Legal Reform of the Land Use Act:
Protection of Private Property Rights
To Land in Nigeria

A thesis submitted to the University of Manchester for the degree of
PhD
in the Faculty of Humanities

2012

Uche Modum
School of Law
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ABSTRACT

University of Manchester
Uche Modum
PhD
Legal Reform of the Land Use Act: Protection of Private Property Rights to Land in Nigeria
February 2012

Strong private property rights to land are recognised as fundamental to the protection of individuals’ property rights within a country’s legal system. Legal reform of inadequate and inefficient property rights laws is therefore essential. My thesis aims to address the lack of legal reform of the laws governing property rights to land in Nigeria. It does this by critically examining the Land Use Act, set up as the primary body of legislation governing property rights in Nigeria.

The thesis seeks to offer meaningful insights by proposing an institutional analysis of the limitations to reform of existing laws governing property rights to land in Nigeria. Several approaches of new institutionalism are explored in analysing identified constraints which exist within formal and informal institutions. Explanations of the absence of legal reform are addressed through themes examining the formal and informal institutional structures which limit reform. Analyses of institutional structures highlight the significant role played by institutions in the establishment and development of property rights laws in Nigeria. An in-depth look at Nigerian private property laws and legally recognised interests on land exposes fundamental limitations to private property rights protection of individuals within the Nigerian state. The thesis provides valuable insights and addresses institutional limitations through consideration of strategies which would enable and assist legal reform of Nigeria’s property rights laws. The study concludes by exploring three aspects. First, it offers reform proposals and analyses the functionality of the proposed reform suggestions. Second, it highlights principles of policy-making redesign within formal institutions. Finally, it offers strategies to assist reform within informal institutional structures.

In short, the thesis focuses on enabling legal reform of Nigerian property rights laws to ensure the amendment, modification or excision of bad, inefficient laws in order to offer better protection of individuals’ property rights to land.
DECLARATION

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DEDICATION

This thesis is dedicated to my husband Herbert who loves and believes in me absolutely, and to my gorgeous parents Prof & Prof (Mrs) Modum who have always believed in me and continue to give me their endless love and support.
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This PhD has been an incredible journey of self-discovery and there are many people who have enriched my experience, teaching and inspiring me along the way. I am tremendously grateful for this.

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Chapter One

1.1 Research Background

Legal reform is the essential and desired response to the existence of bad and inefficient laws within a state. The question of why there has been no reform of the laws governing property rights to land in Nigeria despite its numerous inefficiencies and shortcomings is therefore deeply relevant and important. Property rights to land are widely accepted as fundamental to the protection of individuals’ rights within a state.¹ Strong private property rights regimes which ensure secure acquisitions of land and free alienation have been credited as the main reason why some countries provide better protection for individuals’ property rights to land than others.² The main aim of this thesis is to examine the need for reform of the laws in Nigeria in order to provide better protection of private property rights to land for individuals.

In Nigeria, property rights have had a chequered history.³ Prior to 1978, property rights to land were privately and communally owned in most communities in southwest Nigeria.⁴ Common practice was that land was vested in communities through lineage memberships and individuals were entitled to ownership interests in portions of communal land as members of

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¹ Stanfield D. *The Strategy for Addressing Property Rights Issues* (2006) A summary of discussions at the Land Tenure Centre, University of Wisconsin at jdstanfi@wisc.edu


³ Augustinus C. and Deininger K. *Innovations in Land Tenure Reform and Administration in Africa* In “Land Rights for African Development from Knowledge to Action.” (2005) CGIAR system wide program on collective action and property rights, United States Development Programme (UNDP) and International Land Coalition, Geneva. In Nigeria, land is the main productive resource of the rural populace which makes up about 52 per cent of the nation’s population. Emphasizing the significance of land, Augustinus and Deininger assert that “land access and the ability to exchange it with others and to use it effectively are of great importance for poverty reduction, economic growth and private sector investment as well as for empowering the poor…”

families or clans. Alternatively, in the ten Northern States of Nigeria, a nationalised system of land tenure granting individuals mere interests rather than full ownership rights had been in application since 1916. In 1978, the Land Use Act (herein referred to as the LUA) was set up as the primary body of legislation governing property rights to land in Nigeria. The LUA extinguished all ownership rights to land communally and individually held and vested all ownership rights in the Executive Governors of each state to be held in trust for the common benefit of all Nigerians. The effect of the legal promulgation of the LUA has been to severely limit and constrain private property rights to land. Despite considerable literature heavily criticising the provisions of the LUA and emphasizing the need for legal reform, there is still confusion and questions with regard to the factors that limit reform of the laws. The research sets out to examine and analyse the reasons why the LUA has not been successfully reformed in over 33 years. The analysis and the explanation of the absence of legal reform is addressed through themes examining the present laws governing property rights to land in Nigeria and the formal and informal institutional structures which limit reform of the laws. By doing this, the thesis recognises and points at the significant role played by institutions in the establishment and development of the laws of the LUA. Ultimately, the thesis seeks to contribute to the current debates by proposing an institutional analysis of the limitations to reform of existing laws governing property rights to land in Nigeria and addressing the legal and socio-economic issues arising from the analysis by way of a number of reform proposals.


1.2 Current Status of Research

As pointed out in the above section, the failure to achieve successful legal reform of the laws governing property rights to land to provide for the better protection of individuals’ private property rights in Nigeria has triggered considerable research and debate. The theoretical basis of the thesis is derived from the institutional analysis of the limitations to the legal reform of existing laws. Certain new institutionalism approaches and theories are explored to achieve in-depth analyses of constraints which exist within formal and informal institutions in Nigeria. The work of North\(^7\) represents a starting point of the research with his recognition of the role that norms, rules and laws imposed at the inception of institutions have in shaping and influencing outcomes long after the establishment of the relevant institutions.\(^8\) Historical institutionalists like Thelen, Steinmo\(^9\) and Hall\(^10\) draw on a similar premise in their analysis of policy choices and reform by pinpointing the strong influence of history in any legal policy change and development. Further, North and Thomas\(^11\) adopt path-dependent ideas similar to those propagated by historical institutionalists and contrary to their own rational choice institutional beliefs in labelling and explaining the effect of the “conservatism of existing institutions.”\(^12\)

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\(^9\) See Thelen K. and Steinmo S. supra n 8 above.

\(^10\) Hall P. A. supra. See n 8 above.


\(^12\) North and Thomas refer to the term “conservatism of existing institutions” to highlight their belief that institutions evolve in a path-dependent manner and therefore inherited laws and customs have a fundamental effect on present laws, norms and customs.
institutional constraints to legal reform, March and Olsen use their theory of normative institutionalism to justify their belief that rules and norms are habitualized and routinized within institutions. Their argument is that routinized rules and norms lead to the existence of institutional constraints based on what they refer to as the “logic of appropriateness”. In relation to the laws of property rights to land in Nigeria, the concepts of institutionalism and institutional constraints are explored within the federal separationist features of the Nigerian state. Contribution to the thesis theoretical background is provided by Adigun and Omotola. Adigun refers to the effect of institutionalism and its limitations to legal reform by exploring the difference in the concept of “trust” to property rights within formal institutional structures in Nigeria. The issue of institutionalism is also central in Omotola’s critical approach to the issue of corruption as an informal institutional constraint that limits legal reform. Helmke and Levitsky base their concept of institutionalism on establishing the link between informal institutional constraints and existing formal institutions. This they achieve by highlighting the effects of this institutional link to legal reform. Furthermore, concepts proffered by Buchanan, Beaulier and Subrick are explored to thoroughly address how to successfully achieve legal reform within institutions.

Beyond the theoretical framework, the thesis proposes a theoretical and substantive approach aimed at addressing the legal issues arising from the lack of legislative reform within the Nigerian private property rights laws. This it achieves by analysing existing formal

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14 This is explained in greater detail in a subsequent chapter. See also March and Olsen *supra* n 12 above.
and informal institutional constraints within present laws and proposing possible reform solutions to achieve legal reform. The institutional theoretical framework anchors the analyses of legal and socio-economic issues and presents the foundation for the practical and substantive proposals given in Chapter Five of the thesis. The research carried out in the thesis ultimately aims to contribute to the ongoing debate on the need for reform of the laws governing property rights to land in Nigeria.

1.3 Aim of the Research and Research Questions

The thesis addresses two research questions. The first question is why has there been no reform of the laws governing property rights to land in Nigeria. The second question is what should be done to successfully achieve legal reform. The thesis’s fundamental aim in addressing the first research question is premised upon a theoretical framework of varying theories of institutionalism which allow for an analysis of the present laws governing property rights in Nigeria. The theoretical enquiry forms the background upon which the limitations which exist within formal and informal institutions are identified and explored. The interrelation between formal and informal institutional structures and their effect on the reform of present laws is at the centre of the research. The research follows two main lines of enquiry in analysing the lack of legal reform within Nigerian private property rights laws. The first line of enquiry provides explanations to the limitations which exist within the present laws and examines how existing formal institutional structures have prevented legal reform in Nigeria. Provisions of the legislative Act solely responsible for governing all matters regarding private property rights to land are critically examined to determine cause and effect limiting legal reform. The second line of enquiry explores informal institutional constraints and exposes a high degree of interdependence between the institutional constraints which exist within society and the formal laws limiting reform. The thesis
proposes an alternative approach in addressing the second research question of what is needed to achieve successful legal reform of private property rights laws to land in Nigeria. It is observed that the limitations which exist within informal institutions have a pervading effect on formal institutions and vice versa; both institutions serving to undermine or limit legal reform. Chapter Two establishes the theoretical framework which is used to answer the thesis’s research questions. The first research question is addressed in Chapter Three and Chapters Four of the thesis. Chapter Three addresses the substantive legal issues which limit legal reform within the research while Chapter Four addresses socio-economic issues that adversely affect and constrain legal reform of private property rights laws. Chapter Five tackles the second research question by proposing reformatory suggestions aimed at achieving the successful legal reform of the laws governing private property rights to land in Nigeria. The consideration of several strategies in Chapter Five to facilitate and enable legal reform argues for a more pro-active or assertive approach towards amending or modifying inadequate laws.

