32.43%, 37.07%, 44.4%,44.4%, and 17% less than that of Arab States, East Asia Pacific, Europe and Central Asia, Latin America and the Caribbean, and East Asia regions respectively.8 Also, Sub-Saharan Africa is currently the poorest region in the world with a poverty headcount of 42.7% of


6 The World Bank, “Poverty and Equity Database| World DataBank”, (2016), online: <http://databank.worldbank.org/data/reports.aspx?source=poverty-and-equity-database> (accessed 2 November 2016). There was a reduction in the Poverty headcount ratio at $1.90 a day (2011 Purchase Power Parity) (% of population) from 60.2% and 44.6% in 1990 to 7.1% and 17.5% in 2012 in East Asia & Pacific region and South Asia region respectively, while sub-Saharan Africa experienced a mere reduction from 54.3% to 42.6%.

7 The HDI attempts to measure three national indices, to wit; average expected longevity, average expected education, and Gross National Income per capita (National Income adjusted for Purchase Power Parity).

the population. Questions on why sub-Saharan Africa continues to have high poverty rates have led to various theories that attempt to explain why and offer suggestions on how to achieve development.

This thesis focuses on one of such theories—institutional theories of development to show the role played by legal institutions in the quest for development in sub-Saharan Africa by adopting Milhaupt and Pistor framework in analysing the use of law in significant corporate crisis events in Nigeria, a country in sub-Saharan Africa. As of 2017, Nigeria has the largest population and gross domestic product in Africa. Nigeria itself is in a dire state and currently, over half of her 180 million people live in poverty. In this thesis, I perform autopsies of traumatic times in Nigeria by analysing corporate governance crises, to highlight the complex and diverse ways by which law evolves and is deployed. This work is a response to Milhaupt and Pistor’s work that calls for further research in order to understand the “complex institutional relationship, stasis and transition” in a political economy. This thesis makes an addition to law and development scholarship by scrutinizing the iterative interaction between Nigeria’s legal system and economic

13 Milhaupt & Pistor, supra note 2 at 224.
activities to identify a process of evolution and highlights future implications in this elusive quest.

1.1.1 Milhaupt and Pistor’s Framework

In this thesis, I adopt the framework of analysis propounded by Milhaupt and Pistor in the text titled, “Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World”\(^\text{14}\) in probing the relationship between law and markets. A summary of this novel framework is provided below and discussed further in Chapter 2.

Milhaupt and Pistor challenge prevailing thoughts on the relationship between law and economic development by exploring the organizational features of legal systems to show that the connection is not static but grounded on a process of continuous feedback, which adapts and changes in varied ways in various jurisdictions.\(^\text{15}\) They perceive the relationship between law and markets to be one of incessant cause and effect, action, and reaction. Their iterative change theory is based on three elements; the organization of legal systems, the functions that law plays in support of market activity and the political economy of law production and enforcement.

Legal systems of developed countries are noted to be organized in different ways, depending on the state’s mode of law making and enforcement. They broadly classify legal systems into centralized legal structures—where power is predominantly vested in the state actors (usually the

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\(^{14}\) Milhaupt & Pistor, \textit{supra} note 2.

\(^{15}\) \textit{Ibid} at 38.
executive and legislature), and decentralized legal systems—where other individuals and interest
groups outside the executive and legislature are able to bring about substantial change on their
initiative. Grounded on this method of categorization, I extend their categorization to developing
economies and classify Nigeria’s legal system as a centralized system.

Law is believed to perform multiple functions in support of a capitalist economy. The principal
functions identified by Milhaupt and Pistor are protective, coordinative, signalling and credibility
enhancing. The protective function refers to the preservation of property rights and enforcement
of contracts, a critical function in a market economy. The coordinative function epitomizes law’s
management of market relationships. Another role played by law is to signal expected behaviour
and government’s direction and priority. Also, law enhances or diminishes the credibility of
governance systems. The organization of legal systems and functions that law provides in
support of economic activity is used to create a matrix for understanding legal systems in
capitalist states. The mould reveals a close relationship between coordinative and centralized
legal system, while, protective and decentralization systems display an affinity.

Milhaupt and Pistor show that law and a nation’s political process undergo a unique process of
change due to their peculiar association; referring to the way alteration in law is achieved as a
result of the activities of private, social, and governmental actors and vice versa. In bringing
about a change in law, a centralized state would readily accept variations proposed by state
approved groups, while, a decentralized state would prefer those put forward by self-organized

16 Ibid at 7.
groups and individuals. The political economy also takes into cognizance the changing supply and demand of law. The supply of law involves the rules contained in statutes and the variation (if any) in enforced regulations, while, the demand for law refers to a perceived need for regulation in a previously unregulated area.

The theoretical framework of organizations of legal systems, functions of law and the political economy is fleshed out by Milhaupt and Pistor via the use of “institutional autopsies”. Closely aligned to the medical usage of “autopsy”, institutional autopsies refer to the critical examination of past events to explain an occurrence. Milhaupt and Pistor make use of institutional autopsies to examine a firm level or controversial corporate governance event crisis considering the organization of a country’s legal system, political economy and the functions of law to understand a legal system’s structure and likely path and process of future institutional development.

In this thesis, I reject law and finance theory and embrace Milhaupt and Pistor’s framework. Other frameworks for analysing the relationship between law and development have been proposed. Siems suggests making use of countries colonization experience, language, importance of statutory law and courts, and legal system flexibility as proxies for legal origins. Conversely, Lee proposes a “general theory of law” which takes into cognizance legal systems’ regulatory

design, regulatory compliance and quality of implementation.\textsuperscript{18} Alternatively, Ohnesorge has put forward an approach of studying recent cases of economic successes and failures to draw inferences of apt functions of law and trade-offs with other models.\textsuperscript{19} I choose to make use of Milhaupt and Pistor’s framework because I find it more useful in understanding Nigeria’s political economy and legal system in her quest for development.

Milhaupt and Pistor’s framework is praised and criticized by various scholars. Skeel while admiring the novel paradigm describes it as “a gift that keeps on giving.”\textsuperscript{20} He also notes that the absence of a company specific crisis may result in scholars missing important developments during systemic crises events with no firm level casualty, and a sole firm level autopsy may not give an adequate snapshot of a country’s governance system.\textsuperscript{21} Ohnesorge identifies the framework has presenting a complex relationship between the law and capitalism; thereby, sacrificing a good deal of parsimony and leading to the conclusion that any modern legal system can fail or succeed on its own terms.\textsuperscript{22} Similarly, Vandermeulen and Perron-Savard criticize Milhaupt and Pistor’s framework for its failure to encompass Sen’s concept of development as

\textsuperscript{21} Ibid at 713, 714.
Despite these criticisms, I adopt the framework in this thesis because of its ability to enable in-depth analysis of a nation’s legal system on its own terms, while recognizing the diverse ways law supports economic activity.

I apply Milhaupt and Pistor’s framework to Nigeria, showing that although Nigeria is a federal republic with a presidential system of government; her legal system remains centralized with law’s coordinative function and personal relations playing a paramount role in her political economy. Through institutional autopsies conducted on Nigeria’s 2009-2010 banking crisis and the pivotal case of Moni Pulo v. Brass, it is revealed that demand plays a crucial role in achieving legal change in Nigeria’s political economy. I argue that Nigeria’s government appears bent on not relinquishing control to centrifugal forces and has responded to crisis events by emphasizing her centralized legal system and law’s coordinative role.

1.2 Overview of Thesis

Chapter 2 Past, Present, and Maybe Future of Law and Finance Scholarship

I explain the predominant perspective on the relationship between law and development and highlight the need for an alternative framework. I also expatiate on Milhaupt and Pistor’s framework.

Chapter 3 Nigeria—Past and Present

A summary of Nigeria’s political, economic and legal history is undertaken to place the case studies within context.

**Chapter 4 Bank-mania: Nigeria’s Banking Crisis**

Using Milhaupt and Pistor’s framework, the 2009-2010 banking crisis of Nigeria is reconstructed, the response of various actors is analysed, the after effects, and likely implications of the crisis are discussed.

**Chapter 5 War in the Boardroom: Moni Pulo v Brass**

I review the events that resulted in Moni Pulo’s case, the dispute, parties involved, court decision, and through the lenses of Milhaupt and Pistor’s framework highlight the varying interests at play in Nigeria’s legal system.

**Chapter 6 Nigeria’s Quest**

I discuss the implications of reviewed cases to the burgeoning literature on law and development.
Chapter 2: Past, Present, and Maybe Future of Law and Finance Scholarship

Our interpretation of the meaning of legal origins has evolved considerably over time. But the bumps notwithstanding, the basic contribution appears to us to still be standing, perhaps even taller than a decade ago. And that is the idea that legal origins—broadly interpreted as highly persistent systems of social control of economic life—have significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes.
- Rafael La Porta et al.24

We note, however, that the evidence on the relationship between [legal origin] institutions and aggregate growth more generally, which seemed substantial a few years ago, has been crumbling.
- Rafael La Porta et al.25

Perhaps teams from countries with systems based on the French model (such as 1998 champion France and 2002 champion Brazil) perform well due to the remaining vestiges of the Napoleonic Code that somehow remove discretion from coaches and managers in the same manner that that civil law system curtails judicial activism. Or maybe – just maybe – some other forces are at work.
- Mark West26

2.1 Introduction

This chapter describes the predominant view of the relationship between law and development and major criticisms levied against that perspective. I then delve into an analysis of law and finance scholarship and discuss historical occurrences believed to influence the relationship between law and development in common and civil law jurisdictions. I demonstrate profound flaws in dominant law and finance literature and subsequently, highlight the need for an

alternative perspective—a function aptly performed by Milhaupt and Pistor’s framework. Finally, I expatiate on Milhaupt and Pistor’s framework to show the nuances, intricacies, aims, and purpose of their analysis.

2.2 The “LLSV” Phenomenon

Few papers in comparative scholarship have resulted in the birth of new movements in legal scholarship; however, Rafael La Porta et al. articles can lay claim to such a feat. The pivotal papers known as LLSV 27 originated from the premise that legal protection prevented corporate insiders (such as directors and controlling shareholders) from expropriating external investors (such as minority equity shareholders and debt holders) which encouraged such investors to invest more; thereby, resulting in higher investments leading to financial development.28 It was then argued, that legal protection varies between countries based on legal origins—with such variations capable of being coded and measured. Upon calculation, it was discovered that common law countries provide better legal protection compared to civil law counterparts, theoretically leading to higher financial development in common law countries.29 LLSV further argue that laws are exogenous—having been predominantly transferred via colonialism or

27 The papers are Rafael La Porta et al, “Law and Finance” (1998) 106:6 J Polit Econ 1113; Rafael La Porta et al, “Legal Determinants of External Finance” (1997) 52:3 J Finance 1131; La Porta, Lopez-de-Silanes & Shleifer, supra note 25. The acronym LLSV is derived from the first letter of the authors’ last name- Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny. The lead authors have recently given a summary of their principal findings and views on various related issues in La Porta, Lopez-de-Silanes & Shleifer, supra note 24. I will continue to refer to this summary.
28 Ibid at 426.
29 La Porta, Lopez-de-Silanes & Shleifer, supra note 24.
conquest, they retain their fundamental characteristics and remain largely aloof to happenings in the transplanted countries.\(^{30}\)

LLSV thesis (also known as law and finance theory or legal origin theory) is invariably linked to economic development since the theory propounds that countries’ legal origin largely affect financial development, which is a major determinant of economic development.\(^{31}\) Consequently, the chain reaction is that legal systems will impact financial development which will determine economic development.

The effect of legal origins has been argued to be pervasive and not limited to financial development; but also, affecting government ownerships of banks, labour market regulation, military conscriptions, government ownership of media, market entry regulations, judicial procedures, and judicial independence.\(^{32}\) The pervasive legal outcomes are believed to continue because the historical roles of legal systems were a result of human capital and prevalent beliefs in originating countries; factors that were transferred to other realms when legal systems were transplanted via colonization, adoption or conquest.\(^{33}\) The theory further argues that despite, the changes in the transplanted legal system over time as a result of different cultures and other regional factors in the transplanted country—the hysteresis assumptions, functions,  

\(^{30}\) *Ibid.*


\(^{32}\) La Porta, Lopez-de-Silanes & Shleifer, *supra* note 24.

\(^{33}\) *Ibid.*
characteristics and goals of the original legal system remain relevant in addressing social problems and continue to exert tremendous influence.\textsuperscript{34}

Similar to Milhaupt and Pistor’s framework, LLSV postulates that legal institutions established by common and civil legal systems result in different government modes of intervention. According to LLSV, civil law encourages nationalization and state control and in crises event would likely suppress the problem or take over such enterprise, while, common law governments would readily resort to litigation and government support of markets. This perspective on the expected behaviour of common and civil law systems in crises events is comparable to Milhaupt and Pistor matrix of coordination/centralized and protective/decentralized analytical framework.\textsuperscript{35} LLSV justify their findings from historical and medieval happenings summarized below.

2.2.1 Historical Arguments and Justification of Law and Finance Literature

The dominant legal systems in the world are the common and civil law, with the latter subdivided into German, Scandinavian and French civil legal systems. Countries with hybrid legal systems continue to exist; however, most nations adopt a legal system based on either common or civil law traditions. The common law system originated in England and can be traced to the Norman invasion of England.\textsuperscript{36} It is based on precedents set by appellate judges, which recognizes and enforces case law based on previous judicial decisions. The system is adversarial,
not inquisitional, and the principle of separation of powers that guarantees judicial independence is well respected.\(^{37}\) Common law is believed to have been established as a result of the success of English nobles and aristocrats in the Glorious Revolution and the need for a device to, on one hand, prevent expropriation of property and market interference by the monarchy and on the other, guarantee the respect of contractual rights.\(^{38}\) The struggles between the nobles and monarchy culminated in judges achieving independence from the crown and the grant of judicial powers to make legal rules and uphold property and contractual rights.\(^{39}\)

The civil legal system is based on Roman law where recourse is not usually made to judicial precedents or case law and legal scholars are relied upon to provide interpretations of regulations, codes and statutes. Dispute resolution is inquisitional not adversarial, and the judges are considered to be appendages of the other arms of government with curtailed judicial discretion.\(^{40}\) Although certain distinctions exist between the French, German and Scandinavian civil law systems, they are all broadly classified under civil law.

The French civil legal system is traced to the French Revolution and Napoleon’s ascent to power—historical events that placed the state above the law and circumvented the use of judicial precedent and case law. The historical events culminated in the understanding that the legislature

\(^{37}\) La Porta, Lopez-de-Silanes & Shleifer, *supra* note 24 at 430.


\(^{39}\) La Porta, Lopez-de-Silanes & Shleifer, *supra* note 24 at 451.

\(^{40}\) *Ibid* at 430.
makes holistic laws which do not need to be interpreted by judges.\textsuperscript{41} Unlike in England, where the judiciary was supported by the victorious side of the Glorious Revolution who sought to expand the judicial powers, in France, the French Revolution was won by the faction who aimed to curtail judicial powers and automate judicial functions.\textsuperscript{42} Therefore, France relegated the judiciary to a mere bureaucratic role by adopting greater formalism and limiting judicial discretion in a bid to encourage uniform application of the law void of judicial interpretation.\textsuperscript{43} It is believed that this pivotal event resulted in a fundamental ideological difference between common and civil law countries—with French civil law countries being more comfortable with and encouraging centralized and powerful executive government.\textsuperscript{44}

German civil law like French civil law is based on Roman law and can be traced to Bismarck’s unification of Germany leading to the adoption of German civil legal system.\textsuperscript{45} German civil law is a mix between the English and French systems: like French civil law, it asserts the paramountcy of the state but acknowledges judicial rules, case law and jurisprudence. Also, German civil law evolves and recognizes judicial review of administrative actions—concepts unheard of under French civil law.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{42} La Porta, Lopez-de-Silanes & Shleifer, \textit{supra} note 24 at 451.
\item \textsuperscript{43} \textit{Ibid}.
\item \textsuperscript{44} Mahoney, \textit{supra} note 38 at 505.
\item \textsuperscript{45} La Porta, Lopez-de-Silanes & Shleifer, \textit{supra} note 24 at 431.
\item \textsuperscript{46} Thorsten & Levine, \textit{supra} note 41 at 257.
\end{itemize}
Another branch of civil legal tradition is the Scandinavian civil law legal system developed in the 17th and 18th centuries. Like the French civil system, in Scandinavian law legal tradition the state (referring to the executive and legislative arms of government) are considered to be superior to the judiciary; however, borrowing from common law traditions Scandinavian civil law shows deference to jurisprudence.\textsuperscript{47}

Per LLSV, the historical analysis of legal origins highlights characteristics, in favour of common law countries that may affect countries economic outcomes, to wit:\textsuperscript{48}

\hspace{1em}a) Common law countries quest for an independent judiciary will likely lead to greater respect of property and contractual rights by judges. This is as a result of the historical significance of the twin concepts in the development of common law—a role that continues to remain relevant.

\hspace{1em}b) The preference of judicial resolution of private disputes over government legislation will lead to increase in private contracts and less emphasis on government regulation in common law countries. In events where government regulation is resorted to, it will be used to encourage private contracting in dispute resolution.

\hspace{1em}c) The judiciary’s role in “making law” will lead to evolution of judicial precedents and case laws at a faster pace than legislative enactments—resulting in improved law quality in common law countries. These advances will also extend to German and Scandinavian legal traditions due to their recognition of the judiciary.

\textsuperscript{47} Ibid.
\textsuperscript{48} La Porta, Lopez-de-Silanes & Shleifer, supra note 24 at 453.
Conversely, Merryman identifies reasons why the French civil law will likely have negative economic development consequences in transplanted countries:49

a) The reduction of judicial functions to bureaucratic activates by French civil law resulted in judges portrayed as clerks with minimal intellectual ability. This depiction of the judiciary encouraged sharp and witty minds to seek other legal careers, which in the long term crippled the judicial system.

b) There was a major variance between how French civil law practised in France and the theoretical model transplanted in other countries. When the French civil legal system was transplanted, the expanded role that the courts played in practice was not touted, but emphasis was laid on the theoretical framework which made the judiciary subject to other arms of government. The lack of an understanding of how the praxis of separation of power was employed by French civil law in the originating country had a detrimental effect on countries that subsequently adopted the legal system.

c) The French civil law tradition of avoiding discussions on the role of the judiciary and how law adapts and applies to evolving conditions hindered the development of efficient legal systems and rendered the French legal system less malleable to changing economic conditions in comparison to other legal structures.

An alternative perspective on the historical role law played in society, and the consequential effects on countries legal system is identified by Hayek. 50 In his view, the reason for the

historical differences in the legal workings of the English and French systems is due to a variation in the concept of freedom amongst the two jurisdictions. He argues that while the English system emphasized a decentralized system in pursuit of individual liberty, the French accentuated a centralized system in pursuit of collective goals and social freedom—a difference that invariably affects the legal systems.

### 2.2.2 Medieval Arguments and Justification of Law and Finance Theory

The medieval perspectives attempt to explain reasons for the disparity in the common and civil law traditions as taking root prior to the historical perspective i.e. preceding the English and French Revolutions in the 17th and 18th Century. On one hand, it is argued that unique characteristics of English law may be traced to the English judiciary’s contention that King James was subject to the law, criticism of the inquisitional system of dispute resolution, and use of juries in the 12th century—epochs prior to the Glorious Revolution. On the other hand, Dawson and Berman trace the development of the English and French legal systems to the 12th and 13th century: when France adopted the inquisitional system of the Catholic Church to unify the country and strengthen the central government which climaxed into the adoption of the Napoleonic codes, while, England preferred Protestant values and adopted the Magna Carta that enshrined respect of property and contractual rights which culminated into Parliaments recognition of judicial independence. Another perspective put forward by Siems is that England was more peaceful than France and had no need for strict codes which judges were

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51 La Porta, Lopez-de-Silanes & Shleifer, *supra* note 24 at 454.
mandated to adhere to; therefore, reliance could be placed on fact finding by juries or judges, and judge-made laws could be reckoned with.\textsuperscript{53}

In summation, both the medieval and historical arguments of law and finance theory differ only in the means, the end reached is same. They both conclude that the English common legal system and the French civil legal system are on different ends of a spectrum with German and Scandinavian laws located somewhere in-between. Common law is believed to foster judicial independence, encourage judicial law-making, jurisprudence, and respect of contractual and a property right in comparison to civil law—attributes that aid development. The pros and cons of the legal systems and the consequential effects on development invariably spread to other countries of the world via colonization, adoption, and imitation of these systems.

\textbf{2.2.3 Criticisms of the Law and Finance Theory}

The law and finance theory has led to a flood of papers; some of which provide additional evidence in support of the theory, while others criticize same.\textsuperscript{54} In this section, I provide a summary of principal criticisms of law and finance theory which contends with LLSV’s postulation. I also delve into Milhaupt and Pistor’s criticism and expatiate on their framework.


\textsuperscript{54}Ruth V Aguilera & Cynthia A Williams, “‘Law and Finance’: Inaccurate, Incomplete, and Important” (2009) 1 Brigh Young Univ Law Rev 1413.
2.2.3.1 Causal and Proxy Indeterminacy of Law

This line of criticism is based on the difficulty in identifying the cause of improvements in the workings of a legal system, effects of law on financial development and aspects of law (if any) that affects economic development. A principal contention is grounded on the causal relationship between law and development. In other words, does law precede and cause financial development or does financial development cause stakeholders to make improvements in a legal system? The rapid rise and development of Asian countries appear to give credence to the claim that financial development causes legal development and not vice versa.\(^5\)

Critics under this head, seek to explain legal development by showing that the improvement result from demand by interested constituencies—usually arising from economic changes—and not before such modifications.\(^6\)

Other authors question whether legal origins affect development or only serve as a proxy for other factors. This is because vague characteristics of legal origins make it difficult to determine what features (if any) affects development or if some other factors are actually at play. Here critics contend that history, political, cultural institutions or other factors are the actual actors in development and legal origins only serve as a proxy for these factors.\(^7\)

2.2.3.2 Discrepancies with Corporate Law Practice

Law and finance theory is based on the understanding that good corporate law encourages diverse investors by adequately safeguarding interests of minority investors, leading to enlarged capital markets, financial development and economic development due to increased investments.\(^5\) However, LLSV’s perspective is shown to have turned a blind eye to other corporate factors that deter minority investors from investing available funds. For example, Roe has challenged LLSV claim on the grounds that their view fails to consider managerial agency costs (such as management mistake, misalignment or high probability of loss of investments) which can affect ownership structure and the existence of minority shareholders.\(^5\) Since high managerial agency cost in practice will discourage minority investors notwithstanding the provisions of the law.\(^6\)

Similarly, LLSV root for the existence of dispersed ownership of corporations by encouraging the proliferation of minority shareholders. Like minority involvement, dispersed ownership is also believed to result in highly developed capital markets and financial development. However,

\(^5\) Ibid at 426.
\(^6\) Ibid.
a serious weakness with this argument is that empirically dispersed ownership structures do not necessarily provide optimal financial results.\textsuperscript{61}

Another criticism of law and finance theory under this head can be traced to its classification of law. While, LLSV classifies corporate law based on likely origins (English common law, French civil law, German civil law, and Scandinavian civil law) a distinction, which is believed to be still relevant today. Corporate law scholars argue that the distinction is merely academic with no practical significance because, by the end of the 20th century, there was only one corporate law in all civil and common law jurisdictions with only slight variations.\textsuperscript{62} Mathias in questioning the use of the legal origin distinction is of the view that it will be more helpful to classify corporate law on earlier or later versions transferred to transplanted countries, if transplanted countries continue to alter the law to reflect their experiences, or if transplanted countries diverged from the path of origin countries.\textsuperscript{63}

LLSV is also shown to conflict with historical corporate law evidence. Pivotal historical criticisms include arguments that:

\begin{flushright}
\textsuperscript{61} Claessens et al empirically find that concentrated share ownership correlates with increase share valuation, see Stijn Claessens et al, “Disentangling the Incentive and Entrenchment Effects of Large Shareholdings” (2002) 57:6 J Finance 2741.
\end{flushright}
a) Ownership dispersion occurred before the strengthening of shareholder protection in some countries.\(^{64}\)

b) Empirically, there is little correlation between shareholder protection and development of stock markets. To justify law and finance theory, history should show that countries with superior legal investor protection experienced high financial development; however, this is not the case. For example, studies show that circa 1910 there was little difference in legal and investor protection across various jurisdictions and notably English law appears to have provided less protection in several respects.\(^{65}\) Similarly, Cheffins, Bank and Wells find that between 1930 to 1970 US corporate laws fashioned after common law failed to provide extensive shareholder protection and areas with increased investor protection did not result in financial growth.\(^{66}\)

c) Civil law countries experienced more seismic activities such as military invasions and wars which had far-reaching effects on attitudes, politics and policies pertaining to corporate activities and finance—a fact not shared with common law nations.\(^{67}\) The variance in experience and the resulting attitudinal difference is believed to explain the distinction between legal origins.\(^{68}\)

\(^{64}\) Musacchio & Turner, supra note 36 at 528.


\(^{68}\) Ibid.
d) Critics have also argued that it remains unclear what specific rules of corporate law result in financial development. 69 Consequently, law and finance scholarship distinction based on legal origins remains unhelpful.

2.2.3.3 Incoherent Claims on Juries and Law in the Twenty-first Century

Roe is critical of various aspects of law and finance theory that fail to justify conclusions reached by LLSV. He identifies key problems with schools of thought that argue that common law’s use of juries enhanced contractual and property rights. He points out that:

a) While the adoption of juries is used to explain the differences arising in legal origins by encouraging decentralization of authority, the use of juries has neither been historically or currently central to finance. Hence, legal origins may be less important to modern finance than is believed by LLSV adherents.

b) After the British experience in America and Ireland where juries were used to circumvent colonial goals, juries were no longer transplanted to other common law countries. Therefore, the use of juries cannot be said to have affected majority of common law countries and contributed to the decentralization of authority.

c) Also, law and finance thesis argue that differing views on juries in 12th, 13th and 17th century England and France. It follows that, if variations in political economies of a different period caused legal institutions—the effect of which continues till today, it makes sense to concentrate on the political economy of today to determine its

institutional effects. In other words, if 13th century political economy caused 13th century outcomes, then it is appropriate to look at 21st century political economy to explain 21st century consequences.\textsuperscript{70}

Another incoherent claim of law and finance thesis identified by Roe is its inclination to compartmentalize modern institutions based on archaic grounds of legal origins. He argues that current institutions have blurred the lines between civil and common law institutions because markets in both jurisdictions today are regulated at degrees that exceed what was historically used. This is because common law countries have increasingly resorted to “non-common law” institutions such as securities regulators and detailed codes to degrees that exceed civil law countries, while, making limited use of the judiciary and fiduciary institutions today in corporate transactions—that are historically “common law” institutions.\textsuperscript{71}

This section has provided a summary of law and finance literature. I discussed the origins of the theory by reference to the works of LLSV and then proceeded to highlight potent criticisms under 3 heads—the proxy and causal indeterminacy of law, discrepancies with corporate law, and incoherent claims relating to juries and law in the 21st century—in a bid to identify the need for an alternative framework. I now proceed to discuss the framework of analysis adopted in this thesis.

\textsuperscript{71} Roe, \textit{supra} note 67.
2.3 Milhaupt and Pistor’s Framework

This section discusses Milhaupt and Pistor’s framework of analysis in detail. A tool formulated to explore the relationship between law and markets in the book “Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World.”\textsuperscript{72} I adopt their method of analysis to scrutinize the relationship between law and development in Nigeria.

The term “law” in Milhaupt and Pistor’s framework refers to formal law i.e. law applied by a sovereign.\textsuperscript{73} They analyse “formal legal system”—signifying the process by which law is made, challenged, applied and enforced. Due to different forms of capitalism and diverse roles that law plays in support of capitalist systems, an analysis of firms’ corporate governance (“meaning the complex systems by which firms are structured, financed and controlled”)\textsuperscript{74} is performed by the duo to show the institutional configuration of economies. The analysis is undertaken on the basis that firms are linked to every aspect of a country’s economic, political and legal structures; a point that can be glimpsed from the pivotal roles successful organizations play in developed economies. Consequently, Milhaupt and Pistor adopt a corporate governance framework to analyse institutional structures in countries to understand the relationship between legal systems and economic systems.\textsuperscript{75}

\textsuperscript{72} Milhaupt & Pistor, supra note 2.
\textsuperscript{73} Ibid at 3.
\textsuperscript{74} Ibid at 4.
\textsuperscript{75} Ibid.
2.3.1 The Prevailing View on Law and Development: Need for a New Perspective

The prevailing view on the relationship between law and economic development is identified to be that law is required to protect property rights and enforce contracts to reduce transaction costs (such as unpredictability and enforcement problems) and encourage economic activity.\(^{76}\) It is also usually recognized that the rule of law may not be essential for economic development in the early stages of development but subsequently becomes a necessity. Milhaupt and Pistor following Sabel call this view the “endowment perspective” because proponents of this standpoint view law as a structure that determines development and once in place does not require alteration.\(^{77}\)

The endowment perspective is attributed to Max Weber who expressed the pivotal idea that a “logical formal rational law” is essential to establishing market systems and achieving economic development.\(^{78}\) The perspective was built upon by Hayek, who subsequently argued that common law compared to civil law jurisdictions restrained the government, thereby encouraging economic liberties and market development.\(^{79}\) This led to a series of research based on legal origins with majority “confirming” Hayek’s hypothesis that the common law trumps civil law in the pursuit of economic development, including; LLSV’s articles which show common law countries generally have the strongest investor protection and resultant economic development

\(^{76}\) Ibid at 17.
\(^{77}\) Ibid at 18.
\(^{79}\) Milhaupt & Pistor, *supra* note 2 at 1.
followed by the German and Scandinavian civil law countries, with French civil law countries in the rear.\textsuperscript{80}

Perceiving that institutions play a similar role as a rational legal system, Douglas North argued that “institutions rule”; i.e. prosperous countries have been able to form credible institutional structures that support market activity by protecting property rights and enforcing contracts while developing countries have failed to. He defined institutions as “the rules of the game of a society, or more, formally, the humanly devised constraints that structure human interactions,”\textsuperscript{81} arguing further that institutions are path dependent which makes it difficult for countries with bad institutions to take corrective actions.\textsuperscript{82}

The work of subsequent scholars appeared to prove the endowment perspective assumptions of the relationship between law and market economies.\textsuperscript{83} The quality of law was espoused to drive economic performance, and common law jurisdictions are believed to provide better legal protection than civil jurisdictions. These beliefs were touted by the World Bank and culminated in the development of popular databases that seek to measure the quality of law in several jurisdictions.\textsuperscript{84} The endowment perspective has also greatly influenced the World Bank’s Policy

\textsuperscript{80} La Porta, Lopez-de-Silanes & Shleifer, supra note 24.
\textsuperscript{82} Ibid.
\textsuperscript{83} Milhaupt & Pistor, supra note 2 at 20.
and legal reform initiatives, which usually call for changes in specific rules and parts of a legal system, a practice with many potent criticisms.\(^8^5\)

### 2.3.2 Assumptions and Problems of the Endowment Perspective

Assumptions identified by Milhaupt and Pistor upon which the endowment perspective is based, are: First, causation is assumed to be in one direction from law to economic institutions leading to economic growth and once “appropriate law is in place”, no further consideration need be given to law. Second, a country’s legal system is assumed to have been externally imposed, fixed and path dependent—which cannot be altered. Third, the function of law is deemed to be principally protection of contractual and proprietary rights. Four, the endowment perspective analysis is grounded on formal law with little consideration given to informal norms and other societal practices.\(^8^6\)

These assumptions proceed from the premise that law is a “politically neutral” endowment that is external to markets and not affected by political activities once it is enacted and applied.\(^8^7\) By focusing on legal origins and countries’ institutional state at a particular point in time, law and finance literature only consider the “supply” of law and fail to reflect on the “demand” for law. A critical omission that fails to acknowledge the continuous dynamic relationship between the

\(^{8^5}\) Criticisms include: 1) coding of certain legal indicators produce skewed results when recoded; 2) transplanted rules may not have the desired effect without an understanding of the environment in which the rules arose and are to be adopted; 3) there is no correlation between a particular legal system and effectiveness of legal institutions. See Milhaupt & Pistor, supra note 2 at 21.

\(^{8^6}\) *Ibid.*

\(^{8^7}\) *Ibid* at 22.
two. Milhaupt and Pistor argue that law must adapt to local conditions and continuously evolve to fit local social, political and economic environment—a fact which the endowment perspective fails to take into cognizance.

The problems with prevalent theories on law and development are highlighted by Milhaupt and Pistor’s empirically showing via data analysed from 1870 to 2000 that legal origins do not predict economic growth of countries. Another critical problem identified is that the economic growth of China, Japan and South Korea cannot be explained by their legal system’s provision of property and contractual rights—the absence of which did not prevent remarkable growths in these countries. These problems led to Milhaupt and Pistor proposing a new framework (discussed below) for analysing the relationship between law and capitalism.

### 2.3.3 Proposed Framework

Milhaupt and Pistor challenge prevailing thoughts on the interaction between law and economic development by exploring the organizational features of legal systems to show that the relationship is rolling and dynamic, a process of “creative destruction” which continually adapts and responds to changes in diverse ways in different jurisdictions with the hope that this perspective would shift scholarly inquiry from a static and problematic focus such as, the origin of legal systems to a dynamic perspectives based on changes and the future directions of legal systems. The relationship between law and markets is deemed to be a continuous process of

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88 *Ibid* at 23.
89 *Ibid* at 24, 25.
90 *Ibid* at 25.
action and reaction—resulting in a “continuous feedback loop”. The difference in the iterative change process is argued to be based on; the organization of the legal systems, the functions that law plays in support of market activity, and the political economy of law production and enforcement.

### 2.3.3.1 Organization of Legal Systems

Legal systems of developed countries are organized in different ways; some are centralized, while others are decentralized in law making and enforcement. Centralized systems vest law making and enforcement powers in state mechanisms, such as the executive or legislature, while, decentralized systems involve the participation of diverse individuals outside key state actors. The degree of centralization is a derivative of the number and status of actors involved in the production and enforcement of law. The content, effect, interpretation, application, and enforcement of law are all affected by organizational factors within a country’s legal system. An example of an organizational factor is the absence of certain constituencies in legal processes. They note that by controlling access to law making and enforcement, different incentives may be generated to invest in innovation and adaptation of governance, which radically affects legal outcomes.

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91 Ibid at 28.
92 Ibid at 176.
93 Ibid at 30.
2.3.3.2 Functions of Law

Law can perform multiple functions in support of a capitalist economy, principally; protective, coordinative, signalling and credibility enhancing functions. Law and finance literature focus on the protective function of law i.e. the preservation of property rights and enforcement of contracts to the detriment of other functions. Milhaupt and Pistor’s analysis is undertaken to identify the other functions of law which overshadow the protective role during periods of market crises and to show parties and interests that are secured during periods of market change. An important function and usually overlooked role of law is the coordination of market activity. Markets are made up of relationships which must be properly managed—a task performed by law. The coordinative functions played by law include controlling access to markets, allocating rights to participants and determining parties’ responsibilities. A country’s social or political preference for individual or collective bargaining may be highlighted by the coordinative function of law.

Law also supports market activities by signalling preferred or expected behaviour and enhancing the credibility of governance structures. Apart from setting the rules of market activity, law provides by way of signalling, useful information required by markets actors; for example, the direction of government policy, desired behaviour, government priorities, influence and strength of interest groups etc. The signal will be acted upon by market actors if the government is credible i.e. the state is believed to act in accordance with its pronouncements.\(^\text{94}\)

\(^{94}\) *Ibid* at 35.
The organization of legal systems and functions that law provides in support of economic activity is used to create a matrix for understanding legal systems in capitalist states. The matrix reveals a close relationship between coordinative and centralized legal system, while, protective and decentralization systems display an affinity.

![Legal Systems Matrix](image)

*Figure 2.1 Legal Systems Matrix*

The highlighted functions of law are interrelated and may be simultaneously enforced. However, there is usually a dominant role of law in legal systems, which depends on the existence and character of the country’s institutions including—courts, lawyers, law enforcement agencies and business groups. Historically norms and other non-legal rules have been shown to act as a substitute of law in supporting economic activity.

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95 Ibid at 37.
2.3.3.3 The Political Economy: Supply and Demand for Law

Law and political process share an intricate and rolling relationship coined as “contestable”. Contestability is defined as a measure by which law is subject to “a process of creative destruction” as a result of the activities of private, social, and governmental actors as opposed to being an instrument imposed solely by political actors. In contesting law, a centralized state would prefer state approved groups and actors, while, a decentralized state would favour self-organized groups and individuals.

While prevalent perspectives on law and capitalism consider the supply of law, Milhaupt and Pistor submit that an in-depth understanding must account for not only the supply but also the demand of law. To analyse the supply of law, they consider not only legal provisions as enacted by legislators and bureaucrats, and contained in statutes and regulations; but also, legal enactments as applied, interpreted and enforced by legal practitioners. By demand for law, they mean the perceived need for regulation in a field where such need was not previously recognized and is influenced by the structure of government, political system and educational structure of a society. In reviewing, the demand for law to draw out implications Milhaupt and Pistor argue that:

- the existence of low-cost non-legal alternatives reduces the demand for law;
- the demand for law affects the supply of law and vice versa;
- growth in economic activities results in an increase in demand for law.

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96 Ibid at 7.
97 Ibid.
98 Ibid at 40.
2.3.4 Application of Analytical Framework: Institutional Autopsies

An “autopsy” is defined by Merriam-Webster Dictionary as “a critical examination, evaluation, or assessment of someone or something past”. In applying their analytical framework, Milhaupt and Pistor make use of “institutional autopsies” or “institutional stress tests” to examine firm-level crisis or controversial corporate governance events to derive an understanding of a legal system’s structure, weakness, strengths, and likely path and process of future institutional development.

Milhaupt and Pistor’s analytical framework is fleshed out via institutional autopsies of single firm events to understand law’s role in corporate governance and economic growth to provide a roadmap for understanding future legal change brought about by alterations in global and other market changes. They perform institutional autopsies of six corporate controversies around the world to investigate how different economies respond to challenges posed by globalization, have historically used law to govern market activity, experienced different challenges to legal governance, and experienced legal change. Due to the different functions that law performs in economies, the autopsies are conducted to provide an understanding of a country’s legal system on its own terms, and not in comparison to another country used as an ideal standard. The position of major players on the demand side of law both prior to and after the crises is identified

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100 Defined as “the systematic analysis of a complex system to reveal its inner logic, weaknesses, and prospects for reform” Milhaupt & Pistor, supra note 2 at 9.