1.4 Methodology

The thesis adopts a qualitative literature based approach. The main sources for the research are primary and secondary resources and the thesis relies on legal, political and socio-economic literature to establish the theoretical framework and thoroughly analyse the relevant legal and social issues. The thesis adopts a comparative analytical approach to exploring variances within the formal institutional structures of the UK, US and Nigerian legal systems. To the extent that the research focuses on the examination of institutional constraints, the next phase of the thesis specifically analyses the relevant Nigerian legislative

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20 The primary resources consist of Nigerian, UK, EU, and US statutes, as well as common law applications while secondary resources consist of case reports, journals, articles and books.
Act and uses several hallmark case law to carry out an in-depth study of the formal institutions in Nigeria.\textsuperscript{21} The research adopts a parallel examination of the “knock on effect” of informal institutional constraints on existing formal institutions and legal reform. The significance of the aspect of the research is to achieve a well-informed and extensive analysis of the reasons why reform of the private property rights laws to land has failed in Nigeria. The thesis discusses reform proposals to deal with the central problem of legal reform failure by suggesting strategies of amendment and excision, and proposing substantive legal and socio-economic reformatory suggestions.

1.5 Structure of the Thesis

The thesis is divided into six chapters. Chapter One is the Introduction chapter. It outlined the background to the thesis, revealed the current status of the research and presented the research questions to be undertaken as well as the methodology that is used.

Chapter Two forms the theoretical framework of the thesis. It contributes to the thesis in three significant ways. The first contribution of the chapter is the examination of theories of institutionalism and varieties of new institutionalism as a foundation for analysing the absence of legal reform of the private property rights laws to land in Nigeria. The second contribution that this chapter makes to the thesis is to highlight the relevance of the concept of the rule of law in order to ascertain its influence on institutional structures within legal systems. The third contribution of the chapter to the thesis is to explore the pivotal role of institutional structures within a state as a determinant for progressive legal reform. In sum, the theoretical underpinnings of the thesis are established in this chapter to substantiate the discussions conducted in subsequent chapters.

\textsuperscript{21} The thesis analyses several relevant cases to illustrate limitations which exist within the formal institutional structures preventing legal reform.
Chapter Three analyses the property rights laws governing rights to land and explores the issues arising in connection with all legally recognised interests that may be conferred on individuals under the Nigerian law. The chapter looks at the formal institutional constraints that limit reform of the laws and considers the main reasons why these constraints exist.

Chapter Four explores the role of informal institutions vis-à-vis formal institutions and establishes the link between constraints inherent in both institutional structures and their effect on legal reform. The research here involves an examination of the impact of informal institutional constraints on formal institutions. Chapters Three and Four of the thesis are both important because they jointly provide answers to the question of why there has been no reform of the laws governing property rights to land in Nigeria.

Chapter Five considers different strategies to enable legal reform and the basic underlying principles which are fundamental to the success of any proposed or suggested reform of laws. Chapter Five completes the analysis by proposing amendments and suggestions to eliminate or reduce institutional constraints within formal and informal institutions and promote progressive legal reform. Chapter Five of the thesis is important because it answers the second research question of what is needed to achieve the successful legal reform of the laws of private property right laws to land in Nigeria.

Chapter Six is the conclusion. It draws together the themes and issues discussed within the previous chapters. It illustrates how they relate to the research questions and provides an overview of the reform proposals suggested.
Chapter Two:
Institutions and Legal Reform of Property Rights to Land

2.1 Introduction

This chapter establishes the theoretical underpinning of the thesis. Its aim is to set the scene for understanding why there have not been reformatory changes to the laws governing private property rights to land in Nigeria. The relationship between property rights and reformatory changes to the laws governing the protection of these rights is a crucial factor in determining whether there is adequate protection of individuals’ private property rights to land. For there to be effective private property rights within a country’s legal system, there needs to be constant reformatory changes to the laws governing these rights. Legal reform is therefore essential to maintain an efficient property rights system. One of the most striking factors in the development of the laws governing property rights on land in Nigeria is that there has been no change to the 1978 Land Use Act. The 1978 Act is the main legislative body governing property rights on land in Nigeria. In the last thirty-four years in spite of the wholesale critique of its legal provisions and the institutional limitations created due to its continued existence and applicability, there has been no successful reform of its laws.22 In order to ascertain why legal reform of private property rights to land in Nigeria has not taken place, certain factors and pre-requisites which are essential for reform to take place need to be considered. The chapter is therefore structured as follows. First, the chapter addresses the fundamental criteria which are essential for legal reform to occur - strong and efficient institutions. It begins by contemplating various concepts and theories and their applicability to the legal reform of the laws governing property rights to land in Nigeria (2.2). To this end, an examination of theories of institutionalism as a foundation for analysing the lack of legal

reform to property rights to land in Nigeria is carried out. This is achieved by exploring theoretical institutional approaches and considering old versus new institutionalism. The varieties of new institutionalism is examined in relation to its applicability to the laws governing the better protection of individual property rights to land in Nigeria and its relevance for the thesis. Further, the applicability or lack thereof of the “legal origins” theory to the reform of Nigeria’s laws of property rights to land is considered. Another important factor considered is the legal prerequisites necessary in order to achieve successful land reform within institutions (2.3). Three significant characteristics required to achieve reform within institutions are therefore examined. Firstly, the concept of the rule of law is analysed to ascertain its influence on institutional structures. Secondly, a key factor which is essential for land reform within institutions - secure property and contract rights - fundamental to the protection of individual members’ private property rights is discussed.

The chapter goes on to address model types of institutional configurations and the effect of different inter-institutional constraints on legal reform (2.4). To this end, an analysis of two functioning model legal institutions, the Westminster Model and the United States Model are carried out. It proceeds to carry out an examination of the Nigerian model by using a comparative analytical approach against the United States model. The analysis of the institutional structures within the Nigerian model is to determine whether constraints inherent in these institutions have resulted in the lack of reformatory changes to the laws. The constraints within Nigeria’s existing formal institutions is highlighted as an important deterrent to legal reform in relation to private property rights to land (2.5). The chapter ends with a conclusion (2.6).

23 The relevance of this analysis of the two legal systems is that both legal regimes have existed in Nigeria. The Westminster-type parliamentary legal system existed in Nigeria during the First Republic (1960-1963) Subsequently, the United States federal presidential legal system was implemented into the Nigeria’s legal regime.
2.2 Institutional Approaches: Old v New Institutionalism

Legal scholars and policy analysts are consistently seeking to understand the precise role of institutions within legal systems. It is easy enough to understand that a well structured legal framework governing property rights cannot exist on its own. Rather, it needs the existence of a number of efficient complementary institutions including a strong legislative body to create and amend out-dated laws, an executive arm for the necessary implementation, and an independent judiciary to decide on the efficacy and applicability of the laws. It is therefore crucial to consider four important indicators of institutions. The first feature is that institutions are the structural framework for a society or state. The structural framework provided by institutions may be either formal or informal. However, they must involve individuals and groups of individuals in “patterned interactions that are predictable based upon specified relationships among actors.”

The second indicator of institutions is the existence of a certain amount of stability over time. In other words, there needs to be a pattern of consistency and predictability for it to qualify as an institution. The third important indicator of institutions is that it must affect individual behaviour. This simply means that institutions must constrain or otherwise affect or influence the behaviour of its members. The fourth indicator of institutions is that there should be shared values and meaning among the members of the institution. To fully grasp the concept of institutions within legal systems, a definition of institutions is required. Institutions have been defined as “the rules of the game of a society or more formally the humanly devised constraints that structure human

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25 Ibid, Peters Guy B. n 24 above. Peters provides examples of formal institutions as the legislature or the judiciary while informal institutions are a network of interacting organisations or a set of shared norms.
26 Supra see Peters Guy n 24 above at p. 19.
27 The constraints could be either formal or informal but they must have an effect or influence individuals’ behaviour. Supra see Peters Guy n 24 above.
interaction." Institutions are constituted in a vacuum of repetitive and enduring regularities of human interaction cultivated in situations structured by rules, norms, shared strategies and the physical world. Institutions perpetuate fundamental restraints created by human beings. This may be provided for through formal rules such as common law, statutory law and regulatory measures. In the case of informal institutions, the constraints are provided through conventions, norms of behaviour and self imposed codes of conduct. An aspect of institutions not to be ignored is its enforcement and administration mechanisms. It is asserted that the ability of an institution to function effectively, partially or minimally is dependant on the efficacy of its enforcement mechanisms. The role of institutions in society is to minimise uncertainty by establishing a stable (although in practice not necessarily always efficient) structure to human interaction. It is clear that structure, functionality and efficiency of institutions matter. This is supported by the widespread consensus that certain institutions are particularly conducive to legal reform. A wide range of legal institutions are deemed suitable and essential. These legal institutions include property law, human rights law, commercial law and administrative law. Pertaining specifically to property law, clear, well defined and


30 Crawford Sue E. S. and Elinor Ostrom A Grammar of Institutions American Political Science Review 89 3: 582 where there is a discussion of the different approaches in answering the question ‘what is an institution?’ Works by Menger, Schotter, Riker and Calvert, well known political scholars have referred to stable patterns which arise from mutually understood performances from actors optimising behaviour as creating institutions.

31 A further indicator is its ability to reform its laws in order to keep up with an evolving global society.


34 The writings of Max Weber emphasize the link between development and legal institutions and the importance of maintaining a competent and independent judiciary in order to uphold the rule of law.
alienable private property rights and a formal system of contract law have been determined as vital to protecting the private property rights of individuals.\textsuperscript{35}

In order to carry out an institutional analysis of limitations to legal reform of the laws governing property rights to land in Nigeria, it is essential to acknowledge existing institutional approaches. In light of this, a thorough analysis of institutions and institutionalism must consider and distinguish the study of “old institutionalism” from “new institutionalism.”\textsuperscript{36} Old and new institutionalism refers to the two different approaches undertaken by scholars in carrying out institutional analyses within legal systems and societies.\textsuperscript{37} Old institutionalism (herein referred to as OI) has undeniably been instrumental to the development of institutions and institutional analysis. Peters\textsuperscript{38} believes that OI has developed wide and substantial research into institutions.\textsuperscript{39} It is considered to have laid the foundation for the factors that presently motivate new scholars of institutions and institutionalism. However, OI is considered to have certain shortcomings.\textsuperscript{40} OI tended to focus predominantly on the formal institutional features of institutions within legal systems. An example of an OI type analysis is a sole focus on the form of the legal system. The primary focus on whether the legal system is presidential or parliamentary, federal or unitary, without analysing the manner in which specific individual institutions within relevant legal


\textsuperscript{36} The old and new institutionalism refers to the two major traditions of institutionalist thought and analyses carried out by political, sociology and economic scholars.