101 Ibid.

102 The countries analyzed are United State of America, Germany, Japan, Korea, China/Singapore and Russia
and their use of power is analysed in motion. Also, the supply of law, use of nonlegal remedies
to achieve a solution and prevent future occurrence of the crises event, and consumers’ response
to the change in governance structure are identified.\(^{103}\)

2.3.5 Limitations of Analytical Framework

Milhaupt and Pistor identify limitations with their framework (which invariably apply to this
thesis) and provide justifications for their limitations. A possible limitation is that cases on which
institutional autopsies are conducted are not randomly selected but were preconceived. Thus, it is
possible that the crises events were only chosen because of inferences and conclusions reached.
However, the defence is proffered that the selected cases are considered significant and have
substantial implications in the concerned legal systems.\(^{104}\)

Another possible weakness is that the institutional autopsies are based on extraordinary events,
which may not help in understanding ordinary operations of a legal system. In response,
Milhaupt and Pistor point out that historically, extraordinary events reveal characteristics not
noticed during normal events and have served as pivotal points in enacting laws. Grounded on
this understanding, the autopsies are undertaken to proceed from firm level crisis to reveal the
operation of governance systems. Thus, the cases are placed in the broader governance context of
the jurisdiction they occurred in.\(^{105}\)

\(^{103}\) Ibid at 45.
\(^{104}\) Ibid at 10.
\(^{105}\) Ibid at 11.
The third limitation recognized is the definition of law adopted in the analysis i.e. formal law (or state created law), which appears not to recognize crucial informal norms that support market exchange in the absence of or in support of formal rules. Again, Milhaupt and Pistor defend their model by explaining that the focus on formal law serves as only an entry point into the analytic framework and they seek to identify the existence and effectiveness of informal alternatives.\textsuperscript{106}

\begin{flushright}
\textsuperscript{106} \textit{Ibid.}
\end{flushright}
Chapter 3: Nigeria—Past and Present

For us to make any sense of the current events in Nigeria, we will need to have a clear grasp of the cultural inheritances that have continued to shape our attitudes as a nation.
- Richard Olaniyan\textsuperscript{107}

For inqu\textit{ire}, please of the former age,  
And consider the things discovered by their fathers;  
- Job 8: 8\textsuperscript{108}

Whoever wishes to foresee the future must consult the past; for human events ever resemble those of preceding times. This arises from the fact that they are produced by men who ever have been, and ever shall be, animated by the same passions, and thus they necessarily have the same results.  
- Niccolo Machiavelli\textsuperscript{109}

3.1 Introduction

Prior to proceeding to the prescriptive portion of this thesis, I will in this chapter provide background information on the subject of my analysis—Nigeria. I provide contextual data necessary to situate the institutional autopsies in Nigeria’s historical, political, and economic milieu. I begin by tracing the formation of Nigeria from her British colonial roots to her independence, military intervention, civil war and eventual return to democracy. I then discuss Nigeria’s political and economic framework by providing a summary of her system of government, legal workings, political party system, organizational preference and economy structure. The conclusion is reached that the petroleum and financial service sectors are

\textsuperscript{108} \textit{The Bible} (Nashville, Tennesse: Thomas Nelson, 1982).
important aspects of Nigeria’s economy and the institutional autopsies conducted on these areas may be extrapolated to her governance structure.

3.2 Nigeria’s History

3.2.1 British Colony and Independence

The European slave trade occurred between the fifteenth and nineteenth century and had a major effect on the territory now known as Nigeria.\(^{110}\) It ended in the nineteenth century when Britain became proactive and began sending her navy to West African seas to impose the ban on slave trade. However, Britain’s actions eventually resulted in her direct intervention in Nigeria. The Berlin Conference of 1884-5 marked the official beginning of Africa’s colonization as European powers sought to establish “protectorates” in Africa for their strategic and material gain.\(^{111}\) British colonial rule in Nigeria can be traced to the Royal Niger Company, created in 1886 to safeguard British trading activities and commercial interest.\(^{112}\) In 1900, the British Government took over all territories previously granted to the company and created three protectorates; the Lagos Colony Protectorate of Nigeria, the Niger Coast Protectorate, and the Protectorate of Northern Nigeria. In 1914, the three protectorates were amalgamated to form the Colony and Protectorate of Nigeria.\(^{113}\) Nigeria was governed directly by Britain for 60 years (i.e. from 1900 to 1960); during this period the diverse ethnic groups were unable to develop a strong sense of


\(^{112}\) The Royal Niger Company was previously known as United African Company and National African Company. *Ibid* at 98–99.

nationhood, a flame fanned by the British policy of divide and rule.\textsuperscript{114} Nigeria became independent on 1\textsuperscript{st} October 1960 divided into three major ethnic groups largely on territorial basis—Hausas in the North, Yorubas in the South-West and the Igbos in the South-East. Despite this broad classification, Nigeria remains a multi-cultural society with over 250 recognized groups and languages.\textsuperscript{115}

### 3.2.2 The First Republic 1960-1965

To assume self-governance, three major political parties grounded on ethnic lines were formed.\textsuperscript{116} Nigeria adopted a federal parliamentary system of government for the federal government and in each of the three regions based on the Britain’s model.\textsuperscript{117} Although attempts were made to duplicate Britain’s style of governance, there remained a perplexing lack of proper check and balance in Nigeria’s model to enable the system function properly.\textsuperscript{118} The lack of adequate check and balances, perceived corruption and nepotism eventually lead to preliminary support for military intervention in government.

### 3.2.3 Military Rule and Civil War 1966-1970

Patrick Chukwuma Kaduna Nzeogwu, an Igbo Major and his colleagues in January 1966, conducted the initial coup. However, the failure of the plan in several respects enabled Major General Ironsi become the first military head of state. The fact that the head of the initial coup

\textsuperscript{114} Toyin Falola, \textit{The History of Nigeria} (Westport: Greenwood Press, 1999) at 10.

\textsuperscript{115} Metz, \textit{supra} note 110 at xvi; Falola & Heaton, \textit{supra} note 111 at 4.

\textsuperscript{116} They were the Action Congress (AG) in the West, the National Council of Nigerian Citizens (NCNC) in the East and the Northern People’s Congress (NPC) in the North.

\textsuperscript{117} See Constitution of the Federation of Nigeria, 1960, ch VI.

\textsuperscript{118} Falola, \textit{supra} note 114 at 99.
and the succeeding head of state were from Eastern Nigeria, and large casualties were recorded from the Northern region did little to allay the fear of nepotism and ethnicity, which had taken root in Nigerian’s consciousness. Also, the military decree which changed the federal system of government to unitary government with the resultant centralization of power in the central government, and unification of federal and regional civil service administration exasperated this fears.¹¹⁹ Ensuing from these concerns, there was a counter coup in July 1966 principally orchestrated by Northerners leading to the prosecutions of Igbos.¹²⁰ Consequently, the fear of domination by the Igbos was replaced with a fear of domination by the Hausas. The continuing conflict between the North and South culminated into the civil war which took place from 1967 to 1970.¹²¹ Noteworthy is the fact that Nigeria has since reverted to a federal system of government which devolves power to the state (regional) governments.¹²² However, the civil war and other happenings promoted centralization of authority in the federal government, vested the executive arm with broad authority to the detriment of other arms of government, and curtailed the powers of regional governments—trends that remain today.¹²³

3.2.4 Military Juntas


¹¹⁹ The Unification Decree (Nigeria), No 34 of 1966.
¹²¹ For an analysis of the Nigerian civil war see Bourne, supra note.
¹²³ Falola, supra note 114 at 129.
misappropriation and Gowon’s continuous postponement of return to civilian rule culminated in a bloodless coup by Murtala in 1975.\textsuperscript{124} Murtala regime was short, and an unsuccessful coup in 1976 resulted in his death and the transfer of power to his deputy, Obasanjo. A major reform of this period was the creation of new states and the designation of local government as a third tier of government.\textsuperscript{125} Obasanjo’s regime returned power to a civilian government and disengaged the military from governance albeit briefly. The fall of the Second Republic paved way for Buhari another military dictator, who lacked knowledge of economic policies but sought to improve Nigeria by eradicating social vices via programs such as War Against Indiscipline—an ethical campaign to correct morals.\textsuperscript{126} Babaginda took over the reins of government in 1985; he was an opportunist who infuriated the already dwindling fortunes of the country. He reneged on promises to transfer power to a democratically elected government, increase tensions along tribal and religious lines, annulled elections, adopted awful economic policies such as the Structural Adjustment Program and left the government in a worse state.\textsuperscript{127} Babaginda eventually transferred power to a weak interim government that paved the way for the worst military dictator in Nigeria’s history—Abacha. After massive looting of Nigeria, spearheading an unprecedented rate of corruption, political oppression, feeble economic policies and horrible governance, Abacha died in mysterious circumstances in 1998 amid rejoicing by Nigerians.\textsuperscript{128} Abacha left a nation with double digit inflation, high rates of brain drain, despicable standards of

\begin{footnotes}
\item[124] Arnold, \textit{supra} note 113, ch 3.
\item[125] Falola, \textit{supra} note 114 at 156.
\item[126] \textit{Ibid} at 182.
\item[127] \textit{Ibid} at 183–193.
\item[128] \textit{Ibid} at 196–204.
\end{footnotes}
education and health care, and a dump for international trade.\textsuperscript{129} Abubakar became the military head of government upon the death of Abacha and transferred power to a democratically elected government—the Fourth Republic which continues to date.

3.2.5 Second and Third Republics

Hoping to rectify past mistakes, a presidential system of government closely aligned with the American system was adopted for the Second Republic; all subsequent Republics have embraced a similar structure of government. The Second Republic persisted from 1979 to 1983, and was brought to an end after large-scale violence, corruption, tribalism, nepotisms, and societal decadent, which paved the way for another military intervention.\textsuperscript{130} The Third Republic was initiated by the annulment of an election known as the “fairest election” in Nigeria by a military dictator who schemed to retain power, and upon realizing the consequences of his actions and the resulting dire political climate; transferred power to an Interim National Government.\textsuperscript{131} The Interim Government was a weak governance structure that lacked legitimacy and credibility, given the mantle of leadership in tumultuous times. It lasted for a period of only three months before military officers again forcefully seized power.\textsuperscript{132}

3.2.6 Return to Democracy: The Fourth Republic


\textsuperscript{129} Ibid at 212.
\textsuperscript{130} Bourne, \textit{supra} note 120 at 142.
\textsuperscript{131} Falola, \textit{supra} note 114 at 191.
\textsuperscript{132} The Interim National Government was from 26 August 1993 – 17 November 1993.
Fourth Republic’s ground norm, the Constitution of the Federal Republic of Nigeria, continues to be based on America’s presidential system of government and vests wide authority in the executive branch while seeking to maintain rigid separation of powers between the arms of governments.

3.3 Nigeria’s Political Terrain

Nigeria is divided on many fronts including ethnic and language lines, religious beliefs, and geographic locations. Regrettably, these differences have been emphasized in her politics since inception as a continuation of colonial practices and fear of domination by one group of the other.133 The First Republic accentuated these values, the National Council of Nigeria Citizens political party was popular in the South-East and controlled the government of the Eastern Region, the Action Congress enjoyed a stronghold in the South-West Region, and the Northern’s People Congress originated from a Northern regional organization (Jam’yyar Mutanen Arewa)134 which became a political monopoly in the North. Prior to the second election of the First Republic, there were formations of new parties, cross carpeting, mergers and other activities leading to an unstable conflict filled political terrain.135 Falola is of the view that the First Republic was riddled each year with crises; grave enough to end Nigeria’s budding democracy, concluding that it was only a matter of time before the military intervened.136

133 Bourne, supra note 120 at 253.
134 Meaning The Association of Peoples of the North.
135 Falola, supra note 114 at 100, 103–105.
136 Ibid at 107.
The politics of the Second Republic did not fare better as lessons from history appear not to have been adhered to. The partisan political parties were led by politicians of the First Republic—the Unity Party of Nigeria was led by Awolowo, was majorly situated in the West and served as a reincarnation of the Action Congress; Nigeria’s People Party had Nnamdi Azikiwe as its leader; Great Nigeria People’s Party was led by Waziri Ibrahim. The National Party of Nigeria (NPN), the party which eventually produced the federal government of the Second Republic was also filled with politicians from prior periods. The NPN allocated positions to different parts of the country to encourage local support, a concept which continues to hold sway today. New individuals with varied ideas on governance did not emerge as the political climate was dominated by individuals previously involved from previous eras, another trend that continues till date. Falola believes that the process of power transfer to the Second Republic and the Constitution adopted sowed the seeds for the “entrenchment of the propertied political class”—an influential interest group. Similarly, Bourne recounts the recession and inflation the Second Republic had to contend with as a result of the decline in oil prices; the brunt of which was felt by the ordinary peoples of Nigeria but not the political class.

After this period, political activities went on a hiatus until parties were allowed to be established for elections to commence the Third Republic. Amidst heavy censorship and restraint, two

137 Shehu Shagari, a northerner and minister from the first republic became president, Alex Ekwueme an Igbo man became vice president, while Augustus Akinloye a Yoruba man was the party chairperson. This arrangement to cater for diverse ethnic groups in Nigeria by appointing individuals from different parts of the country is done to reflect the “federal character of Nigeria” defined in Constitution of the Federal Republic of Nigeria 1999 (as amended), s 318 as “the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14 (3) and (4) of this Constitution”. See also Ibid, s 223(1)(b).
138 Falola, supra note 114 at 164.
139 Bourne, supra note 120 at 142, 147.
parties were created by the military government to contest elections; the Social Democratic Party and the National Republican Party. The presidential election campaigns and results during this period were not based on ethnic and religious lines; however, before the electoral commission could announce a winner the elections were annulled by the military government scheming to remain in power.\textsuperscript{140}

The major political parties on commencement of the Fourth Republic were the People’s Democratic Party and the All People’s Party. Constitutional provisions were in place to ensure that political parties did not emphasize religious or territorial factors likely to cause divisions but established an executive council that gives credence to Nigeria’s federal character. In accordance with these provisions, political parties formed were more open minded and drawn across ethnic and religious divides. However, again the political landscape was made up of veterans previously involved in governance.\textsuperscript{141} Currently, eighteen years into the 4\textsuperscript{th} Republic the two dominant political parties are the All Progressive Congress and the People’s Democratic Party.

\textsuperscript{140} Falola, supra note 114 at 191.
\textsuperscript{141} For example, Olusegun Obasanjo, Alex Ekwueme, Bola Ige and Olu Falae were all previously involved in governance prior to this time. The trend has also continued to date subsequent presidents—Obasanjo was the first president of the Fourth Republic, his successor Umaru Musa Yar’Adua was the younger brother of his initial deputy Shehu Musa Yar’Adua during his tenure as military head of state. In addition, Buhari who became the democratic head of government in 2015 was a previous military ruler. Only Goodluck Jonathan, who was the deputy to Umaru Musa Yar’Adua and became President after the death of his boss, had no previous connection to preceding Republics.
3.4 System of Government

Evolving from three regions and a federal capital territory in 1960, Nigeria since 1996 has been partitioned into 36 states and a federal territory.\textsuperscript{142} Nigeria practices a federal system of government based on a written constitution with powers shared between the Federal and State governments.\textsuperscript{143} In each tier of government, power is delineated between the executive, legislative and judicial arms of government.\textsuperscript{144} The executive arm of the federal government enjoys wide powers and is headed by the President, who is both the head of state and head of government.\textsuperscript{145} To ensure that the President enjoys widespread support and to reduce incidents of ethnicism, constitutional safeguards were put in place stipulating that the President is obliged to garner the majority of votes in the entire country and not less than one-quarter of the votes in two-thirds of the states and federal capital territory.\textsuperscript{146} The President is the commander-in-chief of the armed forces and the head of the police force.\textsuperscript{147} Ministers to assist in running the Federation are appointed by the President subject to confirmation by the legislature.\textsuperscript{148} Another area, which emphasizes the centralization of power in Nigeria despite the existence of a federal system of government is the prohibition of states police force to ensure that power and the use of

\textsuperscript{142} Constitution of the Federal Republic of Nigeria 1999 (as amended), supra note 137, s 2 and 3.
\textsuperscript{143} See Ibid, s 4,5,6 and 7. By s 7 State Governments are mandated to promulgate a law establishing and governing local government councils. I will in this analysis focus on Nigeria’s federal government because its authority extends to the whole of Nigeria and the vast powers wielded by the centre government in theory and practice includes the power to make laws and govern all corporate bodies. See ibid, schedule 2 part 1 para 32.
\textsuperscript{144} Ibid, s 4(1), 5(1) and 6(1).
\textsuperscript{145} Ibid, s 5(1) and 130.
\textsuperscript{146} Ibid, s 132 and 134.
\textsuperscript{147} Ibid, s 130, 215 and 218.
\textsuperscript{148} Ibid, s 147.
force is centrally controlled and the access of regional governments to machineries of maintaining law and order is curtailed.\textsuperscript{149}

The federal legislature is bicameral, divided into the upper house (the Senate) and the lower house (House of Representatives) jointly called the National Assembly.\textsuperscript{150} Regulation of corporate bodies falls within the jurisdiction of the National Assembly.\textsuperscript{151} While membership of the House of Representatives is based on the population, which gives Northern states a majority; membership of the Senate is equally divided among the various states.\textsuperscript{152} The pro-rata division of membership of the Senate among the states is to allay fears of domination which may arise as a result of the majority enjoyed in the House of Representatives by the Northern states. In practice, the legislature does not serve as an effective check on the executive branch as maintaining the required majority in the face of various tribal, ethnic, religious, political and ideological differences remains difficult. Conversely, the executive arm finds it difficult to garner support for executive bills as they are rarely passed without extensive deal making and cajoling between the executive and legislative arm.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{149} Ibid, s 215(4).
\item \textsuperscript{150} Ibid, s 47.
\item \textsuperscript{151} Ibid, schedule 2 part 1 para 32.
\item \textsuperscript{152} Ibid, s 48 and 49. Each state is required to provide three Senators while the Federal Capital Territory provides one.
\end{itemize}
3.4.1 Nigeria’s Legal Framework

Nigeria as a former British colony continues to adhere to the tenets of common law. The sources of Nigerian law can be classified as follows:¹⁵⁴

2. Nigerian judicial precedents.
3. Nigerian customary law and Islamic law.
4. English law, which is limited to:
   a. English laws extended to Nigeria before independence in 1960;
   b. Principles of common law;
   c. Doctrines of equity; and
   d. Statutes of general application in force in England on January 1, 1900.
5. Textbooks and monographs

The Nigerian judicial system is manned by the following courts in hierarchical order:¹⁵⁵

3.4.1.1 The Supreme Court

The Supreme Court of Nigeria, which serves as the final arbiter of the land, heads the judicial arm of government; its decisions cannot be appealed.¹⁵⁶ It determines appeals from the Court of Appeal and in limited circumstances exercise original jurisdiction.¹⁵⁷

¹⁵⁵ Other courts, such as; Customary Courts, Magistrate Courts, Area Courts, Customary Courts of Appeal and Sharia Courts of Appeal exist in Nigeria. However, these courts are irrelevant for the purpose of this discourse.
¹⁵⁷ Ibid, s 232 and 233.
3.4.1.2 The Court of Appeal

The next in line to the Supreme Court of Nigeria is the Court of Appeal. The court decides appeals from the Federal High Court, the National Industrial Court, and the High Court of a State or of the Federation Capital Territory.\(^{158}\)

3.4.1.3 The Federal High Court, State High Courts and National Industrial Court

These are courts of coordinate jurisdiction and an appeal from either court proceeds to the Court of Appeal.\(^{159}\) The High Court of a State and the Federal Capital Territory are courts of general jurisdiction empowered to determine all issues brought before them except matters specified to be within the jurisdiction of the Federal High Court and the National Industrial Court.\(^{160}\) The matters within the jurisdiction of the Federal High Court are detailed in s 251 of the Constitution including issues arising from the application of the Companies and Allied Matters Act (CAMA), 2004\(^{161}\) and matters pertaining to banks, and actions regarding the validity of any executive or administrative action by the Federal Government or its agencies. The National Industrial Court’s jurisdiction relates to labour matters.\(^{162}\) Therefore, when an action is regarding the application of CAMA to a company the appropriate court is the Federal High Court; however, when an action pertains to a contract between companies or other issues which do not fall specifically under the

\(^{158}\) Ibid, s 240. The Court of Appeal also determines appeals on specific matters emanating from the Sharia Court of Appeal of a State and the Federal Capital Territory, Customary Court of Appeal of a State and the Federal Capital Territory, and from decisions of a court martial or other tribunals. The court also enjoys original jurisdiction in certain cases see Ibid, s 239.

\(^{159}\) Other existing courts of coordinate jurisdiction are not relevant to my discourse in this thesis.

\(^{160}\) Ibid, s 257 and 272.

\(^{161}\) Companies and Allied Matters Act (Nigeria), 1990 governs corporate entities in Nigeria.

\(^{162}\) Constitution of the Federal Republic of Nigeria 1999 (as amended), supra note 137, s 254C.
jurisdiction of the Federal High Court and the National Industrial Court as delineated by the Constitution. The appropriate court to seek recourse will be the High Court of the State.163

Figure 3.1 Hierarchy of Courts in Nigeria

3.4.1.4 Judicial Independence

Nigeria’s 1999 Constitution provides safeguards to ensure institutional judicial independence from external forces and to enhance individual judge’s personal independence in determining causes before the court. Such provisions: limit appointments of judges to individuals recommended by the National Judicial Commission;164 stipulate the removal procedure for judicial officers;165 indicate retirement age and pension rights of judges;166 and ensure monies accruing to the judiciary are paid directly to the National Judicial Council from the Federation.

164 See Constitution of the Federal Republic of Nigeria 1999 (as amended), ss 231, 238, 250, 254, 271. The appointment of the Chief Justice of the Federation, Justices of the Supreme Court, President of the Court of Appeal, Chief Judge of the Federal High Court, and President of the National Industrial Court is made by the President subject to the confirmation of the Senate, while, the appointment of the Chief Judge of the High Court is made by the Governor of the State subject to the confirmation of the state’s House of Assembly. Other judges are appointed without the confirmation of the legislative arm.
165 Ibid, s 292.
166 Ibid, s 291.
As an additional safeguard, the laws of court guarantees immunity from prosecution as a result of actions taken in judicial capacity. Furthermore, to prevent political interference a National Judicial Council, a Federal Judicial Service Commission and State Judicial Service Commissions are established to recommend persons for appointment or removal as judges, exercise disciplinary powers over the judiciary, control and disburse monies for the judicial arm of government and advise the President or Governor about issues pertaining to the bench.

Nikki Tobi notes that the independence of Nigeria's judiciary was curtailed by military juntas and expressed optimism that the return to democratic governance would usher a return to the hallowed ideal of judicial independence. Similarly, Olowofeyoku during a military junta described the judiciary in the following words, “It is clear that the independence of Nigeria's judiciary is seriously deficient. Its institutional independence and a substantial part of the judges' individual independence is generally undermined by the other arms of government. The judges themselves effectively undermine, through the deficiency in integrity or impartiality of some of them, their own individual independence.”

167 Ibid, ss 121(3), 162(9).
168 For example High Court Law of Lagos State (Nigeria), 2003, s 88(1) states that; “No judge shall be liable for any act done by him or ordered by him to be done in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to do or order to be done the act in question.”
169 Constitution of the Federal Republic of Nigeria 1999 (as amended), s 153(i)(e); Ibid, s 197(11)(c). See also Ibid, schedule 3 part 1 para E, I; Ibid, schedule 3 part 2 para C.
Unfortunately, this description remains true in today’s democratic era. Hakeem views Nigeria’s post-military political economy as giving rise to an authoritarian executive presidency that enabled the judicialization of politics, creating a judicial enigma—a judiciary displaying independence in some cases and fettered in others.\(^{172}\) Oko identifies corruption, the pervasive influence of the executive and other influential individuals, public distrust of the judiciary, poor funding and other institutional problems as inhibitors of judicial independence in post military Nigeria.\(^{173}\) Adopting a less critical perspective, Guobadia notes that despite obvious defects in Nigeria’s judiciary, the institution has been able to play a pronounced role in upholding constitutional democracy and guaranteeing fundamental rights.\(^{174}\)

The constitutional provisions to safeguard the independence of the judiciary are inadequate and habitually breached in practice. For example, Nigeria’s constitution procedural requirement for the removal of judges was identified as inadequate after the cases of Justice Anyah and Justice Ikomi, which resulted in alterations and additional provisions in the 1989 Constitution; however, these provisions have been jettisoned in the Fourth Republic.\(^{175}\) Similarly, the constitutional provision which prevents judicial officers from returning to legal practice after resignation or removal has been criticized for spurring judicial officers to compromise their position to remain

in office.\textsuperscript{176} In addition, the continuous decline in the percentage of the budget accruing to the judiciary and the control over such funds exercised by the executive has left the judiciary in a precarious state.\textsuperscript{177} Even the composition of the National Judicial Council has been effectively criticized because of the pervasive influence of the Chief Justice of Nigeria over the council.\textsuperscript{178}

I agree with Guobadia’s assessment that the judiciary has become a critical part of Nigeria’s democracy by attempting to guarantee and protect fundamental rights; however, more often than not this is not the case. When I gaze at Nigeria’s judiciary I see an institution cowered by the executive, frustrated by the legislature, compromised by corrupt personalities and despised by the populace. Incidents that indicate the judiciary’s compromised position continues to be rife; the Chief Justice of Nigeria’s appeal to the other arms of government to increase allocations to and effect due payment to the judiciary,\textsuperscript{179} the first female Supreme Court Justice plea for better conditions of service to prevent judicial officers living in penury upon retirement,\textsuperscript{180} allegations of corruption between the two most influential individuals in Nigeria’s judiciary—the Chief Justice of Nigeria and the President of the Court of Appeal,\textsuperscript{181} and the brazen arrest of judges by

\textsuperscript{176}Constitution of the Federal Republic of Nigeria 1999, s 292(2); Olowofeyeku, supra note 171 at 63, 64.
\textsuperscript{179} Mahmud Mohammed, (Keynote Address delivered by the Honourable, the Chief Justice of Nigeria and Chairman, Board of Governors of the National Judicial Institute, Hon. Justice Mahmud Mohammed, GCON, at the Opening Ceremony of the 2015 All Nigeria Judges’ Conference 2015) at 4.
the Directorate of State Services. These incidents indicate the continued hollowed hope of independence for Nigeria’s Judiciary.

3.5 Economy

3.5.1 Overview

After the Nigerian civil war, the economy grew drastically as a result of increase export of petroleum products and a fall in other sectors which contributed to the economy. There was a decline in agriculture, manufacturing and other segments of the economy. By 1974, over 80% of government revenue accrued from oil rents leading to neglect of other sources of government income such as income taxes and excise duties—this institutional dependence continues to pose problems of the country. Despite her substantial oil exports, her balance of trade remains subject to wide variations depending to a large extent on world oil prices.

Before Nigeria’s reliance on oil and gas, agriculture was the main stay of the economy. However, by 1970’s the Nigerian government began to rely mainly on revenues derived from petroleum sales. Due to the increase dependence on one source of income, Nigeria became a state subject to international markets and royalties derived from petroleum sales. Falola notes


183 Falola, supra note 114 at 112, 225; Falola & Heaton, supra note 111 at 183.

184 Ibid at 11, 182-184. Falola and Heaton observe that the increase in oil dependence resulted in a “rentier state” which can ignore the views of its populace and act as its wishes because of the rents derived from the control of natural resources.

185 Ibid at 182.
that oil has been a curse and blessing in Nigeria, an observation, which is difficult to refute.\textsuperscript{186} During periods of substantial oil revenue as a result of high prices, Nigeria experiences rapid economic growth and during times of glut with reduced price, the economy suffers. The oil revenue also consolidated power centralization in the executive arm of the federal government by the accretion of oil revenue in centrally controlled organizations.\textsuperscript{187} The Ministry of Petroleum Resources and the Nigerian National Petroleum Corporation perform oversight functions of the oil and gas industry on behalf of the Nigerian government.\textsuperscript{188}

An economy package worthy of mention is the Structural Adjustment Program adopted in 1988;\textsuperscript{189} it was a colossal failure resulting in economic hardship, devaluation of the naira (Nigeria’s currency), decline in living standards, increase in costs of necessities, hyperinflation, and high domestic and external debts.\textsuperscript{190} The economic decline in Nigeria has resulted in the migration of skilled professionals to the West in search of greener pastures—it is estimated that 25\% to 50\% of educated Nigerians live outside the country.\textsuperscript{191} Nigeria’s economy became the largest in Africa in 2013 after a rebasing of the gross domestic product, which took into account various sectors of the economy previously overlooked.\textsuperscript{192}

\textsuperscript{186} Falola, \textit{supra} note 114 at 138.
\textsuperscript{187} \textit{Ibid} at 141.
\textsuperscript{188} \textit{Petroleum Act}, 1969 (Nigeria), ss 2-4.
\textsuperscript{189} The SAP was a combination of World Bank and IMF policies. See Falola, \textit{supra} note 114 at 183.
\textsuperscript{190} \textit{Ibid} at 185. Two years after the adoption of SAP external debts increased by 56.33\% from $15 billion to 23.45 billion, and there was a fall in estimated per capita income from $778 in 1985 to $105 in 1989.

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3.5.2 The Role of Government

Since the increase in national revenue arising from export of petroleum products, government’s control of extraction and sale of oil has made it the state’s the principal source of capital. Emanating from this position, the government has continued to play crucial roles in economic planning. Lawan divides Nigeria’s government economic role over the years into three phases that align with prevailing international thoughts: the first phase (1960-1970s) entailed government being the center of the economy by its direct involvement via nationalization, ownership and expansion of controls over the private sector; the second phase (1980s-1990s) involved a deference to market forces in an attempt to spur the economy; the third phase (1990s-2000s) is identified as a combination of the two previous regimes. Similarly, Metz recognizes increase government activity in the 1970s during periods of oil revenue growth; however, she points out that it led to inefficient markets and enabled political leaders expand their power at the expense of the masses. In her view, the trend began to change in the 1980s when the government’s position became unsustainable leading to policy changes. The government continues to perform oversight functions of the private sector and is directly involved in critical spheres of the economy.

193 Metz, supra note 110 at 161.
195 Metz, supra note 110 at 161.
3.5.3 Banking and Financial Services

The essential role that banks and other financial institutions play in the process of economic development has been recognized in literature including the crucial role of financial intermediation which affects other aspects of the economy. Nigeria is no exception to this rule, a fact demonstrated by the dominance of financial institutions on Nigeria’s Stock Exchange (NSE). Available data shows that from the 2nd quarter of 2013 to the 3rd quarter of 2016, financial equities have exercised considerable influence on NSE and have made 28.5% of Nigeria’s capital market equity capitalization over the period.

Nigeria’s premier financial institution was the African Banking Corporation established in 1892 before the Central Bank of Nigeria (CBN) commenced operations in 1959. The functions of CBN are to ensure monetary and price stability, issue and safeguard the nation’s legal tender (Naira), promote sound financial systems, supervise banking activities within Nigeria, and serve as a banker and adviser to the Federal government. The financial institutions regulated by the CBN are bureau de change operators, commercial banks, development finance institutions,

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198 Metz, supra note 110 at 193.
discount houses, finance companies, merchant banks, microfinance banks, non-interest banks and primary mortgage banks.\textsuperscript{200}

From humble beginnings of a sole institution, in 2017 there are 23 commercial banks, five merchant banks and other financial institutions within the purview of the CBN.\textsuperscript{201} Ogujiuba and Obiechina classify Nigeria financial sector into stages:

- Foundational stage (1950-1970): Commenced with the establishment of the first bank in Nigeria, the CBN, and legal framework to enable the financial sector blossom.

- Expansion Phase (1970-1985): Involved expansion of banking facilities and increase use of such services by Nigerians. Also, priority lending to certain sectors of the economy was emphasized.

- Consolidation and Reform Phase (1986-date): Government’s interest in the financial sector was largely relinquished; the monetary sector was liberalized and the regulatory framework of financial institutions was strengthened.\textsuperscript{202}

\subsection*{3.5.4 Oil and Gas}

Today, Nigeria has the 9\textsuperscript{th} largest proven gas reserves, is the 13\textsuperscript{th} largest producer of petroleum and the 6\textsuperscript{th} largest exporter of petroleum in the World.\textsuperscript{203} The petroleum sector remains a crucial

\begin{thebibliography}{99}
\bibitem{ibid} Ibid.
\bibitem{opec} OPEC Annual Statistical Bulletin 2016 (2016) at 22, 28, 52.
\end{thebibliography}
aspect of Nigeria’s economy with oversight functions exercised by the federal government.\textsuperscript{204} Beginning in the 1970s, there has been an increasing unhealthy dependence on oil and gas rents, a concentration of power in the arm of government that oversees the sector and a decline in other segments of the economy. The sector accounts for 50\% to 90\% of government revenue, about 90 to 95\% of export earnings, and about 11\% to 40\% of the nation’s gross domestic product.\textsuperscript{205} The sole control of this aspect of Nigeria’s economy has resulted in the accretion of power in the executive central government despite the country’s adoption of a federal government system.

The history of Nigeria’s national oil company exemplifies the government’s participation in the petroleum industry.\textsuperscript{206} Nigeria’s government involvement in the oil and gas sector was initially restricted to the grant of licenses and collection of taxes and rents from participants in the sector. However, this began to change in 1971 when moves were made to join the Organization of Petroleum Exporting Countries (OPEC) to safeguard an increasingly important source of national revenue. To consolidate government control in the petroleum sector and to comply with OPEC’s requirements, a national oil company called, the Nigerian National Oil Corporation (NNOC) was created.\textsuperscript{207} NNOC was empowered to participate in all spheres of the petroleum industry and to acquire any asset or liability in existing oil companies on behalf of the

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\textsuperscript{204} Constitution of the Federal Republic of Nigeria 1999 (as amended), schedule 2 part 1 para 39.
\textsuperscript{205} The World Bank, “Wealth Accounting| World DataBank”, (2016), online: <http://databank.worldbank.org/data/reports.aspx?source=wealth-accounting&Type=TABLE&preview=on> (accessed 14 March 2017). Wide variations in the percentage of GDP derived from petroleum rents from about 14\% in 2013 to 50\% in 1994 has been recorded. There was a substantial decline in petroleum rents as a percentage of GDP after the GDP rebasing exercise.
\textsuperscript{206} Godfrey Etikerentse, Nigerian Petroleum Law, 2nd ed (Dredew Publishers).
\textsuperscript{207} Two views exist about the origin of the Nigerian National Oil Company. \textit{Ibid.}
\end{flushright}
government. The government then began to acquire participatory rights from petroleum companies operating in Nigeria. A government agency, the Department of Petroleum Resources (DPR), a division of the Ministry of Mines and Power, was also established to create policy and regulate actors in the sector.

Due to inefficiencies arising from this arrangement, the DPR was excised from the Ministry of Mines and Power and upgraded to the Federal Ministry of Petroleum Resources in 1975. The Ministry then exercised oversight functions in the sector and over the activities of NNOC. However, conflicts between the two government agencies resulted in the decision to create a single government agency to adequately cater for government interests. As a solution, the Nigerian National Petroleum Corporation (NNPC) was created and assumed the functions of the prior institutions; becoming a government commercial corporation, the petroleum sector regulator and policy coordinator, and the body in charge of refining Nigeria’s crude.

The prominent position of NNPC and the absence of adequate checks and balances within its institutional structure made it an ideal candidate for nefarious practices. In the wake of massive corruption, coordinative oversight was restored with the recreation of the Ministry of Petroleum Resources, while regulatory functions exercised by the Petroleum Inspectorate

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211. Personnel of both the Federal Ministry of Petroleum Resources and NNOC were transferred to NNPC. During this period, the Petroleum Inspectorate Department of NNPC performed regulatory functions. *Ibid.*
Department were transferred to the Department of Petroleum Resources (DPR).\textsuperscript{213} Therefore, currently the Minister of Petroleum Resources coordinates Nigeria’s petroleum sector and serves as the board chair of NNPC,\textsuperscript{214} while the DPR provides regulatory oversight. DPR remains in an ambiguous position under a Minister who can exercise regulatory authority without recourse to the department.\textsuperscript{215}

Today, NNPC mans the commercial interest of the Nigerian government in the petroleum sector and serves as a holding company with subsidiaries involved in the exploration and production, refining, distribution, engineering, gas development and related investment coordination.\textsuperscript{216} In practice, NNPC still wields policy and regulatory influence through its interactions with oil companies and remains the crown jewel of the Nigeria’s government as Nigeria’s political structure is built around the struggle for various interest groups to gain access to oil revenues.\textsuperscript{217}

Sole ownership of petroleum resources is vested in the Federal Government, who has the prerogative to grant such rights to interested persons.\textsuperscript{218} Government actual participation is achieved through the NNPC either acting solely via a subsidiary or by way of joint arrangements.

\textsuperscript{213} The Department of Petroleum Resources is currently the technical arm of the Ministry of Petroleum Resources. Etkerentse, supra note 206.
\textsuperscript{214} Nigerian National Petroleum Corporation Act (amended by Nigerian National Petroleum Act, 2007), supra note 208, s 1(3).
\textsuperscript{215} Nwokeji, supra note 209 at 26.
\textsuperscript{216} Subsidiaries include; Duke Oil, Hydrocarbon Services of Nigeria (HYSON), Integrated Data Services Limited (IDSL), Kaduna Refinery and Petrochemical Company (KRPC), National Engineering and Technical Company (ETCO), Nigerian Gas Company (NGC), Nigerian Petroleum Development Company (NPDC), National Petroleum Investment Management Services (NAPIMS), Nigerian Petroleum Exchange (NIPEX), Port Harcourt Refinery Company (PHRC), Pipelines and Product Marketing Company (PPMC), Warri Refining and Petrochemical Company (WRPC), NNPC Retail, and NNPC Pensions Limited.
\textsuperscript{218} Constitution of the Federal Republic of Nigeria 1999 (as amended), s 44(3); Petroleum Act, supra note 188, ss 1, 2. Access to petroleum resources is granted via oil prospecting licenses, oil exploration licenses or oil mining leases.
with other companies. Popular joint arrangements include; traditional joint-venture participation, product sharing contracts, and service contracts. In traditional joint venture arrangements, participation was achieved by way of operating interests shared between the Nigerian government and oil companies. Due to various disadvantages identified with this arrangement including the perennial problem of meeting cash-call obligations, alternative contractual arrangements such as product sharing contracts and service contracts have increasingly been resorted to.

NNPC sits between various groups that seek a slice of the nation’s oil wealth; the government, concerned communities and petroleum companies. Nigeria’s political system vests on the President the power to appoint the Managing Director and board of NNPC. The ultimate prize in the political economy is control of the federal government—who grants legal access to oil wealth—while non-legal access is obtained via bunkering with the acquiescence of state security agencies or indigenous communities. Public funds arising from Nigeria’s government participation in the oil and gas sector is usually transferred to relatives, friends, and acolytes of the executive government via private oil companies awarded lucrative oil wells and government contracts, or through the banking sector which has a long history of nefarious activities involving

219 Nigeria’s government possesses participation rights of between 30% to 60% See Etikerentse, supra note 206 at 23–41.
221 Thurber, Emelife & Heller, supra note 153.
222 Nigerian National Petroleum Corporation Act (amended by Nigerian National Petroleum Act, 2007), supra note 208, s 1. The chairman of the board is the Minister of Petroleum Resources.
223 Gboyega et al, supra note 217.
well-connected individuals bailed out by the government. Regrettably, the absence of an independent and effective regulatory agency to adequately check actors in the petroleum industry remains.

Nigeria’s political economy remains a paradox. On the one hand, the centre is strong as a result of the President’s ability to exercise overt control by appointing heads of state agencies involved in the petroleum sector. On the other hand, the activities of uncoordinated actors protecting their individual self-interest limit the effect of actions from the centre. Similarly, Alex et al. describe politics in Nigeria to be extremely pluralistic and competitive with various actors gaming the political and economic system for their benefit despite the accretion of power in the centre. Active economic players in the oil value chain include major corporations, militants, security agencies and indigenous communities.

3.5.5 **Major Interest Groups**

3.5.5.1 **Religious Associations**

Nigeria is principally divided into adherents of Christianity (dominant in the South-Eastern and South-Western Nigeria) and Islam (dominant in the Northern Nigeria). Religious movements...

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227 Other notable interest groups exist. The influence of an interest group is a function of its access to resources, relations to those in authority, membership base, and affiliations with other groups.