\textsuperscript{37} The old institutionalism was the first tradition of institutional analysis adopted and used by scholars in the nineteenth and twentieth century. The new institutionalism became a successful reformation of the original old institutional analysis reflecting many features of the older version but also advancing the study and analysis in new theoretical and empirical directions.


\textsuperscript{39} Old institutionalism (OI) is defined as an approach to the study of institutions that focuses on the formal institutions of government. OI as an approach to the study of institutions was popularly used until the early 1950s and is still referred to as the foundation for institutional analysis.

\textsuperscript{40} OI has been criticised by new institutionalists.
systems actually functioned has been the subject of criticism by new institutionalists.\textsuperscript{41} OI also made no attempt to analyse the same institutions (for e.g. legislatures) within two differing presidential or parliamentary legal systems. Neither did it go beyond the formal or constitutional institutions to analyse informal institutional structures within state and society.\textsuperscript{42} Rather than carrying out comparative analysis of individual institutions like legislatures and executive institutions within legal systems, OI scholars tended to adopt a holistic approach of comparing whole legal systems against each other.\textsuperscript{43} The effect of this holistic approach was that the OI analysis tended to just describe a country’s legal system in its entirety one after the other.\textsuperscript{44} By focussing primarily on formal structure,\textsuperscript{45} OI largely addressed only the constitutional institutional features of legal systems.\textsuperscript{46} In other words, OI paid singular attention to the mechanisms of the legal governing system of the state and how the legal system affected the behaviour of citizens within the state.\textsuperscript{47} OI’s penchant for analysing legal systems in their entirety raised difficulties in achieving a substantive analysis of institutions. Consequently, institutional theory development suffered as a result.\textsuperscript{48} The result of the dissatisfaction with the analyses of OI was the birth of the institutional theories

\textsuperscript{41} Old institutionalists analysed institutions purely as formal and constitutional.

\textsuperscript{42} Wilson W. “Congressional Government: A Study in American Politics.” (1956) Cleveland World Publishing. OI scholars like Wilson would look at the United States Constitution in order to determine what was considered as defects within the formal design of the system without considering how the individual institutions actually functioned within the legal system as well as the effects of informal institutional structures within the society.

\textsuperscript{43} One criticism of the old institutionalism by the new institutionalists is that the structuralist approach adopted by the old institutionalists focussed too much on formal systems and did not take into account the impact of individuals in influencing events within the state. Thus, OI advocated a focus on the role of law and legalism in analysing institutions.

\textsuperscript{44} See Sundquist J.L. “Constitutional Reform and Effective Government.” (1992) Washington D.D. The Brookings Institution. One of the criticisms of OI is that it was content to just describe institutions while new institutional analysis goes further to examine actual behaviour rather than limiting itself to only formal and structural aspects of institutions.

\textsuperscript{45} Pagett J.F. and Ansell C. Robust Action and the Rise of the Medici (1993) American Journal of Sociology 98, at p. 1259-1319. Pagett and Ansell assert that law offers a framework for the state as well as an important way that the government can affect the behaviour of its citizens.


\textsuperscript{47} Damaska M.J. “Faces of Justice and State Authority.” (1986) New Haven, Yale University Press. Further, OI emphasizes the importance of structure and highlights the belief that structure determines behaviour.

of NI.\(^{49}\) New institutionalism (herein referred to as NI) developed not only to “reassert some of the virtues of the older form of analysis but also to make a statement about its perceived failings…”\(^{50}\) This chapter acknowledges the relevant structural elementary analyses of OI. It does this whilst also actively using NI to analyse institutions, institutional change and the lack of legal reform to property rights to land in Nigeria. In relation to the lack of legal reform of property rights in Nigeria, this analysis goes beyond an OI type analysis of formal and structural aspects. This it achieves by not limiting itself to just a presidential versus parliamentary legal systems analysis. It proceeds to address the prototypes of the Westminster and United States model legal systems which are part of Nigeria’s legal regimes history. Further, it becomes even more specific by comparing two different types of presidential systems – the United States and the Nigerian model and how the individual institutions within the differing legal systems function. It embarks on this by pitting legislative institutions against each other, as well as executive and judiciary institutions respectively. The aim is to determine how they function, and what limitations exist to inhibit or restrict the better protection of individual property rights to land. Going beyond the boundaries of OI analysis of formal institutions, it uses elements of NI analyses in its discussion of informal institutional structures\(^{51}\) that affect and constrain the reform of property rights to land in Nigeria. Following the above discussion, the next issue to be addressed are the varieties of NI and their relevance in analysing the role of institutions within the Nigerian legal system.

\(^{49}\) NI is often referred to as if it is a single theory but in actuality, there are different strands of thinking contained within it. Although the different theories within the NI agree that that they all have the same fundamental approach to institutional analysis and share a common focus on the structures of the public sector within the state, there are disparities and differing views within the different strands of theories.

\(^{50}\) Supra, see Guy Peters n 24 above at p. 11.

\(^{51}\) A detailed analysis of informal institutions that constrain legal reform of the laws governing property rights to land is carried out in Chapter 4 of the thesis.
2.2.1 The Varieties of New Institutionalism (NI)

In considering the role of institutions to legal reform of property rights to land in Nigeria, this section explores certain strands of thinking developed by NI. The NI theories considered each have a deterministic approach and may not all be compatible with each other. However, they all serve to emphasize different aspects of institutions which are relevant to understanding the role of institutions within legal systems. By using certain NI approaches to understand existing institutions in Nigeria, an in-depth analysis of the constraints that exist within formal and informal institutions in Nigeria is carried out to understand limitations to the legal reform of private property rights to land in Nigeria.

The first theory to be discussed is the NI theory of structural institutionalism. It has been referred to as a more refined version of OI. Structural institutionalism (herein referred to as SI) focuses on the comparative analysis of formal institutional structures within legal systems. It does so whilst providing a more thorough framework for understanding the impact of institutions on policy and policy making. For the present purposes, SI is useful in order to carry out a comparative analysis of the Westminster, United States and Nigerian legal systems. This analysis goes specifically into the structural differences between the legislative, executive and judiciary institutions within the respective parliamentary and presidential legal systems. By comparing the concepts of Federalism and Unitarism, it establishes their principle structural differences. By analysing the differences between the United States Model and the Westminster model, it delves into the differences between the three main institutional structures within the respective legal systems. It goes even further to analyse the

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52 There are varying theories in existence within the NI. Though all the theories share a unifying fundamental approach to institutional analysis, some theories actively object to other theories within the NI.
separationist concept of a federal state and what it signifies for both the United States and the Nigerian presidential legal systems models respectively. The purpose of the analysis is to understand how institutions within the Nigerian model function and why there are limitations or constraints to the legal reform of property rights to land. The consideration of these limitations highlights another NI approach - historical institutionalism. Scholars of historical institutionalism believe that institutions are the “formal rules, compliance procedures and standard operating procedures that structure the relationships between people in various units of the polity and economy.”

Historical institutionalism focuses on the relatively straightforward premise that policy choices made when institutions are formed or being formed have a continuing and persistent influence over future policies. The premise is of particular importance when considering institutions within the Nigerian legal system. The issue becomes whether the laws and policy choices initiated when Nigeria’s formal institutions were established have had an effect on subsequent law making and policy choices for better protection of individual property rights to land. The thesis deals with this issue by analysing the formal and informal rules within the Nigerian state and society. It contemplates whether the policy choices and rules imposed at the inception of the institutions have adversely affected legal reform or the

54 See Hall Peter A. “Governing the Economy: The Politics of State Intervention in Britain and France.” (1986) New York, Oxford University Press. Hall advanced the basic argument that in order to understand the policy choices (legal and economic) being made in countries, it was necessary to understand countries’ policy histories. “Once governmental institutions made their initial policy and institutional choices in a policy area, the patterns created persist…”

55 Supra, see Hall Peter n54 above. See also Thelen K. and Steinmo S. Historical Institutionalism in Comparative Politics in “Structuring Politics: Historical Institutionalism in Comparative Analysis.” Edited by S. Steinmo, K. Thelen and F. Longstreth (1992) Cambridge University Press. Other historical institutionalism scholars like Thelen and Steinmo define institutions by using examples formal governmental structures like legislatures, legal institutions like electoral laws and social institutions like societal groups.

56 See Pierson P. and Skocpol T. Historical Institutionalism in Contemporary Political Science in “Political Science: State of the Discipline.” Edited by Katzenelson I. and Milner H.V. New York, Norton. The term often used to describe this pattern is “path dependency.” Path dependency presupposes that when an institution embarks upon a path, there is a tendency for initial policy choices started at the onset to persist.

57 This is considered in greater detail in Chapter 3 of the thesis.
development of new laws and law making policies in relation to private property rights to land.

Separating the theory of historical institutionalism from other types of NI has proved to be a difficult task.\textsuperscript{58} This is evident in the fact that another type of NI - rational choice institutional theories sometimes embraces historical elements. This is demonstrated by North\textsuperscript{59} a well-known rational choice institutionalist who confirms that “institutions have enduring effects that shape and influence outcomes long after the initial decision to create those institutions.”\textsuperscript{60} Rational choice institutionalism is based on the premise that institutions are a collection of rules and incentives that establish a bounded rationality. These institutions create an environment where interdependent actors within the state and society can function.\textsuperscript{61} Rational choice institutionalists believe that individuals realise that their goals are most effectively achieved through institutional action and their behaviour is pivotally shaped by institutions.\textsuperscript{62} Utility maximization by individuals is therefore the central motivation of rational choice institutionalism. Individuals rationally choose to be “constrained by their membership in institutions whether the membership is voluntary or not.”\textsuperscript{63} Perhaps rather fittingly, North’s famous definition of institutions\textsuperscript{64} reinforces this concept of institutions within rational choice institutionalism. Whether an institution is formal or informal, a set of

\textsuperscript{58} Rational choice institutionalists like Douglass C. North and Robert Paul Thomas in “The Rise of the Western World: A New Economic History.” (1973) Cambridge University Press have linked the pervasive effects of early choices in relation to property rights to historical policies and choices.