228 The exact population of Christians and Muslims in Nigeria has been a source of contestation between the two principal religions. See Wale Odunsi, “CAN tackles Sultan’s group for saying Nigeria has only 40% Christians”, *Daily Post Nigeria* (23 March 2014), online: <http://dailypost.ng/2014/03/23/can-tackles-sultans-group-saying-/>
in Nigeria have proved vital to society formation since the 19th century, and the increasing prominence of religious affiliation is an indication of a crisis in the nation state.\textsuperscript{229} The politicization of religion is because of multifaceted interactions of history, slight, rhetoric and violence capable of diverse analysis.\textsuperscript{230} Mutual distrust between the two dominant religions was exasperated by Nigeria’s colonial experience.\textsuperscript{231}

Muslim and Christian institutions wittingly and unwittingly shaping power configuration and societal relations.\textsuperscript{232} Consequently, religious organizations that safeguard the interest of their members are influential as a result of the large number of faithful’s and the immense authority exercised by such organizations and clerics. For Muslims prominent organizations include the Jam’atu Nasril Islam (meaning Society for the Victory of Islam) and the Nigerian Supreme Council of Islamic Affairs both chaired by the Sultan of Sokoto.\textsuperscript{233} The ecumenical politicized body that caters to the interest of Christians is the Christian Association of Nigeria (CAN), which serves as the political voice of a diverse group of Christian denominations.\textsuperscript{234} Despite the

\footnotesize{\textsuperscript{229} Olufemi Vaughan, \textit{Religion and the Making of Nigeria} (Durham, North Carolina: Duke University Press, 2016) at 231.\textsuperscript{230} Murray Last, “Muslims and Christians in Nigeria: An economy of political panic” (2007) 96:392 Round Table 605, online: \url{http://dx.doi.org/10.1080/00358530701626057} (accessed 10 February 2017).\textsuperscript{231} Matthews A Ojo & Folaranmi T Lateju, “Christian–Muslim Conflicts and Interfaith Bridge-Building Efforts in Nigeria” (2010) 8:1 Rev Faith Int Aff 31, online: \url{http://www.tandfonline.com/doi/abs/10.1080/15570271003707762}.\textsuperscript{232} An example of how religious institutions directly shape institutions in Nigeria is the practice of Sharia law in parts of Northern Nigeria.\textsuperscript{233} Vaughan, supra note 229 at 115, 121. The Sultan of Sokoto is the head of Nigeria’s Muslims.\textsuperscript{234} Iheanyi M Enwerem, \textit{A Dangerous Awakening: The Politicization of Religion in Nigeria} (Ibadan: Institut francais de recherche en Afrique, 1995).}
existence of these umbrella institutions, underlying leaders of individual religious movements remain significant in Nigeria’s political economy.

### 3.5.5.2 Corporations

Major corporations such as oil companies (both international and indigenous), financial institutions and conglomerates remain active players in Nigeria’s political economy landscape. For example, international oil companies (IOCs) remain central to hydrocarbon activity and continue to be a major source of government revenue.\(^{235}\) This prominent position has given rise to high political and economic leverage leading to IOCs’ open rebuke and in certain cases-contravention of federal government policies.\(^{236}\) The influence of IOCs is also displayed via the career trajectory of principal officers in regulatory agencies—a review shows that there are unhealthy staff rotations between oil companies, NNPC and other regulatory agencies which raise questions of staff loyalty and the ability of private corporations to influence and promote private interests. As revealed in a WikiLeaks disclosure, a top Shell Nigeria executive claimed to have seconded employees to all relevant ministries in Nigeria resulting in the ability to influence key decisions in its favour.\(^{237}\)

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\(^{235}\) IOCs in Nigeria include Shell, Agip, Total, Chevron and Exxon Mobil while indigenous oil companies include Pan Ocean and Oando.


In addition, financial institutions and other conglomerates remain significant and display expanding spheres of authority in Nigeria’s political landscape. The influence of Nigeria’s financial institutions and conglomerates has extended to the West African sub-region as attested by the prevalence of Nigerian corporations in the list of top 25 Western African Companies.\textsuperscript{238} Similarly, Chinedu notes the importance of conglomerates to Nigeria’s political economy, a fact which influenced the choice of the interim president of the Third Republic.\textsuperscript{239}

3.5.5.3 Militants and Indigenous Communities

A major issue in Nigeria’s political economy is the claim of sub-national government institutions and groups to ownership of natural resources.\textsuperscript{240} These groups challenge the authority of the federal government to grant access to petroleum resources or argue that petroleum resources cannot be vested in the centre to the detriment of hosting communities.\textsuperscript{241} Militant youth have successfully mobilized their communities to challenge access granted in the face of environmental degradation and mass poverty despite substantial revenues generated. Over the years, this group has operated beyond legal boundaries and adopted violence—significantly affecting oil production. For example, in 2009 it was estimated that production worth millions of

dollars was stolen each day. Other activities undertaken by militant groups are the destruction of oil installations, kidnapping employees of major corporations and political patronage activities. Militant groups and indigenous communities have been successful in influencing legal policy, controlling access to petroleum resources and substantially affecting formal and informal dynamics in Nigeria’s political economy.

242 “Risky toughness”, The Economists (September 2008). See also Tarila Marclint Ebiede, “Militants are devastating Nigeria’s oil industry again. Here’s what you need to know.”, Washington Post (July 2016).
Chapter 4: Bank-mania: Nigeria’s Banking Crisis

Persistent tension between the ownership structure which maximized the rents to the ruler (and his group) and an efficient system that reduced transaction costs and encouraged economic growth”
- Douglas North

I have set myself two primary tasks: the first one is restoring confidence in the financial system. The second one is slightly less conventional but is actually playing an important role, as an agent for development.
- Sanusi L. Sanusi (Governor of the Central Bank of Nigeria 2009-2013)

As a final thought, there is no uniform effect, neither is there a single remedy to every crisis. Each brings its own surprises and risks. Clearly, we should not assume that past remedies will fully solve the current and next set of problems or address all future crises. The key is to take lessons from the past and tailor them appropriately to address future situations of potential crisis.
- Sanusi L. Sanusi

4.1 Introduction

It is apt to commence the institutional autopsy with an incident that buoyed Nigeria capital markets for a period and came crashing down reminiscence of the Tulip mania. The Nigerian capital market at its peak in March 2008 comprised over $100 billion made up of about 60% of banking stocks; however, at the onset of the banking crises, there was a fall to about $40 billion—largely predicated by a decline in the banking sector. This analysis highlights the fact that centralized market economies in developing jurisdictions require constant alterations in response to contemporary activities and points to how coordinative legal systems respond to crises events.

244 “Transcript: FT Interview with Nigeria’s new central bank governor”, Financial Times (29 June 2009), online: <https://www.ft.com/content/9b5955c4-5e5d-11de-91ad-00144feabdc0> (accessed 20 March 2017).
246 Oteh Arunma, Testimony on “ the Global Financial Crisis and Financial Reform in Nigeria: a Capital Market Perspective ” (Paper delivered before the United States House of Representatives Committee on Financial Services Sub-Committee on International Monetary Policy and Trade, 16 November 2010).
Using Milhaupt and Pistor’s framework, Nigeria’s centralized and coordinative system is revealed to alter in reaction to changes in external and internal dynamics. The happenings and steps taken in resolution of the 2009-2010 Nigerian banking crisis are bound to affect corporate governance in Nigeria for years to come.

4.2 The Story

In the year 2004, the CBN spearheaded reforms in the banking sector, dubbed; “banking consolidation”, by mandating all banks in Nigeria to increase their capital base by 1150%. It was believed that the step would result in the creation of mega banks capable of withstanding adverse economic downturns and resolve persistent problems of weak corporate governance, insider abuse, unpublished financial statements, weak capital base, over-dependence on public funds, and high insolvency rates which plagued the sector. As a result of CBN’s directive, there was a decline in the number of the banks from 89 to 25 (later 24), increase in combined capital base from $3 billion to $5.9 billion and foreign investment inflows of over $500 million. The emerging banks, therefore, had new capital available with increased financial backing.

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247 As is usual with such seismic events, different perspectives exist about the occurrences leading to the banking crisis. In my analysis, I rely predominantly on the perspective glimpsed from a series of papers delivered by Sanusi Lamido Sanusi, head of the CBN from 2009 to 2014.
248 From N2 billion to a minimum of N25 billion about $16 million to about $194 million.
249 Charles Chukwuma Soludo, Consolidating the Nigerian Banking Industry to Meet the Development Challenges of the 21st Century (Paper delivered at the Special Meeting of the Bankers’ Committee, 6 July 2004).
Noteworthy is the prior adoption of the universal banking model in 1999 which removed the restriction on activities undertaken by banks and signified a return to the liberalization of banking business, which continued after the consolidation exercise.\textsuperscript{251} The consolidation resulted in emerging banks having access to substantial capital inflows which needed to be put to use coupled with increased drive to make returns on capital employed with little restrictions on types of activities the banks could partake in.\textsuperscript{252} The large capital inflows and high oil prices resulted in excessive liquidity and concentration of assets in the stock markets and in the petroleum sector.\textsuperscript{253} For example, market capitalization of the NSE increased by 530% while banking stocks increased by an average of 900% creating a financial bubble.\textsuperscript{254} Despite certain identified weaknesses there was a general consensus that the sector was sound and that the consolidation exercise would weather any storm.\textsuperscript{255}

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\textsuperscript{251} Universal banking refers to a single banking license which authorised banks to partake in any money, capital market or insurance marketing services activity including the provision of finance, consultancy, advisory and management services. This designation broadened the scope of banking activities provided under the Banks and Other Financial Institutions Act (BOFIA) which limited banking business to receiving deposits and operating current accounts, saving accounts or other similar accounts, and the provision of finance combined with such other business as directed by the Governor of the CBN leading to the liberalisation of banking activities. \textit{Banks and Other Financial Institutions Act}, 1991 (Nigeria); \textit{Guidelines for the Practice of Universal Banking in Nigeria}, 2000. See also Aniekan Okon Akpansung & Matthew Oladapo Gidigbi, “Recent Banking Reforms in Nigeria: Implications on Sectoral Credit Allocation and Economic Growth” (2014) 5:13 Int J Bus Soc Sci 91.

\textsuperscript{252} Sanusi Lamido Sanusi, Address (Keynote address delivered at the European Investment Bank Roundtable Conference on “Developments, Challenges and Opportunities in the Sub-Saharan Africa Banking Sector,” 23 January 2013).


\textsuperscript{254} Sanusi Lamido Sanusi, \textit{The Nigerian Banking Industry: What Went Wrong and the Way Forward} ( Paper delivered at the Convocation Square, Bayero Univesity, Kano, 26 February 2010).

\textsuperscript{255} Ibid. This view was supported by the International Monetary Fund, international rating agencies and reiterated by the Sanusi’s predecessor. See Charles Chukwuma Soludo, \textit{Briefing of the Senate on the Global Financial Meltdown} (Paper delivered at the Nigerian Senate Chambers, 21 October, 2008); Charles Chukwuma Soludo, \textit{A Parley with Media Executives} (Paper delivered at the Civic Center, Victoria-Island, Lagos, 31 October 2008).
On the world stage, a storm was brewing in the United States, which would lead to a global financial crisis. The proliferation of subprime mortgage transactions in the United States of America was taking place—individuals with poor credit ratings were enticed to take mortgages without down payments or credit checks because of low-interest rates. Upon a rise in interest rates, there were an unprecedented number of defaults leading to a financial crisis which reverberated all over the world. Nigeria was minimally affected by the first wave of the crises, but suffered impacts from the second wave; including, reduced foreign capital inflows, decline in banks foreign trade finance, divestment of foreign investors in the Nigerian capital market, substantial decline in foreign exchange receipt and government revenue as a result of the fall in oil prices, depletion of external reserves, extensive attrition of the stock market and loss of public confidence in the NSE.

By the end of 2008, cracks had begun to appear in Nigeria’s financial sector. There was a steep decline in the capital market and banks began to falter from liquidity problems. The CBN, in a bid to prop up the banks reduced banks’ cash reserve requirement from 4.0% to 2.0%, provided for a reduction in required liquidity ratio from 40% to 30%, expanded lending periods to banks and introduced an expanded discount window facility. The combination of the global financial crisis and inordinate banking practices caused acute liquidity problems in Nigeria. The banks were severely exposed to capital markets in the form of margin loans and share-backed lending,

256 Steven L Schwarcz, Understanding the Subprime Financial Crisis (Paper delivered at South Carolina Law Review Symposium, 24 October 2009).
making up 31.9% of bank’s shareholder funds and 12% of the industry’s aggregate credit.\textsuperscript{259} Also, significant exposure was recorded in the petroleum sector making up over 27% of bank’s shareholder funds and 10% of the sectors aggregate credit.\textsuperscript{260} Consequently, over 58% of banks shareholders’ funds and 22% of available credit was tied up in the petroleum sector and capital markets, which later required provisions of over 44% of total loans.\textsuperscript{261}

Against this backdrop, Soludo’s tenure as the CBN governor came to an end in 2009, upon which he was replaced by Sanusi.\textsuperscript{262} Under changed leadership, the CBN closed the expanded discount facility and guaranteed interbank placements pending further review. Five banks from their incessant use of CBN’s product were initially perceived to be in a dire state and a joint team of CBN and NDIC conducted an examination of the banks.\textsuperscript{263} Subsequently, the audit was expanded to include all twenty-four existing banks. The audit exercise focused on three crucial factors related to financial institutions—capital adequacy, corporate governance and liquidity.\textsuperscript{264} It was discovered that nine banks were in dismal condition below par in all respects, while one bank failed only the capital adequacy test. The result of the audit test is illustrated in a table below:

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Bank Name & Capital Adequacy & Corporate Governance & Liquidity \\
\hline
Afribank Plc & Below Par & Below Par & Below Par \\
Finbank Plc & Below Par & Below Par & Below Par \\
Intercontinental Bank Plc & Below Par & Below Par & Below Par \\
Oceanic Bank Plc & Below Par & Below Par & Below Par \\
Union Bank Plc & Below Par & Below Par & Below Par \\
\hline
\end{tabular}
\end{table}

\textsuperscript{259} Sanusi Lamido Sanusi, \textit{Growth Prospects for the Nigerian Economy} (Paper delivered at the Eighth Convocation Ceremony of Igbinedion University, 26 November 2010).
\textsuperscript{260} \textit{Ibid.}
\textsuperscript{261} Sanusi Lamido Sanusi, \textit{Consolidating the Gains of the Banking Sector Reforms} (Paper delivered at Sylvester Monye Foundation, 9 July 2010).
\textsuperscript{262} The tenure of the CBN Governor is a term of 5 years. The Governor may be reappointed to serve another term of 5 years; however, the President did not reappoint Soludo. \textit{Central Bank of Nigeria Act, 2007}, supra note 199, s 8(2).
\textsuperscript{263} The initial banks were Afribank Plc, Finbank Plc, Intercontinental Bank Plc, Oceanic Bank Plc, and Union Bank Plc. Sanusi Lamido Sanusi, \textit{Developments in the Banking System in Nigeria} (Address delivered on 4 August, 2009).
\textsuperscript{264} The criteria were minimum of 10% capital adequacy ratio and 25% liquidity ratio and observance of the \textit{Code of Corporate Governance for Banks in Nigeria Post Consolidation}, 2006.
<table>
<thead>
<tr>
<th>Banks</th>
<th>Capital Adequacy</th>
<th>Corporate Governance</th>
<th>Liquidity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Access Bank Plc</td>
<td>P</td>
<td>P</td>
<td>P</td>
</tr>
<tr>
<td>Citibank Nigeria Ltd</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>Diamond Bank Plc</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>Ecobank Plc</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>Fidelity Bank Plc</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>First Bank Plc</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>First City Monument Bank Plc</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>Guaranty Trust Bank Plc</td>
<td>P</td>
<td>P</td>
<td>P</td>
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<tr>
<td>Skye Bank Plc</td>
<td>P</td>
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<tr>
<td>Stanbic IBTC Bank Plc</td>
<td>P</td>
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<td>P</td>
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<tr>
<td>Standard Chartered Bank Ltd</td>
<td>P</td>
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<tr>
<td>Sterling Bank Plc</td>
<td>P</td>
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<td>P</td>
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<tr>
<td>United Bank for Africa Plc</td>
<td>P</td>
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<tr>
<td>Zenith Bank Plc</td>
<td>P</td>
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<td>P</td>
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<tr>
<td>Afribank Plc</td>
<td>F</td>
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<tr>
<td>Bank PHB Plc</td>
<td>F</td>
<td>F</td>
<td>F</td>
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<tr>
<td>Equitorial Trust Bank Plc</td>
<td>F</td>
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<tr>
<td>Finbank Plc</td>
<td>F</td>
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<tr>
<td>Intercontinental Bank Plc</td>
<td>F</td>
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<tr>
<td>Oceanic Bank Plc</td>
<td>F</td>
<td>F</td>
<td>F</td>
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<tr>
<td>Spring Bank Plc</td>
<td>F</td>
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<td>F</td>
</tr>
</tbody>
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Table 4.1 Table Depicting CBN/NDIC 2009 Audit Report

<table>
<thead>
<tr>
<th>Banks</th>
<th>Capital Adequacy</th>
<th>Corporate Governance</th>
<th>Liquidity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Union Bank Plc</td>
<td>F</td>
<td>F</td>
<td>F</td>
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<tr>
<td>Unity Bank Plc</td>
<td>F</td>
<td>P</td>
<td>P</td>
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<tr>
<td>Wema Bank Plc</td>
<td>F</td>
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</tbody>
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Legend: P= Pass  
F= Fail

From the audit, it was discovered that certain banks were technically insolvent and unable to meet their creditors’ obligations without resorting to funds from the CBN or other financial institutions.\textsuperscript{265} The affected banks were found to be systemically important to Nigeria’s financial system and capable of inciting a financial contagion if urgent action was not taken. Monumental fraud had taking place under the noses of the regulators, such as, chief executive officers used customer’s deposits to purchase shares and estates all over the world, special purpose vehicles were used to acquire large percentages of own company shares, single obligor limit was breached,\textsuperscript{266} jets were purchased in the name of the banks executives’ relatives with customers funds, dividends above 200\% of share prices were paid out, some financial institutions were discovered not to have even raised the sum ordered during the bank consolidation exercise.\textsuperscript{267}


\textsuperscript{266} Single obligor limit refers to the provision of \textit{Banks and Other Financial Institutions Act, supra} note 199, s 20 which prohibits financial institutions from extending loans above 20\% of its shareholder funds to a single individual.

\textsuperscript{267} Sanusi,\textit{ supra} note 254.
Also, auditors were discovered to have acquiesced in perpetuating fraudulent acts.²⁶⁸ These activities had resulted in colossal capital and customer funds loss.

In the CBN’s 2009 Annual Report, the failure of banks in the CBN/NDIC examination is attributed to a myriad of factors, including; excessive risk taking and superfluous risk management, focus on short-term returns, weak internal control, inadequate board capacity, excessive executive compensation, substantial non-performing loans, illiquidity, and existence of conflicting interests.²⁶⁹ While the banks that aced the examination did not suffer from this vices.