\textsuperscript{63} Supra see Peters G.B. n 24 above; see also Huber E. and Shian C.R. “Deliberate Discretion? The Institutional Foundation of Bureaucratic Authority.” (2002) Cambridge University Press.

\textsuperscript{64} Douglass North defines institutions as the “rules of the game in a society, or more formally, the humanly devised constraints that shape human interaction”
rules can exist or be imposed that structures individual behaviour and sets up the boundaries of acceptable actions. The ability to establish “collective rationality from rational individual actions that might (ordinarily) without the presence of the institutional rules generate collective irrationality is the central feature of the rational choice perspective on institutions.” In applying the rational choice institutional perspective, the thesis duly examines the constraints imposed by formal and informal institutions in relation to the legal reform of property rights to land in Nigeria. This it achieves by analysing formal and informal institutional constraints and how these collective institutional rules have restricted reform of the laws of property rights to land and limited the better protection of individual property rights. North and Thomas contend that institutions are predicated on the efficiency approach. This simply means that institutions are created based on the aggregation of collective decisions resulting from the maximization of rational individual interests. The issue to consider is whether existing institutions in Nigeria are based on rules generated by the maximization of individual interests as espoused by the rational choice institutional theorists. It seems clear that this is not always the case in practice. If it were, then there would be progressive reform of the laws to maximise individual interests and offer better protection of individual property rights to land. The presupposition is that institutions are based on efficiency and the collective decisions garnered from the maximization of rational individual interests. How then does one explain the continuous existence of institutions that are inefficient and do not protect or maximise individual interests. North and Thomas have struggled to adequately justify the rational choice perspective that efficiency and utility

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65 See Peters Guy supra n 24 at p. 49.
66 This is analysed in more detail in subsequent chapters.
maximization is the focal point in the establishment of institutions.\footnote{Supra, see North and Thomas n 67 above; see also Field A. Microeconomics, Norms and Rationality (1984) Economic Development and Cultural Change 32 at p. 683-711.} As a result, both scholars have abandoned the sole use of efficiency and utility maximization in explaining the creation and development of institutions. They have also conceded that other factors can have an effect on the establishment and development of institutions. For example, North stipulates that the “widespread existence of property rights throughout history…that did not produce economic growth” occurred due to other extenuating factors. North continues by highlighting the issue of government leaders and rulers who have devised property rights in their own interests.\footnote{See North Douglass “Structure and Change in Economic History.” (1981) New York, Norton.} He indicates that where government leaders instil property rights based on their own selfish interests, the result does not benefit or protect individual members of the society. A factor negating the exclusive reliance on the rational choice institutional perspective is what North and Thomas refer to as the “conservatism of existing institutions”.\footnote{North and Thomas concede that existing institutions constitute real constraints on further institutional change and development.} They adopt a path dependent view stating that “existing fundamental institutional arrangements, the inherited structure of land use and the customs of the manor (limit) or slow down the changes that could be made in existing property rights.” It is obvious that pre-existing institutional arrangements, customs and the inherited structure of land use have adversely affected and limited reform of private property rights to land in Nigeria. Therefore North and Thomas’s assertion can be applied to the laws and existing institutions governing property rights in Nigeria in understanding whether pre-existing institutions and institutional structures have influenced or adversely limited or restricted legal reform.

Another criticism of the rational choice perspective is the argument that a model based on purely self-interested individuals cannot explain why “people obey the rules of
North defends the rational choice institutional perspective and credits the theory of ideology for any deviations from the individualistic rational calculus perspective. Ideology is defined as the holding of beliefs and values that can drive actions. Ideology encapsulates norms, values and conventions which themselves constitute institutions. The NI theory of normative institutionalism becomes relevant to this study because it emphasizes the importance of norms and values in defining how institutions should and do in fact function. March and Olsen assert that normative institutionalism refers to an approach which is based on the centrality of values and collective choice. Normative institutionalism argues that actors within institutions reflect more closely the values of the institutions within which they belong to. Individuals have their values and behaviours shaped by their membership in institutions. The main argument proffered by normative institutionalists against rational choice institutional theorists is their emphasis on individualistic rather than collective choice. Normative institutionalists believe that the central role of norms and values in explaining behaviour is being stifled by the individualistic and utilitarian assumptions of rational choice institutionalists. A normative focus constitutes an examination of the constraints imposed by collective values.

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71 Supra, see North Douglass in “Structure and Change in Economic History” n 69 above.  
72 Unfortunately, North does not explain or elucidate on the theory or concept of ideology which he credits with such a deviation.  
74 See March James and Olsen Johan The New Institutionalism: Organizational Factors in Political Life (1984) American Political Science Review 78 at p. 734-749. The first theory of NI is normative institutionalism and this was advocated by March and Olsen and March and Olsen were the first to coin the phrase “new institutionalism”. Their normative institutional theory is based on the importance of norms and values in defining how institutions should function and how these norms affect, determine or shape individual behaviour.  
75 March and Olsen Ibid see n74 above.  
76 See Granovetter M. Economic Action and Social Structure: The Problem of Embeddedness (1985) American Journal of Sociology 91, at p. 481-510. Granovetter’s view is that individuals within institutions are embedded in complex series of relationships and these complex interactions have an influence on their values and behaviours. Thus, individuals cannot be the “autonomous, utility maximising and fully rational individuals assumed by the rational choice institutional theories.”  
77 Supra, see March and Olsen n 74 above.
norms, practices and routines inherent within Nigerian institutions to determine how these institutions limit legal reform. March and Olsen believe that the most distinguishing characteristic in defining an institution is the “collection of values by which decisions and behaviours of members are shaped, not any formal structures, rules or procedures.” 78 The main concept of their theory is the “logic of appropriateness”. 79 Logic of appropriateness indicates situations where institutions tend to define a set of behavioural expectations for their members. This equates to positive appraisal for what it considers appropriate behaviour and disapproval for behaviour which it considers unsuitable or inappropriate. “Appropriate” conformity to the norms becomes routine and standard; this being a definitive aspect of normative institutionalism. Normative institutionalism perpetuates that rules, values and beliefs become habitualized and routinized within institutions. 80 The significance in such institutions is that members would focus more on whether their actions conformed to the norms of the institution rather than what the consequences would be for the individual member in question. 81

Hence, by way of conclusion, the above theories help to understand the role of institutions to legal reform in Nigeria, and also to understand the constraints and limitations that institutions impose on the reform of the laws governing property rights to land in Nigeria. Next, a consideration of whether the legal origins theory sheds any light in understanding why there is a lack of legal reform of property rights in Nigeria will be carried out.

78 March and Olsen highlight the importance of the “logic of appropriateness” as a means of shaping the behaviour of members of institutions.
79 This refers to situations were institutions are effective in influencing the behaviour of its members.
80 Supra, Peters Guy in “The Roots of the New Institutionalism” n 24 above at p. 40. Peters expresses the view that under normative institutionalism, once behaviour is routinized, and habitualized, “conscious commitment and conscious decision making become minimized. Further, individuals continue to respond in the ways expected and needed by the institution because they have become accustomed to doing so…”
81 See MacDonald Lynn “Somme.” (1983) London, M. Joseph. MacDonald uses the extreme example of the behaviour of soldiers who go to war facing the prospects of imminent death but still behave “appropriately” or firemen who behave “appropriately” by entering burning buildings because of the occupational role they have taken on and conformed with.
2.2.2 Applicability of Legal Origins Theory

The legal origins theory is inapplicable in determining the progress or lack thereof of the legal reform of property rights to land in Nigeria. This is due to the fact that legal and economic scholars Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny (herein referred to as LLSV)\(^{82}\) have failed to take into consideration in their analysis, countries like Nigeria which have adopted two different legal regimes during their legal history. LLSV have failed to consider the effects of different legal regimes within a particular country and the consequences it may have in relation to reform. Secondly, LLSV have failed to make a distinction between well-established developed countries and developing countries like Nigeria with little or no established tradition of rule of law. Their analysis does not adequately tackle the issue of developing countries like Nigeria and distinguish them from fully developed countries like the United States.

The “legal origins” theory bases its core concept on the supposition that law and legal institutions matter. It expounds the importance of the legal origins of states in substantially and systematically determining the current legal and economic institutional structures that exist within a wide range of countries around the world.\(^ {83}\) In their empirical analysis of forty-nine developed and developing countries, LLSV categorically and assuredly declare that the correct legal code is essential for efficient financial markets and critical for economic development. As LLSV does not take into account significant factors like considerable changes in legal systems and institutions, it seems that the LLSV legal origins theory should not have blanket applicability. Nigeria as a developing country has acquired its common law legal origins through colonial imposition. Nigeria adopted a Westminster type model legal

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\(^{82}\) La Porta Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, Robert Vishny *The Economic Consequences of Legal Origins* (2008) Journal of Economics 46. Herein referred to as LLSV.

\(^{83}\) *Ibid* see La Porta et al n 81 above. LLSV propagate the importance of legal origin in determining the level of economic growth and financial development and postulate that Anglo-American common law origins are associated with greater private property rights protection, securities market development and higher levels of economic growth than civil law jurisdictions.
system during its First Republic and a United States type model in its Second Republic and subsequently thereafter. A change from a parliamentary Westminster legal system to a federal presidential system is a significant factor which affects a country’s legal institutions and LLSV has not taken this specific issue into consideration in their analysis. Admittedly, the process for reformatory changes in a state’s legal and institutional structures goes to the root or manner in which the relevant institutions are set up in the first place.\textsuperscript{84} LLSV’s assertion that law and legal institutions matter for shaping and determining successful legal systems is clearly influential and persuasive. Their analysis of the legal origins theory relies largely on a “path dependent view of law and institutions...”\textsuperscript{85} LLSV’s reliance on the relevance of path dependency to institutional structures is similar with the view shared by historical institutionalists in crediting history in the development of institutions.\textsuperscript{86} It emphasizes how the historical development of an institution can trigger or set off a sequence of events that result in an outcome that would not have ordinarily been reached but for the historical event or events in question.\textsuperscript{87} LLSV propose that legal structures proceed in a path

\textsuperscript{84} Thelen Kathleen “How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States and Japan.” (2004) New York, Cambridge University Press. See also Thelen K. How Institutions Evolve : Insights from Comparative-Historical Analysis in James Mahoney and Dietrich Rueschemeyer edition “Comparative-Historical Analysis in the Social Sciences.” (2003) Cambridge: Cambridge University Press. Thelen states that “there are very many political institutions that are interesting because if we look at them today we are struck simultaneously by how little and how much they have changed over time.” See also Tracy Hoffmann Slagter and Gerhard Loewenberg Path Dependence as an Explanation of the Institutional Stability of the German Parliament (2009) German Politics Volume 18, p. 469-484 for their view that “the theory of path dependence identifies sources of institutional stability and change, by emphasizing the importance of early contingent events and increasing returns over time to explain patterns of institutional persistence.