Noteworthy are the strong parallels between the Nigerian banking crisis of 2009-2010 and the Asian financial crisis of 1997-1998. In affected countries of Asia (majorly Thailand, Indonesia, Malaysia, and South Korea), during the crisis financial institutions were discovered to be undercapitalized, poorly managed and, inadequately regulated with high levels of nonperforming loans and corporate indebtedness.²⁷⁰ Various theories exist on the cause of the Asian crisis with a paradigm very similar to Nigeria’s crisis in play.²⁷¹ After a period of financial liberalization, there a boom in capital inflows into the region followed by rapid withdrawal of funds and decline

in export receipts.\textsuperscript{272} Similar to the Nigeria’s case the political economy of concerned Asian states were fraught with macroeconomic imbalances, poor corporate governance framework, wide spread corruption, crony capitalism, and close links between public and private institutions which prevented optimal use of funds leading to Asia’s financial crisis.\textsuperscript{273}

### 4.3 Nigeria’s Capitalism

The Nigerian banking crisis highlights foundational features of Nigeria’s capitalism. One major feature is Nigeria’s coordinated network of elites and the ability to circumvent regulation with the acquiescence of executive authority. Sanusi was well aware of Nigeria’s political economy and required informal steps to ensure that regulatory actions were adhered to. His biography reveals that he grew up within the intersection of formal and informal authority as the grandson of the 11th Emir of Kanu, Muhammed Sanusi, and the son of the Chiroma of Kanu, Muhammad Lamido Sanusi (the CBN’s governor father) was a career diplomat and technocrat who became the Nigerian Ambassador to Belgium, China and Canada, and later served as the Permanent Secretary of Federal Ministry of Foreign Affairs.\textsuperscript{274} Sanusi (the CBN governor) joined the banking sector in 1980s and rose in rank to become Group Managing Director of First Bank—

\textsuperscript{274} “Sanusi Lamido - Sanusi, Banker, Civil Servant, Emir of Kano, Governor of the Central Bank, Nigeria Personality Profiles”, (2015), online: \textit{Nigeria Galleria} <http://www.nigeriagalleria.com/Nigeria/Personality-Profiles/Politicians/Sanusi-Lamido-Sanusi.html> (accessed 19 March 2017). The Emir of Kanu and Chiroma of Kanu are highly respected traditional and religious titles in Northern Nigeria. Sanusi later became the Emir of Kano upon his fallout with President Jonathan, President Yar’ Adua’s successor.
Nigeria’s oldest existing banking institution—by 2009. His background-cum-years of experience made him conversant with the fact that notwithstanding the provisions of the law, in a relatively centralized legal system like Nigeria’s, an extensive coordinated network exist between elites and actions taken against captains of industry and influential individuals require the assent of the source of authority. A fact upon which he sought the approval of the President prior to taking regulatory action—he only responded after he secured express consent. Adeniyi recalls that Sanusi, aware of the political fallout that could result from his actions told President Yar’Adua; “Mr. President, these are powerful people, and some of them are your friends. If we start this process, we cannot stop, and they will put pressure on you.” To which President Yar’Adua responded; “Sanusi, I give you my word; I will not interfere in your work.”

Major players in Nigeria’s capitalism are implicitly linked through series of transactions that protect elite interests via deeply embodied institutional practices. A glaring example is perceived from high incidences of wealth generated from combining political influence and connections. Amudsen identifies such connection as being pivotal to the emergence of at least 3 of 5 Nigerians on the Forbes’ 2015 list of billionaires. He recognizes that the transfer of oil revenues takes various forms to friends, relatives and acolytes; including via private companies.

275 Yomi Makanjuola, Banking Reform in Nigeria: The Aftermath of the 2009 Financial Crisis (Hampshire, United Kingdom: Palgrave Macmillan, 2015) at 44.
276 Olusegun Adeniyi, Power, Politics and Death: A Front Row Account of Nigeria Under the late President Yar’uda (Lagos, Nigeria: Prestige, 2011) at 76.
277 Ibid.
279 Amundsen, supra note 224 at 20.
that acquire lucrative oil contracts and banking reforms/bail-out as a result of unsecured loans and embezzlement.280 Such transfer through banks bail out and reforms is giving credence by a CBN investigation that revealed interlocking directorships in various generations of failed banks in Nigeria.281 Makanjuola traces one of the failed banks to President Yar’Adua’s elder brother Major General Shehu Musa Yar’Adua who was one of the founders of Habib Bank—a merging bank to form Bank PHB and alludes to reports that Francis Atuche (the former CEO of Bank PHB Plc) attempted to make use of this connection to avoid persecution.282 Similarly, the erstwhile CEO of Oceanic Bank, Cecilia Ibru, was revealed to be a close associate of the then Governor of Delta State, James Ibori, and Attorney-General and Minister of Justice of the Federation, Michael Aondoakaa who attempted to prevent her detention.283

Another highlighted feature is the difficulty of ascertaining, protecting and enforcing property rights as a result of inadequate institutional structures, expressed in the banking crisis as; the lack of credit information on borrowers, lengthy and expensive legal process to recover property, and investor and consumer unsophistication. Although the protection of property rights has been identified as important in capitalist economies, it has been recognized that the machinery of the law is usually bypassed because of substantial transaction costs.284 Nigeria’s developing economy provides a quintessential example of where alternative and “non-legal” structures are

280 Ibid.
282 Makanjuola, supra note 275 at 18. Major General Shehu Musa Yar’Adua was also a former Vice-President of Nigeria under a military regime, see supra note 141.
283 Makanjuola, supra note 275 at 17.
284 Milhaupt & Pistor, supra note 2 at 31, 32.
preferred to state machineries of property protection. As observed in Nigeria’s petroleum sector-the lines between the state’s legal and non-legal actors (such as Niger Delta militants) have been blurred due to government’s incapacity to adequately protect oil companies’ property rights.\textsuperscript{285} Government and oil companies have adopted militant security services and paid off various militant groups to ensure that oil installations are adequately protected thereby appearing to legitimize such activities.\textsuperscript{286} In the banking sector, the difficulty in enforcing and protecting property right is identified by Sanusi “as a lack of a sufficiently developed infrastructure and business environment …” exasperated by a poor legal environment, which discourages and prevents banks from moving against creditors.\textsuperscript{287}

Also expressed is the divergence between laws in books and law in action. Prior to the crisis, banks were mandated to comply with the Code of Corporate Governance for Banks in Nigeria Post Consolidation 2006. The rules identified prevalent weaknesses in the financial sector, including: ineffective board oversight, existence of fraudulent and self-enriching practices, overbearing influence of the chairman or chief executive officer, weak internal control, passive shareholders, poor risk management and lending practices, lethargic response to changing business environment, inadequate management capacity, rendition of false returns, and ineffective audit committees. The Code proceeded to make mandatory provisions to guard against these ills and adopted safeguards.

\textsuperscript{285} Thurber, Emelife & Heller, supra note 153.  
\textsuperscript{286} Ebiede, supra note 242.  
\textsuperscript{287} Sanusi, supra note 254 at 11.
Despite these provisions, the Code was observed more in breach than in compliance has perceived from the resulting financial crisis. This shows an issue with developing economies; Nigeria being no exception—the wide gap between law on paper and law in practice. A weak legal system, deep rooted corruption, ethnic rivalry, inadequate institutional framework and disregard for the rule of law have been identified as issues fanning poor corporate governance in Nigeria.\footnote{Boniface Ahunwan, “Corporate Governance in Nigeria” (2002) 37:3 J Bus Ethics 269.} The inability of CBN officials to provide adequate oversight function of banks shows the ineptness of regulators and corruption that pervades Nigeria’s public enterprises—matters that contribute to a weak institutional framework.\footnote{Sanusi Lamido Sanusi, Neither the Washington nor Beijing Consensus: Developmental Models to fit African Realities and Cultures (Paper delivered at the Eirenicon Africa Public Lecture Series, 27 March 2012).} Consequently, Sanusi decries the lack of regulatory action, which allowed inappropriate banking practices and behaviours to take root.\footnote{Sanusi, supra note 254.}

In broad terms, the crisis was facilitated by simultaneous changes in internal and external factors. On one hand, external factors such as globalization, changes in macroeconomic stability and regulatory failure, and on the other hand, internal factors including poor corporate governance practices and investor-consumer naivetés. Noteworthy, are other interesting perspectives which exist on the reason for the crisis—certain arguments were made on the ground that all actions were ethnically inclined, as part of a “northern agenda” in which Northern Nigeria was systematically taken control of Southern Nigeria.\footnote{Ibid. Omo Gabriel, Babajide Komolafe & Michael Eboh, “No Northern Agenda Over Sack of Bank MDs, Sanusi Insists”, Vanguard (26 October 2009), online: <http://www.vanguardngr.com/2009/10/no-northern-agenda-over-sack-of-bank-mds-sanusi-insists/> (accessed 21 March 2017). Given credence to this view, Sanusi is quoted saying, “The economy of Nigeria is now in the hands of Kano. Once we have done our work, there is nothing anybody can do.” Apati, supra note 281 at 124 reported to be quoted in TELL Magazine 14 September, 2009 at 28.}
4.4 The Response

The CBN acted swiftly by replacing executive directors of eight ailing banks while allowing the executive team of Wema Bank to remain because of their recent assumption of office and high turnover prior to the audit exercise.292 The replacements were done rapidly with all parties outside the CBN management and its trusted advisers in the dark because of the perceived ability of bank executives to use courts to inhibit intended response to the crisis.293 The boards of Wema and Unity banks were instructed to recapitalize.294 The CBN also injected N620 billion as tier 2 capital, structured as a 7-year convertible loan into the unstable banks to prevent a systemic crisis.295

Makanjuola reports that over 40 cases were instituted to challenge the actions of the CBN; broadly alleging that the removal of the bank executives was unlawful and that due to the capital adequacy of the banks the conversion of unsolicited injected funds into equity was wrong.296 The first civil case instituted requested for a judicial review of CBN’s removal of the CEO of Intercontinental Bank in 2009 before the substantive suit could be delved into an appeal was

292 This was done pursuant to the Banks and Other Financial Institutions Act, supra note 199, s 33 and 35 which vests on the CBN Governor powers to conduct special examinations and replace bank’s executives. After the initial audit exercise executive directors of five banks (Afribank Plc, Intercontinental Bank Plc, Union Bank of Nigeria Plc, Oceanic International Bank Plc, and Finbank Plc) were removed, three more banks executive directors (Bank PHB, Spring Bank and Equitorial Trust Bank Plc) were replaced when the audit exercise was completed. Sanusi, supra note 263, Central Bank of Nigeria, Press Statement on Outcome of Special Examination of 14 Banks (2009).

293 A major concern was that if word got out disgruntled executive directors could obtain an injunction against CBN which would curtail further steps. Other fears expressed were to prevent a run in of banks, dumping of shares on the stock exchange and unintended freezing of interbank market. Makanjuola, supra note 275.


295 Sanusi, supra note 254; Central Bank of Nigeria, supra note 269 at 33. These funds are a transfer from the petroleum sector and taxpayers to corporations.

296 Makanjuola, supra note 275 at 65.
made to the Court of Appeal and later to the Supreme Court. The matter is still currently on appeal to the Supreme Court 7 years later. Other civil cases emanating from the intervention of the CBN exist and the issues are yet to be settled as they are currently being appealed in Nigeria.

An interesting case undertaken and concluded outside Nigeria against the CEO of Intercontinental Bank arose out of his assumption of residence in the United Kingdom upon the commencement of prosecutions in Nigeria. It was held that Akingbola had fraudulently engaged in the company’s purchase of its own shares to benefit from the scheme and had misappropriated monies belonging to the bank to purchase property and pay debts amounting to the sum of N 164 billion or £654 million. Unlike in Nigeria, efforts to appeal the decision were rebuffed by the English court.

Apart from civil cases, criminal proceedings were also commenced against the bank executive directors. Charges were instituted claiming a total of 972.3 billion naira (About $6.5 billion) from the bank executives. Out of the criminal cases instituted from the banking crisis only the case of the former CEO of Oceanic Bank—Cecilia Ibru has been concluded. She was indicted for

300 Makanjuola, supra note 275 at 67–71; Access Bank Plc v Erastus Akingbola and ors, [2013] EWCA Civ 744 (UK).
301 Ibid at 76.
the sum of N162 billion (about US$1.1 billion ), upon which she agreed to a plea bargain to serve 6 months in prison and to forfeit assets to a tune of N190 billion naira (about $1.3 billion). Apart from this sole conviction and assets obtained via plea bargain, all other cases are currently pending before courts.302

The resolution of the banking crises resulted in renewed vigor in corporate governance matters. Alterations were made to the corporate governance regime including—limiting the tenure of chief executive officers and auditors to ten years and stipulating the credentials of management teams. Standby teams of target examiners capable of being deployed at any time to ensure compliance and enforcement were created.303 Adoption of a common financial year for all bank with financial statements prepared in compliance with International Financial Reporting Standards was mandated.304

In order to prevent future occurrences where resources are harnessed by unproductive but seemly lucrative ventures, the CBN decided to commence directing funds to productive ventures in the real economy in contravention of the previous pure capitalist model of allocating financial resources based on market forces. Priority areas such as agriculture, power and transportation

304Banks were directed to comply with the FIRS by 2012.
were initially identified and financial institutions instructed to direct lending towards such areas.\footnote{Sanusi, supra note 252.}

An asset management company was set up to purchase non-performing loans at written down values from distressed banks. Unsuccessful steps had been taken in prior times to convince members of the National Assembly that an asset management company was required by Nigeria’s financial institutions.\footnote{Soludo, supra note 255.} However, the Asset Management Corporation of Nigeria (AMCON) legislation was hurriedly passed when the extent of toxic loans in the financial system was revealed.\footnote{Makanjuola, supra note 275 at 95.} AMCON was established based on similar steps taken by Malaysia during the Asian financial crisis by forming an organization called Pengurusan Danaharta Nasional Berhad that successfully fulfilling its mandate in seven and a half years by acquiring 94\% of the value of non-performing loans.\footnote{Duncan Alford, “Reform of the Nigerian Banking System- Assessment of the Asset Management Corporation of Nigeria (AMCON) and Recent Developments” (2012), online: \url{<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1592599>}. CBN officials studied the Malaysian model based upon which the AMCON was created.} AMCON has purchased eligible banks assets comprising non-performing loans, margin loans and systematically important loans with a book value of N4.02 trillion (about $25.4 billion) for N1.76 trillion (about $11.4 billion), to absorb toxic assets of intervened banks. AMCON is funded by N50 billion CBN’s annual contribution with banks contributing 0.3\% of its total assets annually into a sinking fund for 10 years. Bonds valued at N4.7 trillion (about $29.7 billion) have also been issued by AMCON to purchase eligible banks assets.
assets. A cap of N1 trillion is set for banks contribution while CBN’s limit is N500 billion during the life of the fund.

There was a spate of merger and acquisition activity encouraged by the CBN to strengthen the ailing banks capital base. FCMB Bank merged with FinBank, Access Bank merged with Intercontinental Bank, Sterling Bank with Equitorial Bank, Ecobank acquired Oceanic Bank, while Union Bank was acquired by private equity investors. Afribank, Bank PHB and Spring Bank (subsequently renamed Mainstreet Bank, Keystone Bank and Enterprise Bank respectively) were unable to raise the required capital base and were recapitalized by AMCON and converted into “bridge banks” controlled by the Federal Government of Nigeria through the Nigeria Deposit Insurance Corporation and the Asset Management Corporation of Nigeria pending adequate infusion of capital by private parties.

Finally, the universal banking model was reviewed. Regulators restricted activities undertaken by financial institutions to only banking activities as defined in the Banking and Other Financial Institutions Act. This was achieved by categorizing banks into commercial, merchant and

310 Makanjuola, *supra* note 275 at 102.
311 Sanusi Lamido Sanusi, *Banking Reform and its Impact on the Nigerian Economy* (Paper delivered at the University of Warwick’s Economic Summit, 17 February 2012). See also Makanjuola, *supra* note 275 at 124–125. AMCON became the sole shareholder in the banks by injecting N732.55 billion into the 3 bridge banks to enable them attain the minimum capital requirement. Enterprise Bank was later acquired by Heritage Bank, Mainstreet Bank by Skye Bank, while the acquisition of Keystone Bank by private individuals is still pending.
312 *Banks and Other Financial Institutions Act, supra* note 199, s 66. Defines banking business as; “the business of receiving deposits on current account, savings account or other similar account; paying or collecting cheques drawn by or paid in by customers; provision of finance or such other business as the CBN governor may so designate.”
specialized banks to curtail prior risky use of depositors’ funds.\textsuperscript{313} However, concessions may be granted by the CBN on a case by case basis and holding company structures may be approved to enable financial institutions partake in other activities if depositors’ funds are determined to be adequately protected. Commercial banks were divided into national, regional and international institutions to delineate expected scope of activities.\textsuperscript{314} Banks were mandated to divest all interests held in unapproved related businesses and explicit provisions were made prohibiting political and speculative activities.\textsuperscript{315} 

4.5 Evaluation

In this section, I draw upon Milhaupt and Pistor’s analytical framework to analyse the post-banking crises corporate governance environment in Nigeria. In previous chapters, I argue that Nigeria’s legal system though federal is relatively centralized due to the accretion of power in the President arising from control of oil revenues and the militia, the historical need for a strong federal government to unite the diverse and divided ethnic groups, the Nigerian civil war, and as a result of the restricted number and clout of non-state actors involved in the production and enforcement of law. The Central Bank embodied by Sanusi; well versed in Nigeria’s capitalism and aware of the extensive network between corporate players ensured that the consent of the

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\textsuperscript{313} Ibid, s 4(1).
\textsuperscript{314} Ibid, s 4(3). See also CBN Scope, Conditions and Minimum Standards for Commercial Banks (Nigeria), 2010, s 2 regional license enables a commercial bank to conduct business in a maximum of 12 states within 2 geo-political zones in Nigeria, a national license permits commercial banking business anywhere in Nigeria, while an international license allows such business anywhere in Nigeria and outside Nigeria.
\textsuperscript{315} Regulation on the Scope of Banking Activities & Ancillary Matters, supra note 312, ss 5 & 8.
executive government was obtained prior to seeking to coordinate corporate governance activities even though the CBN governor “legally” had the power to respond.

It is interesting to note the differing considerations given to the various functions of law. In banking matters, there are various spheres of property rights seeking protection—the shareholders of the financial institutions (who may not have been culpable in the syphoning of funds) seeking protection of their investments and the bank customers seeking protection of their deposits. Although shareholders unsuccessfully instituted proceedings challenging CBN’s action, the protection of shareholder value was at all times given secondary consideration to safeguarding depositors’ funds by regulators. Nonetheless, the protection of all property right was eclipsed by CBN’s intent to provide a coordinated response to the impending financial crisis. Thereby aligning with Milhaupt and Pistors observation that “centralized systems tend to be coordinating, whereas decentralized systems tend to engender a protective function of law.”

The credibility and signalling functions are also seen in play. Sanusi personally travelled to allay fears and assure investors that adequate steps were been taken with the backing of the Presidency to resolve the banking crisis, presumably as a result of contrary signals expressed in the past.

316 Some of such actions are ongoing.
317 It was repeatedly emphasized, “We will not allow any bank to fail” in a bid to protect customer funds, restore confidence in the banking system and avoid a financial contagion. Sanusi, supra note 263.
318 Sanusi, supra note 254 at 5 writes “I am using this platform to unfold the full details of the banking reform programme and to outline exactly what went wrong and what we are going to do about it.” He then proceeds to state the coordinative efforts of the reforms, to wit; enhance the quality of banks, establish financial stability, enable healthy financial sector evolution, and ensure the financial sector contributes to the real economy.
319 Milhaupt & Pistor, supra note 2 at 7.
despite legal provisions—actions which limited Nigeria’s government credibility.\textsuperscript{320} The consequent refusal of foreign owned banks to participate in the sale of non-performing loans to AMCON signifies less belief in the credibility and prowess of the Nigerian government compared to domestically owned organizations, which were bound to dance to the tune of Nigeria’s government.\textsuperscript{321}

The use of law on both sides of the divide—by the regulators and bank executives is noteworthy. From the onset, regulators were wary of the use of courts to derail intended actions—legal advisers’ familiar with possible steps to curtail regulatory actions were recruited by the CBN. Also, the fact that the sole conviction obtained and funds recovered till date was only attained via plea bargain, while all other cases are still pending before Nigerian courts signify parties’ ability to employ legal proceedings to various ends. This phenomenon contributes to a centralized legal system by the high cost and time needed to institute and continue proceedings in Nigerian courts. Nevertheless, the use of law by the shareholders and defunct bank executives imply that it is viewed as a weapon to prevent state oppression and overt executive action.

Due to the weakness of the judiciary predicated by long periods required for cases to be concluded, the inability of unsophisticated shareholders to effectively organize and institute actions against executive directors, and high thresholds and technical requirements for instituting derivative or class actions in Nigeria. CBN was enjoined to act or no punitive or corrective


\textsuperscript{321} The foreign owned banks are Citigroup, Stanbic IBTC and Standard Chartered Bank. Makanjuola, \textit{supra} note 275 at 103.
action would have occurred—this call was upheld by ensuring the accrual of more corporate governance authority to itself, thereby, signifying an increase in centralization and coordination of Nigeria’s capitalism.