\textsuperscript{86} As earlier mentioned in the NI theory of historical institutionalism.

\textsuperscript{87} Steinmo Sven What is Historical Institutionalism? In “Approaches in the Social Sciences.” (2008) Donatella Della Porta and Michael Keating edition, Cambridge UK: Cambridge University Press. See also Knight J. “Institutions and Social Conflict.” (1992) Cambridge: Cambridge University Press. Historical Institutionalism has been defined as an approach which focuses on answering real life empirical questions by firmly basing the approach to the study on historical progression and giving attention to the ways that institutional structures originate and develop, shaping political, legal and economic behaviour and outcomes. Some political scholars like Jack Knight and Douglas North believe that the path dependent concept is sometimes used without a precise explanation of the historical mechanisms involved.
dependent manner thereby resulting in long-term influences on institutions’ behaviour.\textsuperscript{88} This has been affirmed by numerous political and legal scholars\textsuperscript{89} who have described the development of institutional structures in society as “path dependent.” Scholars have enunciated that institutions are perpetuated by certain traits or characteristics which as a result of historical occurrences and resultant choices or decisions, are constantly reinforced and repeated over time, becoming difficult and costly to change, and ultimately forming part of the institution’s path.\textsuperscript{90} The argument is that institutions perpetuate the maintenance of consistency with past actions by ‘locking in’ on a particular path of historical development.\textsuperscript{91} If for example, the structure of a federal state is historically created, with an executive institution that is overly dominant in comparison to its legislative and judicial institutions, then it could be assumed that this state of affairs would likely be maintained.\textsuperscript{92} Other scholars\textsuperscript{93} have criticised LLSV for its reliance on a “profoundly historically path dependent and deterministic model of legal and economic structures.” They argue that during the present era of globalization, the increased propensity for legal and institutional change within countries despite their legal origins contradict this singular reliance on path dependency as is


\textsuperscript{89} As mentioned earlier, historical Institutionalists like George Tsebilis, Kathleen Thelen and Guy Peters believe that the initial choices or decisions, structural or otherwise that are made at the beginning of the development of legal policies and ideas have an enduring and pervasive effect on subsequent policies and ideas. There are also other concepts other than historical institutionalism used to analyse institutions like new economic institutionalism, modernization and liberalization. See Reich Simon \textit{The Four Faces of Institutionalism: Public Policy and a Pluralistic Perspective} (2000) Governance: An International Journal of Policy and Administration, Volume 13, p. 501-522.

\textsuperscript{90} Tracy Hoffmann Slagter and Gerhard Loewenberg \textit{Path Dependence as an Explanation of the Institutional Stability of the German Parliament} (2009) German Politics, Volume 18, No. 4 at p. 471.

\textsuperscript{91} Pierson Paul \textit{Increasing Returns, Path Dependence and the Study of Politics} (2000) American Political Science review 94 (2) at p. 251-267.

\textsuperscript{92} Mahoney James \textit{Path Dependence in Historical Sociology} (2000) Theory and Society 29 at p. 510-511 for his discussion on institutions that are locked into maintaining behavioural patterns.

claimed by LLSV’s theory. As an alternative, the development of legal and institutional structures within legal systems has been explained through the process of “bricolage”. Bricolage occurs where new institutional solutions are proposed by recombining borrowed elements derived from multiple legal traditions and systems. The result is the creation of new institutions that resemble or have similarities with the old ones rather than institutions based on a single linear historical legal origin.

The second issue – LLSV’s failure to adequately address the differences between developed countries that have well established and functional legal institutions and developing countries that often have significant post-colonial legacies is also significant. Developing countries are usually still setting up or attempting to set up functional legal institutions. It is therefore inadequate to consider both developed and developing countries under one umbrella. As stated by Cioffi, a “serious methodological problem of the legal origins theory is the analytical treatment of developed and undeveloped/developing countries in the same manner.” LLSV’s all encompassing analyses of the legal rules and institutions of both developed and developing countries using quantitatively operationalised variables without any distinction comes across as flawed. This is because it implies that developed

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95. Campbell John “Institutional Change and Globalization.” (2004) Princeton University Press, p. 69-74. Campbell extensively discusses institutional change and development through two possible types of bricolage, substantive bricolage which involves the recombination of already existing institutional principles and practices to address problems and symbolic bricolage which is based on the logic of appropriateness and proffers the development of new institutions framed with already existing legitimate norms, acceptable cultural and social principles. Campbell asserts however that bricolage institutions evolve in a path dependent way due to the fact that the elements that develop are limited to the set of institutional principles and practices within the country. See also March James G. and Johan P. Olsen Institutional Perspectives on Governance (1993) Norwegian Research Centre in Organisation and Management, Bergen. See also Douglas Mary “How Institutions Think.” (1986) Syracuse: Syracuse University Press.
96. See Cioffi John W. Legal Regimes and Political Particularism: An Assessment of the “Legal Families” Theory from the Perspectives of Comparative Law and Political Economy (2009) Brigham Young University Law Review at p. 1501. Cioffi believes that as LLSV relies on the fact that the legal origins of institutions explain cross national differences in economic growth and development, then a fundamental flaw to their assertion is that a large number of countries included in their analysis barely have established and functional legal systems thereby suggesting that law does not in fact matter.
97. Ibid, see Cioffi John W. Legal Regimes and Political Particularism n 95 above at p. 1541.
countries with long traditions of the rule of law and well-established legal institutions are the equivalent or the same as relatively young developing countries with no established tradition of rule of law and no formulated or established legal and regulatory institutions. Similarly, it does not distinguish countries with fledging new legal systems which have been imposed through colonial expansion.\textsuperscript{98} After a consideration of these factors, it becomes apparent that the LLSV’s legal origins theory cannot be adequately and competently applied to the progress or lack thereof of legal reform in Nigeria.

2.3 Rule of Law and Legal Reform

So far, we have analysed OI and NI theories which are applicable to the current research as well as considered the inapplicability of the legal origins theory in determining the lack of reform of private property laws in Nigeria. This section addresses the concept of rule of law as a prerequisite for achieving legal reform within the institutions governing private property rights. The last decade has seen a surge in debates linking laws and institutions.\textsuperscript{99} A fundamental factor that is essential in achieving progressive reform within institutions and legal systems is the existence of the rule of law. Rule of law is based on the principle that no one is above the law.\textsuperscript{100} The rule of law anchors the relationship between state and society around an accepted set of legal, economic and social rules.\textsuperscript{101} Application of the rule of law is predicated on the principle that a state’s authority is legitimately exercised in accordance with written, publicly disclosed laws adopted and enforced in accordance with established


\textsuperscript{99} Stephenson M. Judicial Reform in Developing Economies: Constraints and Opportunities (2007) Annual World Bank Conference on Development Economics. Stephenson refers to the increasing interests by legal, development and economic scholars to the link between institutions and economic growth and highlights the popular refrain that “institutions matter” as becoming “common place or perhaps even cliché.”


procedural steps, referred to as due process. Rule of law in a state is specifically shaped and defined by the constraints of the institutions within its parameters. For example, the presence of formal institutions like an independent judiciary, a transparent government or a separated executive and legislature. It goes further and is also shaped by informal constraints like local customs, traditions and norms which tailor the requirements and actions of individuals and their impact on governmental powers and laws. The rule of law advocates restraint on governmental institutions with the promotion of private rights and liberties and the creation of order and predictability regarding how a state functions. The core of the rule of law ideal is to protect individuals from arbitrary and abusive uses of governmental power.

The issue arises as to what legal preconditions are necessary for a private property rights to land regime to function effectively. Secure property and contract rights are fundamental in effective legal systems and successful countries tend to have strong property rights systems. Legal scholars have asserted that for transition legal systems which have progressed from planned economies to market economies, clear and secure property rights is an indispensible criterion. The issue of institutional limitations to the development of laws is therefore pertinent. The ability to establish and maintain effective institutions and well-

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103 Fuller Lon L. “The Morality of Law,” (1969) Revised Edition, Yale University. See also Grant Gilmore “the Ages of American Law,” (1977) Storrs Lectures on Jurisprudence Yale Law School where Grant dismisses the rule of law concept in America to be a cheerfully meaningless repetitive slogan which serves to indicate that the American government is a government of laws not of men. See also Walker David M. “The Oxford Companion to Law” (1980) 1094 which gives an impression of the role of the concept of rule of law in Britain and indicates that despite the forms and appearances of liberal democracy, government is a “dictatorship headed by a group of trade union leaders and their political servants.”


105 North Douglass C. “Institutions, Institutional Change and Economic Performance” (1990) 1ibid, see above.

106 Asli Demirguc-Kunt, Luc Laeven and Ross Levine Regulations, Market Structure, Institutions and the Cost of Financial Intermediation (2003) National Bureau of Economic Research Working Paper. They have carried out studies which indicate that the stronger the protection of property rights, the higher the property value of the country and the more financially developed the country is.
grounded legal processes to protect private property rights is therefore important to the
framework of order and predictability offered by the rule of law concept to substantive law
within institutions.107

Legal reforms of private property rights within developing legal systems and institutions
serve to crystallise the search for better protection of individuals’ rights and liberties. Reform
prevents the encroachment or overstepping of governmental powers which is the main reason
why the rule of law ideal was established in the first place.108 For the concept of the rule of
law to continue to evolve, institutions within the state need to be amenable to legal reforms.
Formal institutions need to embrace constitutional amendments and legislative reformatory
proposals to adequately keep up with a dynamic society and ensure that the private rights of
individuals are suitably protected.109 Reform connotes structural changes in the constitutional
and statutory rules that govern a state.110 The facilitation of a progressive legal system is
predicated on the fact that laws must be constantly created, modified and reformed to offer
better protection for individuals’ property rights. In addition the laws must be administered
and enforced in a predictable, timely and cost effective manner.111 The protection of private
property rights to ensure that individuals have adequate incentives to invest in property and
are able to transfer property efficiently and effectively is heralded as the primary reformatory

107 See Williamson J. What Washington means by Policy Reform in Latin American Adjustment: How much has
happened? (1990) Chapter 2, Peterson Institute for International Economics for his view on property rights as an
area for improvement. The Washington Consensus identified property rights reform as one of the major areas of
reform for the developing world.
108 Orth John V. Exporting the Rule of Law (1998) 24 N.C.J. International L & Com REG. 71. See also Mootz
109 See Lord Goldsmith QC Government and the Rule of Law in the Modern Age (2006) lecture given on 22nd
February 2006. See also Pritchard Robert The Contemporary Challenges of Economic Development in
110 Vermeule Adrian Political Constraints on Supreme Court Reform (2005) Law and Economics Working
Paper No. 262.
111 Shihata I. Law, Development and the Role of the World Bank in “Complementary Reform: Essays on the
3 – 30.
goal of a successful legal system.\textsuperscript{112} The outcome of reforms that encompass changes in substantive legal rules and changes in the institutions responsible for the creation, modification, enforcement and administration of these legal rules indicate positively towards better legal systems.\textsuperscript{113} The legal reform machinery is therefore enabled by effective institutions. The ideal is that institutions should be postulated on a well designed judiciary insulated from interference by the legislative and executive branches of government. The legislative and judicial institutions should operate against a background of rules and practices, creating and modifying laws in accordance with societal needs. Further, the executive should ensure that the laws are dependably implemented and enforced, all in accordance with the rule of law ideal.\textsuperscript{114} In the next section, comparative model types of institutions will be explored to determine whether certain legal systems are more amenable to legal reform. More specifically, the structural institutional analyses of formal institutions within the Nigerian legal system will be carried out. This is to ascertain how the relevant individual institutions function and to determine their proclivity or susceptibility to legal reform.

2.4 Model Types of Institutional Configurations

The issue of legal reform of substantive law within institutions makes it imperative to consider the legal powers granted to relevant institutions under unitary and federal systems of


\textsuperscript{113} World Bank sponsored research indicates that the reliability and independence of the judiciary institution of a state is positively associated with investment and economic growth of the state. See also Mahoney P. G. The Common Law and Economic Growth: Hayek might be right (2000) University of Virginia School of Law Legal Studies Working Paper Series, Working Paper 1 – 8 where Mahoney refers to the independence of the judiciary institution as an important factor in determining why countries with a common law background have indicated quicker economic development than civil law countries.

government. This is to ascertain whether the institutional structures of both legal systems enhance or otherwise adversely impact or limit the enactment, amendment or development of laws, or in any way affect progressive and reformatory changes in existing laws. This is relevant analysis because historically, Nigeria has embraced both legal systems – the Westminster unitary style and the United States federal style. The choice of whether the American style separation of powers structure is more capable of fostering progressive development of existing laws becomes important. Alternatively, consideration of whether the English style system of concentrating lawmaking powers in a single parliamentary institution is a better indicator of a more conducive legal system for the creation of new laws or the reform of existing or outmoded laws is also pertinent. The issue of fundamental constitutional law and the choices between parliamentary and presidential systems of government is symbolically aimed at highlighting distinguishing characteristics that set federal nations apart from unitary nations. This is an area that has been debated vehemently by legal and political scholars.

2.4.1 Federalism and Unitarism

The concept of federalism and the term ‘federalist’ states has provoked debates as to which governments in the world are *bona fide* federal states. Subtle nuances indicate and differentiate between federal states and quasi-federal states. Quasi-federal states exist in a state where the national government is the main arbiter of power, leaving the constituent governments with merely subordinate powers. Confederacies exist where the role is reversed and the bulk of the power is vested in the constituent governments while the federal government maintains weak and subordinate powers.\(^{115}\) The classic definition of a federalist

\(^{115}\) Verney D. V. *Federalism, Federative Systems and Federations: The United States, Canada and India* (1995) University of Pennsylvania, Publius: the Journal Of Federalism at p. 83. Highlighting conflicting views on the term ‘federalism’ and ‘federalist states’ certain political scholars like Bednar have characterized the European
nation refers to the existence of “two levels of government…to rule the same land and people, each level having at least one area of action in which it is autonomous and there being some guarantee of the autonomy of each government in its own sphere.” A true federalism professes to be a division of power between two or more meaningful realms of sovereign control. Its inference is a system of shared sovereignty rather than delegated authority. Consequently, sovereign sub-units are created and vested with significant powers, though the extent of these powers varies from jurisdiction to jurisdiction. A political scholar Wheare defines a federal legal system as a system where the relationship between the two orders of government, the national and constituent governments, in law and in practice, is not subordinate but coordinate. However, both orders of government remain subject to the supremacy of the Constitution. The legal framework differentiating a federal legal system from a unitary legal system is a clear and definite separation of powers in federalist states. This is illustrated by the clear horizontal division of the powers between the three arms of government institutions on two levels. The legislature, executive and judiciary on the

Union as a federal state while other political scholars like Burgess and Gagnon have referred to it as a confederal state.


117 Elazar Daniel “Exploring Federalism” (1987) Tuscaloosa, AL, University of Alabama Press. See also Wheare K. C. “Federal Government” (1963) Oxford, Oxford University Press. See also McHugh James *North American Federalism and its Legal Implications* (2009) NorteAmerica, Year 4, No. 1. McHugh’s view is that although legal harmonisation and integration can be achieved more easily with unitary systems of government, countries with genuine and efficient federal systems can inspire a level of collaboration and harmonisation at sub-unit levels that may ultimately attain greater in-depth cohesion and integration, more specifically suited and effective within a diverse, legal, political and economic environment than a single imposed vision may achieve.


as he elaborates on the term Federalism “as a concept like nationalism or socialism”, Federative systems “as a broad term used to describe actual systems which are to any degree federative, from quasi-federations to federations, confederacies etc” and Federation “as a species of federative system in which the powers of the regional governments are not subordinate to the national government, in which the powers of the two orders are really coordinate- in practice as well as in the law of the Constitution.”
national platform and a vertical division represented by at least one other order of government, usually the state(s) government. The state government and any other order of government have their own separate and distinct arms of the legislature, executive and judiciary institutions.\textsuperscript{121} The legal implication of this separation between the institutions of the federal government and the state government is that within each specific state’s jurisdiction, the state legislature can make laws that are binding and limited to the boundaries of the particular state in question.\textsuperscript{122} Federalist nations are conscientiously aware of infringing on the legal powers of their member states and have strict limitations on their centralising authority and the encroachment this may impose on the jurisdiction of their member states. In contrast, the theoretical concept of a unitary state is that it embodies the features of a legal system where constitutional sovereignty or authority is vested in one central or national government.\textsuperscript{123} Unitary states are not limited to one governmental structure and may have local governmental structures in place within the national or central government. However there is no legal limitation on the jurisdiction, powers and central authority of the central state over its provinces.\textsuperscript{124}

In establishing clear distinctions between federal and unitary legal systems, the existence of a written constitution has been asserted as an indicator of a federal state rather than a unitary state. The written constitution serves its purpose as a document or set of documents which stipulates the rights and responsibilities of the federal government. Further, it asserts the rights and responsibilities of the state government, the legal boundaries between

\textsuperscript{122} Bedner J. \textit{A Robust Federation: Principles of design} (2009) Cambridge University Press, New York. Bedner is of the opinion that the division and separation of powers, responsibilities and authority within federal states may possibly prevent the failure of the entire federalist state as theoretically if the legal system of a particular state breaks down substantially, there is no guarantee that the central laws or laws of the other states would break down too.
the two orders of government and the legal rights and responsibilities of the citizens of the
country within the two co-ordinate orders of government. The existence of the written
constitution accordingly preserves and protects the legal rights and liabilities of the federal
government and the numerous states governments by stating what each order of government
is allowed to do and not do. This legal clarity and boundary setting aspect of the written
constitution is not reciprocated in unitary states. Unitary states as a consequence of operating
though one central or national legal system of authority govern entirely. As a result, they may
delegate, assign, impose or reclaim legal power and authority within all parts of the unitary
country without any legal repercussions.

2.4.2 US Model v Westminster Model

In order to gain a better understanding of the limitations to legal reform, the preceding
discussion on federal and unitary legal systems needs to be complemented by an in-depth
analysis of the US and Westminster models. Indeed, the classical original federation is the
United States. The inception of the horizontal separation of powers between the three main
governing institutions, the legislature, executive and judiciary was theorised by the founding
fathers of the United States Constitution. Separation of powers was proposed and
advocated. This was because it established checks and balances within the constitutional

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125 Ibid, see Burgess (2009) above and also Bednar (2009) for opinions about the presence of a constitution as a
requirement for ascertaining if a state is federal or unitary. See also Emerson M.S. Niou and Peter Ordeshook
Political Economy 9 at p. 271 – 288.

126 See generally Rodden J. Comparative Federalism and Decentralization. On meaning and Measurement
(2004) Comparative Politics, Volume 36, 4 p. 481 – 500. See also Rodden J. Federalism in Barry Weingast and
Donald Wittman Oxford Handbook of Political Economy, (2007) Oxford University Press for more analysis on
the functionality of federal states.