The global happenings, weak institutional framework, deregulation of banking activity (adoption of universal banking) and market transformation created ample opportunity by lowering perceived risk of liability and augmented incentives for making misleading financial disclosures by bank directors. The banking crises created a new legal demand leading to the establishment of AMCON, increased regulation of the financial sector, alteration of the universal banking model in favour of pigeon-holed institutions, and renewed vigour in the enforcement of corporate governance matters. Therefore using Milhaupt and Pistor’s framework, the resolution of Nigeria’s banking crisis resulted in increased centralized enforcement of corporate governance regulations to coordinate the activities of corporations and a strong signal of government seriousness in banking matters. Apati refers to this development as “moving from market regulation towards a regime that approximated a central command and control.”\(^{322}\)

The transplantation of AMCON’s legal framework from the Malaysian model also illustrates the shift in Nigeria’s corporate governance framework. The CBN intended to structure AMCON on a similar institution adopted by Malaysia, which was successful in navigating the Asian financial crises. A team of Nigerians was sent to study the Malaysian model to make suggestions to the

\(^{322}\) Apati, \textit{supra} note 281 at 148.
proposed AMCON act—an idea which was but initially but forward by Soludo.323 The law subsequently enacted to create the Asset Management Corporation of Nigeria has drawn concerns over the corporation’s lack of independence. For example, Ofo expresses concerns over the pervasive influence the CBN has over the activities of AMCON.324 The autonomy of the corporation is also curtailed by the lack of an expected termination date or winding up procedure.325 These alterations extend regulators control over AMCON’s activities as its very existence has been subject to various conjectures and opinions, which serve to increase uncertainty over its future and increases the need for regulatory oversight.

4.6 After Effects

The financial crises resulted in the adoption of a more rule based corporate governance code with novel provisions restricting the tenure of chief executive officers and bank auditors. Analogous limitations have been implemented in other sectors.326 The crises underscored the need to create and enforce codes of corporate governance in other sectors in Nigeria; resulting, in a vast increase in corporate governance codes. Codes that were created as a result of this perceived need; include, Code of Corporate Governance for Licensed Pensions Operators 2008, Code of Corporate Governance for Insurance Industry in Nigeria 2009, Securities and Exchange

323 Central Bank of Nigeria, CBN Signs Strategic Partnership Memorandum of Understanding with Malaysian Central Bank (Bank Negara) (2010).
325 Malaysia’s Pengurusan Danaharta Nasional Berhad Act (Malaysia), 1998, s 70. provides a procedure to terminate the operations of the corporation, while the United States’ Resolution Trust Corporation legislation provided for a termination date. A functional equivalent provision is missing in the Asset Management Corporation of Nigeria Act, supra note 324. See also Alford, supra note 308 at 8.
326 For example the Code of Corporate Governance for Public Companies, Securities and Exchange Commision (Nigeria), 2011, s 33 provides that audit firms and partners should be changed after a maximum period of ten years.

In response to the proliferation, the Financial Reporting Council of Nigeria was created in 2011 to review and enforce the applications of financial standards and codes of corporate governance, and to harmonize corporate governance regulatory activity in Nigeria. In accordance with its functions, a National Code of Corporate Governance (NCCG) comprising codes for the Not for Profit Sector, Private Sector and Public Sector was drawn up to regulate and replace the numerous sectoral specific codes. The codes for the Not for Profit Sector and Private Sector was scheduled to take effect in October 2016, while, the Public Sector’s code was to commence on the order of the Federal government. However, following the public outcry and backlash received as a result of NCCG’s application to religious organizations, which came under the purview of the Not-for-Profit-Sector’s code its application was put on hold. The outcry resulted from the resignation of Pastor Enoch Adeboye, as the leader of the largest church in Nigeria, The Redeemed Christian Church of God (Nigeria), due to the NCCG provision that all leaders of not-for-profit-organizations in Nigeria must step down after a period of twenty years at the helm of

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affairs or upon attaining 70 years of age.329 This provision essentially flowed from CBN’s directive that limited the tenure of bank heads.

Flowing from the public outcry, the NCCG was suspended pending further review—this shows the continuous iterative relationship between law and the quest for economic development signified by a clash of ideologies by parties on different positions of the centralized and decentralized continuum.330 At this point, it appears that Nigeria’s capitalism is heading towards a more centralized and coordinative framework because of changes in the demand of law brought about by the banking crisis, globalization and the historical workings of Nigeria. It would be noteworthy to observe how this relationship develops and its future directions to draw out implications for economic development.

A renewed prominence has been given to plea bargain as a means of resolving breach of corporate governance codes and corporate fraudulent activities as a result of the lone successful conviction achieved from the banking crisis seven years after the events. Plea bargain had been employed by the Economic and Financial Crimes Commission (EFCC) in resolving criminal


charges emanating from corruption in governance matters, including high profile cases which secured the conviction of Tafa Balogun, Lucky Igbinedion and Diepreye Alamieyeseigha amongst others, but not in relation to cases bordering on corporate governance malfeasance.\textsuperscript{331} The use of criminal trials and subsequent adoption of a plea bargain arrangement between the prosecutors and Mrs Ibru, the erstwhile CEO of Oceanic Bank in 2010 was a pivotal point in Nigeria’s corporate governance jurisprudence. Due to the arrangement, she spent a period of only six months in jail and refunded a total of N191.4bn in exchange for her guilty plea to three of the twenty-seven charges procured against her.\textsuperscript{332} The likelihood of conviction and the possibility of sidestepping long periods of litigation as currently employed by other bank directors have encouraged the adoption of this model despite potent criticisms in its application.\textsuperscript{333} The model inadvertently places more discretion in the hands of the regulators via agreements, which can be reached with the prosecutor and serves as an additional means of punishing and correcting infringements of corporate governance provisions which extends regulatory powers. However, the continued use of plea bargaining has been subject to severe criticisms as a result of perceived inadequate punishments which encourage corporate

\textsuperscript{331} Corruption is endemic in Nigeria with massive looting of funds carried out by public officials. Tafa Balogun was the Inspector General of the Police force, while Lucky Igbinedion and Diepreye Alamieyeseigha were Governors of states in Nigeria. These individuals all made use of plea bargain mechanisms to receive reduced sentences in corruption cases.

\textsuperscript{332} Central Bank of Nigeria, \textit{Ceicilia Ibru Jailed, Forefeits Assets... CBN Vindicated} (2010).

governance malpractices and corruption that provides conflicting signals and diminishes government credibility.\textsuperscript{334}

4.7 Conclusion

Using Milhaupt and Pistor’s framework, I have situated the banking crisis within Nigeria’s legal habitus to show how law is used to regulate market activity and expose major impediments of current practices—helping understand the path to future change. Coordinative features of Nigeria’s capitalism are revealed to include institutional practices that have resulted in extensive networks and alliances between elites; formal and informal alliances so powerful that overt executive acquiescence is required before regulatory action can be effected. The difficulty with enforcing and protecting property rights via legal channels is highlighted. In addition, significant distinctions between corporate governance regulations and actual practice are shown to exist in Nigeria; signifying the difference between law on paper and law in action in Nigeria’s capitalism.

The crisis in Nigeria’s political economy invigorated the legislature to establish AMCON and the Financial Reporting Council. AMCON was based on a model provided by other countries, which when transplanted to Nigeria underwent changes to cater for increased control and uncertainty of winding up to fit Nigeria’s legal system with the CBN at the helm of affairs. The Financial Reporting Council attempted to further centralize Nigeria’s corporate governance by enforcing a

National Code of Corporate Governance; however, the move was aborted as a result of protests from other actors in the legal process. Therefore, Nigeria has commenced a period of revaluation and adjustment to fit the post banking crisis period for establishing institutions to provide, oversee and enforce corporate governance.
Chapter 5: War in the Boardroom: Moni Pulo v Brass

When the memorandum is duly signed and registered though there be only seven shares taken, the subscribers are a body corporate “capable forthwith,” to use the words of the enactment, “of exercising all the functions of an incorporated company.” Those are strong words. The company attains maturity on its birth... The company is at law a different person altogether from the subscribers to the memorandum.

- Lord MacNaghten 335

Except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorized business or objects, have all the powers of a natural person of full capacity.

- S. 38 (1) Companies and Allied Matters Act 336

However, it must be borne in mind that such a company operates through its director appointed by the shareholders. The Minister of Petroleum Resources has a duty to satisfy himself or herself that the 5th, 6th and 7th defendants who have acquired the 2nd, 3rd and 4th defendants’ shares are qualified to participate in OML 114. It is for this purpose that the veil of the 1st defendant will need to be lifted to ascertain who the new owners of the 1st defendants are.

- Hon. Judge Okechukwu J. Okeke 337

5.1 Introduction

This analysis illustrates a modification in Nigeria’s corporate governance regime resulting from a change in demand; an alteration spurred by an aggrieved shareholder. I show how a private decentralized actor is converted into a state approved player after a court decision consolidates the authority of the Nigerian government in a vital source of revenue—the oil and gas sector. The case of Moni Pulo v Brass highlights various actors and interests in play, struggling for control of Nigeria’s petroleum sector. The battle for increased control of the sector by the Nigerian government and corporations’ quest for decentralization of authority is epitomized

336 Companies and Allied Matters Act 1990, supra note 161.
before the judiciary. The scuffle takes the form of a clash in corporate governance principles. Milhaupt and Pistor’s framework is discussed against the backdrop of Nigeria’s Petroleum Industry Bill (“PIB”) to show how increased centralization and coordination is achieved in the governance of the petroleum sector and implications are drawn out for Nigeria’s legal system.

5.2 The Story

In 1992, Moni Pulo was awarded 100% participating interest in Oil Prospecting License “OPL” 230. The OPL was later converted to Oil Mining Lease “OML” 114 and Moni Pulo divested 40% participating interest to Brass Exploration Unlimited “Brass”. Due to a series of transactions detailed below prior to parties disagreement Petrosa owned Brass. Initially, Brass was held by off shore companies Brassco (Cayman) Ltd and Brass Holding Ltd “Brass Hold Cos”. Baker Hughes, the American industrial service company, owned Brass Hold Cos but later transferred its shareholding to Rachael Holdings Ltd, a company solely owned by the principal shareholder in Moni Pulo—Olu Lulu-Briggs. Lulu-Briggs via Rachael Holdings Limited sold ownership of Brass to Petroleum Oil & Gas Company of South Africa (Nigeria) Ltd and Petrosa Brass Ltd (both “PetroSA”). The transfers to Brass, Racheal Holdings Ltd and PetroSA were consented to by the Minister of Petroleum Resources “the Minister”.  

338 Moni Pulo retained 60% participating interest in OML 114.
340 The consent of the Minister was later argued to have been wrongly sought and obtained by Moni Pulo. See Moni Pulo Limited v. Brass Exploration Unlimited and 7 Ors, supra note 337 at 61–63.
Subsequently, PetroSA decided to transfer its interest in Brass and in accordance with the preemption rights agreement between parties made an offer to Moni Pulo. However, negotiations between parties broke down as a result of the thorny issue of Brass’ valuation. PetroSA later sold its interest to Camac Energy Services Limited and Camac Energy Resources Limited (together, “Camac”), companies to which Moni Pulo did not approve of. Despite Moni Pulo’s objections, the sale to Camac was effected by PetroSA’s transferring its shareholding in Brass. PetroSA requested Moni Pulo to obtain the Ministers consent to the Camac transfer, a chore deftly ignored by Moni Pulo.341

With the transfer of shareholdings in Brass from PetroSA to Camac, Moni Pulo was saddled with a partner it did not approve of in running OML 114. Moni Pulo, therefore, sought to annul the transfer of PetroSA’s interest in Brass to Camac. Moni Pulo sued Brass, Petrosa, Petrosa Nigeria, Petrosa Brass, Camac Energy Services, Camac Energy Resources, Camac International Corporation and the Minister as the first to eighth defendants respectively.

5.3 The Response

In 2011, Moni Pulo instituted an action in the Federal High Court of Nigeria with Brass, PetroSA, Camac and the Minister as defendants, seeking a declaration that without the prior consent of the Minister, PetroSA cannot validly transfer its shareholdings. 342 As expected, the lone defendant that supported the Moni Polo’s position was the Minister. The Minister via the

341 Onwubuariri, supra note 339.
Ministry of Petroleum Resources took this new stance in contravention of its earlier position as revealed in its letter, where it was stated that, “It is pertinent to note that the DPR is not the competent authority to address the issue of transfer of shares. That is a matter for the Corporate Affairs Commission (CAC).” Moni Pulo’s case hinged on the provision of the Petroleum Act which provides that, “Without the prior consent of the Minister, the holder of an oil prospecting license or an oil mining lease shall not assign his license or lease, or any right, power or interest there under.”

It was calculated that based on the failure to obtain the Minister’s consent the share transaction leading to a change in the corporate governance of Brass could be annulled. However, in prior events of corporate restructuring and share transfer transactions, both oil companies and the government had failed to involve the courts in determining the need for consent due to the probable unintended consequences of a contrary decision. In this case, Moni Pulo was apparently not bothered by such concerns.

Moni Pulo’s case was that an analysis of prior dealings with Brass will show that the actual commercial intention of parties was always to effect the transfer of the company’s core asset; the 40% participating interest in OML 114 via a share transaction. Thus, Brass only functioned as a “shelf company”, a conduit to OML 114. Consequently, the shareholding of Brass—a company

343 Moni Pulo Limited v Brass Exploration Unlimited and 7 Ors, supra note 337 at 89. The Corporate Affairs Commission is Nigeria’s company registry.
344 Petroleum Act, supra note 188, schedule 1 para 14. This provision was supported by Petroleum (Drilling and Production) Regulations (Nigeria), 1969, para 4 and Petroleum Act, supra note 188, para 16.
345 Onwubuariri, supra note 339.
holding an OML should be subject to the purview of the Minister, and failure to obtain his consent to a change in controlling shareholding, invariably imposed an unapproved partner via a share transfer on Moni Pulo. In other words, to achieve the proposed aim of annulling the share transfer and preventing an unwanted partner (epitomizing the protective function of law), Moni Pulo’s claim was couched in terms of the Minister’s duty to provide oversight and consent to corporate transactions (emphasizing the coordinative function of law).

Brass and Camac (at this time the purported transfer to Camac had taken place and had become a subsidiary of Camac) contended that the issue raised by Moni Pulo should be analyzed through the lenses of the different corporate personalities of a company and its shareholders as enshrined in the locus classicus case of Salomon v Salomon346 and adopted by Nigeria’s legislature in ss. 37 and 38 of CAMA.347 Therefore, due to the separate and distinct personalities of Brass and the prior shareholders (PetroSA), the interest in OML 114 did not reside in PetroSA, and a transfer of shares in Brass from PetroSA to Camac did not amount to a legal transfer of OML 114. Towing a similar path, PetroSA argued that it was fallacious to require the Minister’s consent for a share transaction in Brass and such a decision will amount to legislative action by the court (these arguments also symbolize law’s protective function).348

The Ministry of Petroleum Resources gleefully adopted the arguments of Moni Pulo expatiating that due to the supervisory role regarding petroleum resources vested in the Minister by the

346 Salomon v Salomon, supra note 335.
347 Companies and Allied Matters Act 1990, supra note 161.
348 Moni Pulo Limited v. Brass Exploration Unlimited and 7 Ors, supra note 337 at 88, 89.
Petroleum Act. Transfer of the controlling shareholding interest in a company, without the Ministers consent, will rob the Minister of this supervisory capacity.\(^{349}\) In support of this position, instances, where the Minister's consent was sought and obtained in similar transactions, were recalled.\(^{350}\)

The court held that the transfer of the entire share capital (100%) in Brass from PetroSA to Camac could not be validly accomplished without the acquiescence of the Minister and the acquisition of controlling shares in Brass is tantamount to a takeover of 40% of OML 114. Thereby, approving the Minister's authority to provide extensive oversight and coordinate corporate transactions in Nigeria’s petroleum sector. The court noted that the consent application may be made by Brass, PetroSA and/or Camac—thereby circumventing, Moni Pulo.\(^{351}\) After the court decision, appellate briefs were filed; however, parties settled without any objection from the Minister. Consequently, averting an appeal and effectively sanctioning a favourable judicial precedent. The settlement permitted Moni Pulo to reacquire the 40% interest, which it initially held in OML 114 (as OPL 230) and assume its original 100% participating interest in the asset.

The law was wielded by Moni Pulo to protect its corporate interest by means of emphasizing the Minister’s authority and need to regulate Nigeria’s petroleum sector. The argument which swayed the court was based on the premise that without a strong centre regulating the vital sector of Nigeria’s economy, anarchy will reign. Considering, Nigeria’s socio-political climate, and

\(^{349}\) Ibid at 95–104.  
\(^{350}\) Ibid at 105.  
\(^{351}\) Ibid at 116.
various interests and parties in play in her political economy; I can see why such an argument is supported by a judge familiar with Nigeria’s political economy. The court’s decision recognized and emphasized the need for the executive government’s control of Nigeria’s petroleum resources leading to Moni Pulo’s victory.

5.4 The Ubiquitous Presence in Nigeria’s Petroleum Industry

Nigeria’s petroleum industry is riddled with different actors contesting for control with the Presidency casting a long shadow on the sector. Nwokeji notes that Nigerian’s are aware that only one person has the authority to award oil blocks with all queries on petroleum matters falling on his desk—with petropolitics holding full sway—the President to who the Minister, NNPC’s General Managing Director and NNPC’s board remain subject to. However, various interest groups including oil companies, trade unions, and militants and indigenous communities contest this control. Alex Gboyega et al identify this contest with uncoordinated self-interested actors as resulting in systemic inefficiencies in the sector.

The democratic executive government similar to the military government has responded to this contestation by consolidating power in the President. Obasanjo, the first democratic president in Nigeria’s Fourth Republic is identified to have held a vice-like grip on the petroleum industry by appointing himself as the Minister of Petroleum Resources until five months to the end of his

352 Nwokeji, supra note 209.
353 Gboyega et al, supra note 217.
eight year tenure.\textsuperscript{354} A trend continued by other successors including President Buhari, who simply appoint minions or themselves as the Minister.\textsuperscript{355} I perceive the Petroleum Industry Bill (PIB) to be further evidence of this contestation. The PIB is a legislation that attempts to fundamentally alter the governance structure in the petroleum industry.\textsuperscript{356} It seeks to further consolidate authority in the executive government by vesting broad powers in the Minister, including powers to consent to transactions involving a transfer or exchange of controlling shares in a company or parent company located in or outside Nigeria with interest in the petroleum sector.\textsuperscript{357} This provision invariably reflects Nigeria’s government future policy direction.\textsuperscript{358}

The PIB originally introduced to the legislature in 2008 has been opposed on different grounds by active players in the petroleum industry. The PIB originated from the activities of the Oil and Gas Sector Reform Implementation Committee inaugurated in 2000 and the draft National Oil Policy but has failed to garner sufficient support in the National Assembly till date.\textsuperscript{359} Critics of the PIB remain wide and varied resulting in continuing alterations being made to pacify actors to

\textsuperscript{354} Nwokeji, supra note 209. Notwithstanding the existence of a Minister of Petroleum Resources, actual power resides in the President; who the Group Managing Director of NNPC and the Minister contests for his ear.


\textsuperscript{356} See the preamble to \textit{The Petroleum Industry Bill} (Nigeria), 2012.

\textsuperscript{357} \textit{Ibid}, ss 194, 195.


garner sufficient legislative support. Onwubuariri writes that all oil companies (both IOC’s and indigenous) have criticized certain provisions of the PIB. Thunber et al note that the PIB will likely consolidate opposition and be fiercely contested. The contestation has resulted in the current PIB stalemate with various actors seeking means to protect and further their interest pending the impasse.