127 Federalism as a concept was invented by the framers of the United States Constitution in Philadelphia in
1787. See Verney D. V. Federalism, Federative Systems and Federations: The United States, Canada and India

128 See generally Almond G. Bingham G. Powell Jr, Kaare Strom and Russell Dalton “Comparative Politics
Today”, (2004) New York, Pearson Longman. It has been found that in practice, the complete separation of
powers between the three governmental institutions is practically impossible and there are occasional
dependencies and overlaps between the three branches. For example, judges are appointed by the executive
branches and therefore cannot be completely independent etc.
structure of the United States and curtailed arbitrary rule or the concentration of powers in one institution or person. Alternatively, the oldest and most notable unitary legal system is the UK Westminster Model. The original Westminster model is based on the conceptual theories of parliamentary sovereignty and the rule of law. The UK parliamentary system has evolved from monarchical rule to democratic rule. Present day Britain still retains the UK monarchy as the symbolic head of state, although the prime minister as head of the government is vested with the real leadership powers of the nation. The legal scholar Dicey\textsuperscript{129} emphasizes the concept of “sovereignty of Parliament” on which the UK legal system is based in his declaration that Parliament “can make or unmake any law it chooses and no other person or institution can overrule its laws.” Perhaps to limit the apparent unfettered powers of Parliament or to qualify the exercise of such sovereignty, the concept of rule of law in the original parliamentary Westminster model was interjected to ameliorate and accord a certain constraint to parliamentary dominance. Dicey goes further to infer the rule of law as signifying parliamentary reliance on well-known and established rules. He alleges that the rule of law perpetuates the notion of equality before the law and the well-entrenched principles of individual rights and liberties through the use of judicial precedents.\textsuperscript{130} On the other hand, American federalism is based on the principle of popular sovereignty.\textsuperscript{131} This is propagated by the adoption of the presidential system of government which promotes an individualistic approach. It is based on a reliance on the citizens’ choice in determining the
head of government and requiring the general election of the “popular candidate” into the office of the President. The legal parameters within which each United States governmental institution is allowed to operate is strictly provided for in the written constitution and the rule of law is established by an adherence to these laws of the Constitution. Within the Westminster parliamentary system the fusion of the legislative and executive institutions is one of the most distinguishing characteristics of its legal parameters. The parliamentary system operates with no set boundaries between the legislature and the executive. The result is no separation of powers between both institutions. Ministers of the executive branch are drawn from the legislature and the head of government is both chief executive and chief legislator of the legal system. In modern day Britain, lawmaking powers are concentrated in the House of Commons, and the creation of new laws and reformatory changes to existing laws is dominated by the executive institution. The Prime Minister (PM) and his Cabinet have effective control over the legislative agenda. The role of the PM as head of government and the governing party is to transform governmental policy into law. The opposition party within the Parliament have powers to challenge the legislation advanced by the government and introduce amendments. Executive dominance in initiating legislation is echoed indicative of what Hailsham refers to as “elective dictatorship.” This simply means that with the sovereignty of parliament concept, there is an absence of judicial restraint over parliamentary dominance. Parliament has handed over reins of power to the

Electoral systems exist within all democratically elected offices in the United States in the different governmental institutions. The only office which is not subject to direct election is the appointment of judges to the Supreme Court. The main reason for this exception is to preserve the high legal level of knowledge and expertise required by the office.


Cabinet, specifically to a powerful minority within the Cabinet resulting in the dictatorship of the executive. As the concept of collective responsibility is the mantra of the Westminster model, the PM is well aware that he is dependent on his party’s support in parliament. He knows that it would be disastrous to his continued occupation of the office of PM if he should impose a legislative agenda that is strongly opposed by his party.\textsuperscript{137} Further, the PM’s relationship to his cabinet is tempered by the knowledge that he needs to sustain the support of his political party in order to stay in power.\textsuperscript{138} The PM is elected into office with an official electoral mandate of legal reforms which he aims to achieve during his tenure of power. As a result, the legislature finds itself in the position where it spends most of its time addressing these executive proposals and almost no time suggesting or proposing laws of its own.\textsuperscript{139} The ability of the legislature to create new laws, initiate reformatory proposals and amend existing ineffective laws is further limited by parliamentary restrictions. For example, when considering legal changes that have an effect on the budget, the legislature is often prohibited from initiating legislation which has financial consequences.\textsuperscript{140} The legislature is further constrained by its inability to in any way have an impact on the national budget once proposed by the executive government. Legislatures are not allowed to amend the budget to reduce or increase spending and taxes. The option accorded to the legislature under the Westminster model is severely restrictive. Approve the budget in its entirety or defeat the

\textsuperscript{137} Supra, see Lijphart n 132 above.
\textsuperscript{138} Birch A. \textit{The British System of Government} (1998) Routledge, 10\textsuperscript{th} Edition. This is illustrated appropriately in 1990 when opinion polls indicated that the Conservatives under Margaret Thatcher’s leadership had been trailing behind the Labour party by 14\% for eighteen months. The Conservative party believing that she had become a political liability, conspired to force her to resign and replaced her with another party member, John Major.
\textsuperscript{140} Inter-Parliamentary Union, \textit{Parliaments of the World} (1986) Volume II New York: Facts on File Publications. This privilege is reserved for the government, the limitation to laws that do not have the effect of increasing budgetary spending is severe considering that most prospective legislation involve financial implications.
government in a no confidence vote. The result is that reformatory changes and amendments to new laws under the original Westminster model seem to focally rest in the hands of the executive government, specifically the legislative agenda of the PM and his Cabinet.

Given the American style separation of powers, a popularly elected candidate is elected into the presidency for a fixed term of years. The President, unlike the parliamentary PM can only be removed from power through a rarely used impeachment process invoked by a super-majority vote in the legislature. Popular sovereignty connotes that the American President’s mandate is more individual and personal than the PM’s collective responsibility mandate. This is also perpetuated by his general ability to appoint and dismiss members of his cabinet. The separationist roles of the three institutions in the US federal system are to ensure that the executive branch is not overly dominant in imposing its legislative agenda or reforms.

The consequence of the division of powers between the legislature and executive institutions is that it is more difficult for the President to unilaterally force or impose his own legislative agenda. The legislative institution of the United States tends to have more leeway than its British counterpart as all law making powers are vested in the House of Representatives and the Senate. The legislature has power to raise taxes and borrow money,

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142 Impeachment and removal of a United States President is a very difficult process and require that the president be found to have acted improperly, alternatively, a vote of confidence by his party is all that is required to remove a Prime Minister under the Westminster parliamentary system.

143 The Legislature is allowed an advisory role in the United States presidential system under the U.S. Senate’s ‘advice and consent’ on presidential appointments rule. See also Ackerman B. The New Separation of Powers (2008) Harvard Law Review Volume 113:633 at p. 658 – 659 where he discusses the personalistic nature of the Presidential hopefuls in their bid to become President and the fact that once elected, the President is often tempted to be of the view that the people he has elected him President “and his political party has served merely as a vehicle for the projection of his own personality and ideals.”

144 Skowronek S. “The Politics Presidents Make: Leadership from John Adams to George Bush.” (1997) Harvard University Press. The illuminating difference under the American Presidential system is the President’s relationship to his cabinet members; the role of cabinet members is more of a subordinate in an advisory capacity contrary to the Westminster parliamentary cabinet which is more coordinate and consensus-based.
independent from the executive government, which consolidates its autonomy from the executive institution. As is so often the case under the United States system, where the legislative Assembly is dominated by the President’s opponents (a different political party from the President’s) then the making of new laws and reformatory proposals becomes difficult and tension-filled between both the executive and legislative institutions. The separation of the three institutions does not entirely eradicate the susceptibility to executive dominance. The President as the head of the executive may act “on the premise that whoever wins the election to the presidency is thereby entitled to “govern as he or she sees fit constrained only by the hard facts of existing power relations and by a constitutionally limited term of office. The view being that the president is the embodiment of the nation and the main custodian and definer of its interests.” In terms of the proposals of new laws and changes and the amendment of already existing laws, the United States President usually promotes his own legislative agenda despite the heralded separation of powers. US Presidents have been known to lobby and organise alliances and coalitions. Further, US Presidents have been known to go beyond their own political party lines, at the risk of alienating their own supporters and party loyalists, in a bid to get a new law or bill passed through congress and made law. The executive under the US federal system proffers a one person at the helm effect. The members of the President’s Cabinet are merely advisers to the President in relation to any proposed legislation or new reformatory changes forming part of the President’s legislative agenda.

On the other hand, the Westminster style joint executive/legislative institution advocates for co-equal participants in executive power between the PM and his Cabinet.


Without the limitations the separation of powers imposes on both the legislative and executive institution under the Westminster model, other constraints still exist. These constraints check the powers of the PM and his ability to create new laws and reformatory proposals and get them enacted into law. The PM is always aware of the importance of maintaining trust within his party in Parliament. In order to have continued prominence at the helm, he endeavours to consistently listen, compromise and amend any proposed legislative principles and reforms of existing laws with the members of his party in order to ensure continued support within his party.\(^{148}\) The concentrated lawmaking powers of the Westminster model is therefore counter-balanced by the powerful constraints placed on the PM by his party and other competing leaders of the opposition. This is because competitors are openly given a platform in Parliament to express their ideas about any proposed legislative enactments or reformatory suggestions. These constraints serve to prevent solitary or arbitrary impositions of new laws considering the PM’s vulnerability to the judgement of his peers and the necessary support he requires to remain in power as head of government.\(^{149}\) The concept of ‘parliamentary sovereignty’ in the original Westminster model lauds the virtues of parliament in terms of its combined legislative and executive institutional powers whilst implying certain limitations on the third governmental institution - the judiciary. The result is that it renders the judiciary subordinate to the Parliament and incapable of challenging Acts of Parliament.\(^{150}\) The implied limitation to the institution of the judiciary has been professed to be inconsistent with the tenors of common law. The tenets of common law promote the idea that the judiciary is set up to garner and foster the creation and


\(^{150}\) See Dicey supra n 128 above. See also Bevir M. *The Westminster Model, Governance and Judicial Reform* (2008) Parliamentary Affairs Vol. 61, No. 4, p. 559-577.
development of laws. This it achieves by establishing precedents which then becomes case
law effectively binding on successive cases.\footnote{Dicey argues that the practice of common law does not contradict parliamentary sovereignty since judicial legislation is subordinate legislation in comparison with Acts of Parliament. See also Davis K. The Future of Judge-made Public Law in England: A Problem of Practical Jurisprudence (1961) Columbia Law Review. There was a contrasting view within the original Westminster model that the judiciary are merely expected to interpret Acts of Parliament and rule in accordance with the purpose of the legislature: resultantly, judges are constrained from challenging an existing law indicating that any challenges by courts is deemed to be an abuse of the powers accorded to them. This textualism can be seen as presenting a public positioning of the judiciary as subservient to the legislature.}