5.5 Evaluation

Milhaupt and Pistor’s framework focuses on the organization of legal systems, the functions of law and the political economy (personified by the supply and demand of law) of a jurisdiction. I have shown that Nigeria’s legal system is relatively centralized due to a combination of the adopted constitutional framework, the civil war, accretion of oil revenues in the centre, and a weak and dependent judiciary. Similarly, Nigeria’s petroleum industry remains one where the centre is strong in which the President coordinates the industry, however, the activities of other

362 Thurber, Emelife & Heller, supra note 153 at 40.
actors prevent a fundamental alteration of basic governance parameters.\textsuperscript{364} A fact observable from the PIB’s continued legislative limbo.

Moni Pulo’s case exposes a clash of two principal functions of law. On one hand, laws protective function effected by the doctrine of corporate personality espoused by common law jurisdictions, enshrined in Salomon v Salomon and upheld by Nigeria’s Companies and Allied Matters Act. On the other hand, laws coordinative function via the Minister’s ability (indirectly the President) to organize and influence the alienation of interests in the petroleum sector by piercing the veil of incorporation to the detriment of the protective function of law. This clash takes place against the backdrop of the PIB, which reveals the executive government’s future policy direction.

The PIB represents proposed legal change—a supply not backed by a corresponding demand. Hence, its failure to make it through the National Assembly after almost a decade. However, a demand of an aspect of the proposed legislation originated from an aggrieved indigenous oil company—Moni Pulo. Moni Pulo, aware of the executive government’s policy direction as signalled in the PIB wielded a legal provision which had been dormant for more than four decades. The contentions of the Minister and Moni Pulo were upheld by the Federal High Court to prevent the “petroleum industry from turning into the motor park for touts to hold sway.”\textsuperscript{365} Subsequently, the Minister well aware of parties’ right of appeal and the possibility of a contrary decision by a superior court; encouraged settlement of parties dispute after a decision acceptable

\textsuperscript{364} Thurber, Emelife & Heller, \textit{supra} note 153 at 20.
\textsuperscript{365} \textit{Moni Pulo Limited v. Brass Exploration Unlimited and 7 Ors}, \textit{supra} note 337 at 114.
to the executive government was given. This action prevented further appeals and sanctioned a judicial precedent which consolidates the Minister’s powers to coordinate activities in Nigeria’s petroleum sector pending the PIB impasse.

5.6 After Effects

Prior to the resolution of Moni Pulo’s case, Nigeria’s legal community actively debated if a transfer of controlling shares in a company with assets in the oil and gas sector will be subject to the Ministers consent.\textsuperscript{366} Two views of the relevant provisions existed—the restrictive and broad perspectives.\textsuperscript{367} The restrictive perspective argued that the Minister’s consent was only required if a legal assignment of the relevant asset or license was effected, i.e. consent was not required for share transfers in companies which owned a license or a lease in the petroleum sector and in interests generated from rights in personem as opposed to rights in rem because a transfer of legal interest in the license or lease did not arise. The broader view contended that any transaction which resulted in a change of control of the license or lease required the Minister’s consent.\textsuperscript{368}

The decision in Moni Pulo’s case embraced the broad perspective by affirming that the Minister’s consent is required in share transactions occasioning a change of control in

\footnotesize{\textsuperscript{366} Agbor, supra note 358.  
\textsuperscript{367} Banwo and Ighodalo, \textit{Guidelines and Procedures for Obtaining Minister’s Consent to the Assignment of Interest in Oil and Gas Assets} (2014).  
\textsuperscript{368} Ibid. A noteworthy case in support of the broad perspective is the transaction between Perenco and Ashland which was structured as a stock sale as opposed to an asset sale to circumvent the need to obtain the Minister’s consent. When the transaction was announced, the Minister revoked Ashland’s interest under the Production Sharing Contract for failure to obtain his consent. See Advocaat Law Practice, \textit{To Be or Not To Be...? That is the Question; New Guidelines on the Requirement of Ministerial Consent for the Assignment of Oil and Gas Leases in Nigeria} (2015).}
corporations with interests in Nigeria’s oil and gas sector. The court decision, however, left unanswered questions regarding the type of transactions requiring the Ministers consent.\textsuperscript{369} The Department of Petroleum Resources responded by issuing a directive titled; “Guidelines and Procedures for Obtaining Minister’s Consent to the Assignment of Interest in Oil and Gas Assets” (“the Guidelines”) which sought to clarify the decision’s gray areas by delineating instances in which the Ministers consent will be required and the procedure to obtain same.\textsuperscript{370} The Guidelines defines assignments as including a variety of transactions that alter interests arising from joint ventures, production sharing contract, service contract, sole risk or marginal fields operations, whether, such interests are sought to be transferred via:

- Private or public listing of shares;
- Mergers and acquisitions of interest holding companies, including transactions involving parent companies outside Nigeria;
- Assignments for corporate reorganization purposes;
- Assignments arising from the operation of law or testamentary device.\textsuperscript{371}

The Guidelines extends the consent requirement to include creations of actual or constructive trusts that will not amount to legal transfers and to cases where any right or privilege arising

\textsuperscript{370} Department of Petroleum Resources, Guidelines and Procedures for Obtaining Minister’s Consent to the Assignment of Interest in Oil and Gas Assets (2014).
\textsuperscript{371} Ibid, para 3.
from a lease or license is transferred. This curtails the prior practice of creating charges over the shares of assets holding companies to circumvent the need to obtain the Minister’s consent.

The Guidelines expands the Minister's power beyond the provisions of the Petroleum Act and even the decision in Moni Pulo’s case and invariably achieves the assignment restricting aim of the PIB. Consequently, transactions which prior to Moni Pulo’s case did not fall within the Minister's purview are now subject to his consent. As it currently stands most structures adopted for business transactions will require the Ministers consent—a conclusion unanticipated by the drafters of the Petroleum Act.

5.7 Conclusion

The resolution of Moni Pulo’s case and it’s after effects signify increased coordination and centralized activity in Nigeria’s corporate governance clime. An aggrieved indigenous oil company through the machinery of the courts instigated a demand for legal change. Two principal functions of law—the protective function and coordinative function—are shown to have clashed against the backdrop of the PIB. The coordinative function of law was used as a

372 Banwo and Ighodalo, supra note 367 at 3.
374 For example, Oando’s 2014 acquisition of ConocoPhillips companies holding interests in Nigeria’s petroleum sector was subject to the Minister’s consent. See Ben James & Adams Blythe, “Nigeria: what consents are now required in upstream M&A transactions?”, (2015), online: <http://www.energylegalblog.com/blog/2015/02/09/nigeria-what-consents-are-now-required-upstream-ma-transactions> (accessed 23 April 2017).
375 It is still argued that an equitable mortgage or charge might not require the Ministers consent. See Osayaba Giwa-Osagie & Emwanta Ehigiato, “Financing options in the oil and gas sector in Nigeria” (2015) 33:3 J Energy Nat Resour Law 218 at 228, 229.
shield to protect a Moni Pulo’s interest and circumvent PetroSA’s corporate right to transfer shares. The Federal High Court consolidated executive power by its decision in favour of executive coordination, unwittingly effecting a change resisted by other actors in Nigeria’s petroleum industry. A contentious ruling was not appealed against with the blessings of the Minister—converting Moni Pulo to a state approved actor. The decision in Moni Pulo’s case facilitated the Department of Petroleum Resources subsequent release of directives to achieve policy directions perceivable from the PIB.

The happenings in Moni Pulo’s case typify Milhaupt and Pistor’s framework in Nigeria’s developing clime. Nigeria’s legal organization is dominated by an executive president with pervasive influence that extends to the oil and gas sector, this control is contested by other actors who have resisted the PIB. Moni Pulo demand for law resulted in the coordinative function of law overshadowing the hallowed ideal in common law jurisdictions and mainstream law and finance literature—the protective function of law. It will be interesting to note how this iterative relationship between law and Nigeria’s petroleum corporate governance plays out.
Chapter 6: Nigeria’s Quest

Alas, the relationship between law and capitalism, like many things in life, is far more complex than one would hope for in an ideal word. But in the complexity lie discernible patterns, the perception of which promises to change the way we understand a subject that has, with good reason, occupied generations of scholars.
- Milhaupt and Pistor\textsuperscript{376}

Our institutional autopsies suggest that countries do not remain in legal stasis. Both the degree to which economic systems rely on legal governance and the nature of legal governance in a given system can change significantly over time.
- Milhaupt and Pistor\textsuperscript{377}

As we come to see that there is no pre-ordained script to follow and experimentation is essential, recognize that the appropriate policy mix depends very much on the national context, and see that legal systems are varied and deeply embedded, we recognize that, for law and development scholarship to have impact on policy, it must always pay close attention to local history and context. And that means that the scholars of the South, who are closest to the local realities, must play a central role in the production of law and development knowledge.
- Trubek\textsuperscript{378}

6.1 Summary

This thesis criticizes LLSV’s perspective on the relationship between law and economic development. A paradigm principally based on the origins of a nation’s legal system—classified into English common law, German civil law, Scandinavian civil law, and French civil law. I have embraced an alternative perception, which acknowledges the difficult relationship between the two concepts and attempt to identify patterns in the iterative relationship between law and markets. I employ Milhaupt and Pistor’s framework based on the organization of legal systems,

\textsuperscript{376} Milhaupt & Pistor, supra note 2 at 13.
\textsuperscript{377} Ibid at 217.
the functions of law and a nation’s political economy, to identify the various interests at play in Nigeria’s capitalism and to understand how law is wielded to achieve development in Africa’s giant.

A federal system of government was adopted in Nigeria to prevent dependence on the centre and dispel the fears of various interest groups by decentralizing authority. However, based on the framework, I perceive Nigeria to be a centralized state as key areas of lawmaking (including corporate law), law enforcement, control of the principal source of revenue (oil and gas sector), lessons from her civil war, effects of the military’s involvement in governance, a dependent judiciary, and lack of coordinated interest groups all contribute to this classification. Coordinative, protective, signalling and credibility enhancing functions of law are all identified to be relevant and interrelated roles of law in Nigeria’s capitalism. Law’s coordinative function is shown to be the dominant use of law in market activities in Nigeria—this role has been upheld and largely accepted by her courts, lawyers, law enforcement agencies and business groups.

Institutional autopsies are conducted on pivotal corporate crises to determine how the organization and functions of Nigeria’s legal system change under traumatic periods. Nigeria’s 2009/2010 banking crisis is revealed to have resulted in increased demand for coordination and centralization of Nigeria’s corporate governance clime, a move also embraced in the resolution and after effects of the case of Moni Pulo v. Brass. This move is contested by other actors in Nigeria’s political economy and the resolution and long term effects of the contestation remain to be seen as this scuffle is currently ongoing.
6.2 The Elephant in the Room: Corruption in Nigeria

It is inappropriate to speak of Nigeria’s development quest without highlighting the role of corruption. To say corruption is pervasive in Nigeria is a gross understatement. The extent of corrupt practices that have occurred over the years in Nigeria is astounding. Achebe in 1984 wrote, “Corruption in Nigeria has passed the alarming and entered the fatal stage; and Nigeria will die if we keep pretending that she is only slightly indisposed.”379 Obviously, Achebe misjudged the tenacity of Nigeria. In 2006, Ribadu revealed that Nigerian officials had misappropriated more than $440 billion between 1960 and 1999.380 A sum (which has since increased) multiple the funds required to rebuild Europe after the devastation of the Second World War.381 In 2015, The Economist magazine published an article on Nigeria titled, “Corruption, the only thing that works.”382 An allegation, which is unfortunately true. In 2016, the British Prime Minister rightly called Nigeria “fantastically corrupt.”383

The negative impact which corruption has on development is experienced in Nigeria.384 PwC estimates that corruption cost Nigeria about $1000 per person in 2014 and if not curtailed would increase to nearly $2,000 per person by 2030.385 The Niger Delta region from which most of her

381 Ibid.
384 For consequences of corruption on development see Trebilcock & Prado, supra note 5 at 151-157.
oil wealth is derived is one of the most polluted and least developed areas in Nigeria; making a quintessential example of the resource curse. \(^{386}\) Nigeria has not fared much better, despite her vast natural resources there are corrupt incidents on a daily basis to make the heart bleed. \(^{387}\) Her poverty rate has increased over the years despite increase revenues generated. \(^{388}\)

Corruption in Nigeria is systemic and attributable to variety of factors and interests. Inferred causes include; a perverse value system, \(^{389}\) a political economy of patronage, \(^{390}\) lack of accountability, \(^{391}\) a vestige of colonialism, \(^{392}\) public acceptance of vice, \(^{393}\) resource curse, \(^{394}\) poor leadership and lack of political will to combat the menace, \(^{395}\) military rule, \(^{396}\) government

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\(^{388}\) Supra note 12


\(^{395}\) Achebe, supra note 379 at 1, 11.
domination of the economic sphere,\textsuperscript{397} and ethnic loyalties.\textsuperscript{398} To underscore its existence since Nigeria’s independence, Ribadu identifies corruption as the only thing common to all successive governments.\textsuperscript{399} Headways made in combatting this scourge in Nigeria are activities taken with the full authority and support of Nigeria’s Head of State. For example, Adebanwi and Obadare attribute the early successes of the Economic and Financial Crimes Commission in reducing corruption to the initial unalloyed support of President Obasanjo.\textsuperscript{400} This emphasises the centralised nature of Nigeria’s legal system and the need for the full blessings of the executive government to curtail corruption and attain development. Regrettably, this vital support is lacking.

\textbf{6.3 Organization of the Nigerian Legal System}

This thesis facilitated an in-depth analysis of the dynamic interplay between law, markets and the Nigeria’s political economy. It was discovered that the financial and petroleum sectors are integral to Nigeria’s economy and the governance structures of these sectors speak to the preferred role of law in Nigeria’s political economy. The 2009-2010 banking crisis reveals that personal relations and not law is the preferred governance structure in Nigeria as the CBN governor thought it prudent to obtain permission before commencing action he was legitimately

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\textsuperscript{399} Ribadu, \textit{supra} note 380.


\end{footnotes}
vested with. The preference is also highlighted in the fact that the award of oil licenses is subject to the President’s discretion, a stance which was sought to be extended to other corporate transactions in the petroleum sector by the PIB and subsequently achieved by the case of Moni Pulo v. Brass and DPR’s directive. Consequently, personal relationship and coordination of public and private interests remain pivotal in Nigeria’s governance structure.

The institutional autopsies conducted reveal that law is currently being used to reinforce Nigeria’s centralized, coordinative and informal institutional setup. I perceive the centralization of Nigeria legal system to be a step in the right direction, as a decentralized system will not function effectively in her clime. The adopted institutional framework has proved to be capable of successfully attaining development in a number of countries. For example, countries of East and South East Asia despite their characterization as semi-democratic or authoritarian with corrupt government-business relations, state led capitalism, and non-transparent systems have been able to achieve high growth rates with reductions in poverty levels. However, Nigeria though similarly characterized has not enjoyed a reduction in poverty levels or been able to achieve development on par with such countries. The reason for this disparity is an area for further research. In Nigeria’s quest for development, the adopted institutional setup has not delivered returns and it remains to be seen if any change will result from this reinforcement. I believe important interest groups are still insufficiently organized and unable to serve as

401 Adeniyi, supra note 276 at 76; Makanjuola, supra note 275 at 11, 12, 64, 65.
402 Nwokeji, supra note 209; Agbor, supra note 358.
404 Haggard, supra note 273 at 217.
effective watchdogs on other interest groups in addition to the executive government. With the continuation of this deficiency, Nigeria’s government and corporate malfeasance, wastefulness, corruption and under development will continue until potent independent watchdogs become established.

Law serves dual purposes for various actors at play in Nigeria’s capitalist economy. The interplay of the state and government approved actors in responding and enforcing legal governance goes together with non-state actors seeking to make use of the protective function of law to various ends. Law is used to strengthen the grip of the state on factors of production as revealed in the resolution of the institutional autopsies i.e. the proliferation of codes of corporate governance issued by government agencies and the decision in Monu Pulo v Brass enforced by DPR’s Guideline which consolidated executive authority in coordinating the petroleum sector by stipulating that Ministerial consent was required in variety of corporate transactions involving companies with interest in the sector. Conversely, law is viewed as a potent tool in preventing overt state action and protecting rights of the less powerful, who can afford to make use of the courts; epitomized by the use of bank’s former chief executive officers to delay trial.

Evidence is found in agreement with Milhaupt and Pistor’s thesis that all legal systems entail a mixture of elements of centralization and decentralization regimes, with law’s coordinative function containing a degree of protective characterization and vice versa. The continuous interaction between Nigeria’s executive government, legislature, judiciary, corporations, 

405 Milhaupt & Pistor, supra note 2 at 182.
religious organizations, militants and indigenous groups, and private individuals show that coordinating and protective functions of law go hand in hand. The resolution of the 2009-2010 banking crisis which resulted in increased centralization and coordinative responsibility is couched in terms of protecting customers’ deposits.\textsuperscript{406} Similarly, the decision in Moni Pulo’s case and DPR’s reinforces the authority of the Minister in the petroleum sector is identified as protecting the state’s interest in a vital sector of the economy.\textsuperscript{407}

The control of access to law making and enforcement, which affects legal outcomes and contributes to an increase in the centralization of Nigeria’s political economy, is highlighted in the institutional autopsies. The lack of an independent judiciary and the high cost and delay in making use of this institution contributes to the dominance of government actors in law making and enforcement. Also, the ability of state actors to step in and influence non-state actors to achieve policy goals is highlighted by parties’ settlement in Moni Pulo’s case after a judicial precedent favourable to the executive government is granted by Federal High Court. Courts may also be sidestepped to achieve various aims when the involvement of the third arm of government will be viewed as problematic—underscored by the pains the CBN went to ensure the judiciary only got involved at later stages of resolving the banking crises.\textsuperscript{408}

\\[406\text{ Sanusi, supra note 254 at 3, 4.}\]
\[407\text{ Moni Pulo Limited v. Brass Exploration Unlimited and 7 Ors, supra note 337 at 104.}\]
\[408\text{ Makanjuola, supra note 275 at 12.}\]
The crises events analysed were triggered by changes in demand for legal governance which resulted in modifications to Nigeria’s corporate governance clime.409 The 2009-2010 banking crises resulted from the revelation of damaging information about the operation of Nigeria’s financial market and banks’ heads—culminating into a demand for legal change. Similarly, Moni Pulo’s v Brass was incited by a change in demand for Minister’s oversight to curtail a change in corporate control despite the indeterminate state of the PIB. Therefore, the autopsies point to the pivotal role of a change in legal demand to attaining legal alteration in the ongoing construction and deconstruction of Nigeria’s legal governance.

Nigeria is a complex state with substantial potential and many problems. In consonance with her legal system, dominant function of law, political economy, and perceived path to institutional change in the twenty-first century. It is imperative to explore means of improving her governance structure and ways of enhancing the coordination of interest groups to serve as an unofficial ombudsman on the state and political-economic elites.

6.4 Conclusion

I find the current state of law and development scholarship deficient with a narrow comprehension of interests, actors, needs and entrenched institutions in play in the quest for a nation’s development. I believe the undue emphasis on legal systems adopted ages ago contribute to this paucity. Milhaupt and Pistor’s framework, although simple avoids this pitfall

409 The reasons for the changes in demand are in consonance with Milhaupt and Pistor’s typical reasons for market change in capitalist economies. See Milhaupt & Pistor, supra note 2 at 28.
and serves as an interesting tool for deciphering and dissecting a country’s political economy; while attempting to chart the process to future legal change in the continued quest for development. In this thesis, I have focused on Nigeria; situating her as a centralized legal system, where the coordinative function of law plays a paramount role and identified major interest groups and political actors in her political economy. Subsequently, I conducted institutional autopsies of Nigeria’s 2009-2010 banking crises and the case of Moni Pulo v Brass to help understand Nigeria’s governance structure, path to legal change and the iterative interaction between law and markets. I hope this thesis provides a foundation for future research on the iterative relationship between law and markets in Nigeria’s political economy in her continued quest for development.
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