New theories of governance have developed and altered the original Westminster model.\footnote{See Blichner L. and Molander A. What is Juridification? (1996) Northwestern Journal of International Law & Business 97 at p. 354-397 where Blichner and Molander identify five different types of juridification which have led to expansion in the role of law in society.} These new theories have created more avenues in which laws can be made, modified or changed. This differs to the more restrictive original model of parliamentary sovereignty and its resultant subordination of the judiciary.\footnote{Habermas J. Law as Medium and Law as Institution (1986) in G. Teubner ed Dilemmas of Law in the Welfare State, W. de Gruyter. Habermas popularised the term ‘juridification’ which is used to indicate the changes to law that make it a more relevant, prevalent and important force in society.} These new theories of governance\footnote{See generally Bevir M. and R.A.W. Rhodes “Interpreting British Governance”, (2003) Routledge. Bevir and Rhodes explore how new theories have inspired politicians, judges and citizens to develop an increased awareness of the role of law, become more legally conscious, show greater reliance on courts to make laws, and become more conscious of the growth of regulations in society.} involve the conceptual expansion of the role of the judiciary as an avenue for the development of reformatory laws. The endemic expansion of the judiciary as an institution allows for judges and the courts to play a greater role in law making within Britain, particularly with Britain becoming a member of the European Union.\footnote{See generally Nicol D. “EC Membership and the Judicialization of British Politics” (2002) Oxford University Press. In accepting EU law into the British Constitution, Parliament has agreed to abide by these laws, and although in theory, Parliament is free to vote not only to leave the EU but also to reject any part of EU law. In practice, EU law has become tantamount to a higher law for Britain.} These judicial reforms\footnote{See Bevir M supra n 153 above.} have resulted in the judiciary becoming increasingly more of a force to reckon with alongside the legislative and executive institutions in relation to reforms and the making of changes to existing or outmoded laws. This change to the role of the judiciary institution in the Westminster model brings Britain more in line with the powers vested in the judiciary institution under the American federal system.
The American judiciary is separate and theoretically independent from the other governmental institutions. The American legal system seeks to establish the independence of the judiciary as a viable institution alongside the executive and legislative institutions. The US Supreme Court has considerable power in terms of creating new laws and making reformatory changes to existing laws through judicial precedents.\textsuperscript{157} As judges are appointed rather than elected officials, they are free from electoral constraints or accountability. They have the capacity to decide on cases and create new laws or reforms, even in unpopular causes or circumstances where the general public have a different opinion about the cause or law in question.\textsuperscript{158} In reality, it is extremely difficult for governmental institutions to remain completely independent of each other. The American judiciary struggles with the constraints accorded by its appointment process. Judges are appointed by the President and the Senate. Therefore, both the executive and legislative institutions wield a measure of power over the independence of the judiciary.\textsuperscript{159} In creating new laws and amending existing inefficient laws through precedents, the judiciary needs to have the power, once the law is created to implement them. Unfortunately the courts lack these enforcement powers. This is a further constraint on the role of the American judiciary as an independent institution.\textsuperscript{160} To this end, the Westminster model remains an advocate for centralised powers with checks and balances built in to prevent or limit the lawmaking powers of a dominant executive institution within the fused legislative/executive relationship. On a positive note, the judiciary institution is

\textsuperscript{158} Rosenberg G. “The Hollow Hope: Can Courts bring about Social Change?” (2008) 2\textsuperscript{nd} Edition, University of Chicago Press. Rosenberg discusses the fact that courts are free from the constraints of elections and are therefore in a good position to contribute significantly to legal and social reform. United States Justice Brennan, in 1981, also advocated the view that as the judiciary is insulated from political pressures and charged with enforcing the Constitution; it is in the best position to freely consider constitutional and legislative matters. \textsuperscript{159} Supra see Rosenberg n 157 above. The fact is that Presidents tend to nominate judges who they believe are in support of the same ideals and policies that the President himself stands for. Thus the appointment process infringes on the judiciary’s independence.
\textsuperscript{160} Hamilton A. “The Federalist Papers”, (2008) First published in 1788 and republished by Forgotten Books at www.forgottenbooks.org. Hamilton believed that the judiciary was the least dangerous of the three institutions as it was totally dependent on the executive institution “even for the efficacy of its judgement.”
becoming increasingly pro-active in its own ability to create, modify or reform laws through judicial precedents. Nevertheless, the tendency for executive dominance cannot be completely curtailed and this is reflected in the lawmaking process within the British legal system. Contrarily, the American federal system advocates separation of institutional powers. This provides checks and balances to curb and prevent the dominance of any institution in the law making process. However, an absolute separation of the legal powers of institutions is virtually impossible and remarkably hard to achieve.

2.4.3 Nigerian Model

So far, we have seen that the dynamics of the Westminster unitary style institutions and the American federal separation of power institutions have clearly imposed a varied range of limitations to the development of new laws and the pursuit of constitutional reforms in order to establish a progressive change in existing laws. Taking into account Nigeria’s legal regimes history, it is time to consider the constraints placed on the development of laws in the Nigerian federal state by institutions and the constitutional implications it presents for laws in need of amendment. Nigeria’s federative features are based on a complex structure. Nigeria incorporated a unitary legal system during its first republic (1963 – 1966) thereby practising a Westminster-style model of government for her first years of independence. She subsequently adopted an American-style federal legal system which she has practised to date. Assuredly, Nigeria’s federal legal system has been significantly less successful than the American federal system. It has been plagued by military dictatorship, religious and ethnic conflicts.\footnote{See Calabresi Steven and Bady Kyle Is the Separation of Powers Exportable? (2010) Harvard Journal of Law & Public Policy, Volume 3, where the authors conferred that a presidential separation of powers system may not be conducive or ideal for countries polarized into religious or ethnic conflicts or third world countries suffering from a history of dictatorship.} The popular belief is that the imposition of a single vision by a dominant central state for a country which is made up of divergent regional units can erode or deter the whole
structure of the country’s stability, popular support and efficacy.\textsuperscript{162} Nigeria’s federalism was consolidated in 1979 with the adoption of the presidential legal system of government. Nigeria’s presidential legal system combined the legislative procedures of the British House of Commons Practice, in homage to Nigeria’s first republic legislature based on the parliamentary system, and the American congressional process adopted from Nigeria’s second republic federal system. The result today is a hybrid law making system.\textsuperscript{163} The main characteristics of a federal state exist in Nigeria. Two or more orders of government, a written constitution, and a clear separation of powers between the three governmental institutions precipitated by a constitutional distribution of legislative and executive authority with the judiciary acting as umpire and arbiter of the rules in the interpretation and applicability of the laws.\textsuperscript{164} However, there are other peculiarities to Nigerian federalism which set it apart. Nigerian federalism is characterised by a duality that encapsulates federalist features whilst still maintaining a strong and powerful central government which has absolute power over the other tiers of governments.\textsuperscript{165} Further, Nigeria has been through several political phases - the colonial phase, the military and post-military dictatorship regimes and finally the constitutionally democratic civilian government which is in place today. All these phases have affected the shaping and development of the character of Nigerian federalism. The distinctive feature of the federal separation of powers system is that the theory of separation of the three institutions, the legislative, the executive and the

\textsuperscript{162} Williams Robert F. and Tarr Alan G. “Sub-national Constitutional Space: A View from the States, Provinces, Regions, Lander and Cantons.” (2004) in G. Alan Tarr, Robert F. Williams and Josef Marko, editions Federalism, Sub-national Constitutions and Minority Rights, New York, Praeger. Federalism is considered to be more effective whereby sovereign states unite and willingly agree to permanently delegate some of their sovereign authority to a central government.


judiciary, which constitute the lawmaking and enforcing powers of a state, operates on a bedrock of deliberately created tension and conflict between institutions. However, the relationship between the Nigerian federal government and the state and local orders of governments is still indicative of a “military command structure.” This is characterised by the federal executive remaining dominant and the other governmental institutions and orders of government struggling to retain fiscal independence from the federal government. To get a better sense of the Nigerian model, it is helpful to compare it with the US model. The American style federal state has been lauded as one of the most successful federations in the world. Its concepts of federalism, written constitutions, separation of powers, judicial review, and bills of rights have been widely debated and imitated by countries. The derived American federalist features are apparent in its lawmaking powers; and by virtue of Article I are exclusively allocated to the United States Congress. The Nigerian 1999 Constitution operates along similar lines and section 4 also confers the legislative powers of the federation in the Nigerian National Assembly. The essential goal of the federalist separationist stance is to keep the powers to make laws separate from the powers to implement them in order to prevent arbitrary rule. The American and Nigerian separationist characteristics of

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166 See Ackerman Bruce *The New Separation of Powers* (2009) Harvard Law Review Volume 113:633 where he infers that due to the electoral process in the American legal system, even if the President wins the election, the Senate and House of representatives may be dominated by a different party from the President’s party or even a different faction of the same political party. As a bill or law requires an assent or veto from the President before it is passed into law, this could potentially lead to an impasse between both institutions.


168 The usual practice in Nigeria is that the constituent states have an arrangement with the federal government in accordance with a revenue sharing formula whereby nationally allocated revenue is given to the constituent states whilst the federal government retains the bulk of the revenue.


170 Article I, section 1 of the United States Constitution provides that “all legislative powers herein granted shall be vested in a Congress which shall consist of a Senate and a House of Representatives.”

171 See section 4 of the 1999 Constitution of the Federal Republic of Nigeria which vests the National Assembly consisting of the House of Representatives and the House of Senate with legislative powers to “make laws for the peace, order and good government of the Federation…”

172 It is an essential feature of a federalist state to have a significant form of checks and balances within its constitutional structure and mutual influence over the fundamental aspects of the legal, economic, political and
institutions are heralded as vital and both States in their respective constitutions grant sole lawmaking powers to their legislative institutions.\textsuperscript{173} However, there is a variance in the constraints and balances accorded within both jurisdictions. Within the separationist concept of a federal state, before a proposed bill is turned to law after approval by the House of Representatives and the Senate, the President is required to give his assent to the proposed law.\textsuperscript{174}

Both the Nigerian President and the American President are respectively part of the lawmaking process. The American President has the power to either assent to the bill or veto the bill if he disapproves of the legislation, returning it unsigned to Congress with certain objections or proposals for amendment.\textsuperscript{175} The American President’s veto can only be overriden by two-thirds majority of both the Senate and the House of Representatives. If the President takes no action, the bill automatically becomes law after a period of ten days.\textsuperscript{176} The Nigerian President has similar powers to assent or veto a bill before it becomes law. However, referring specifically to amendments of already existing laws of the constitution the legal powers of the executive institution, to the detriment of the legislative institution, is more extensive under the Nigerian Constitution. Section 9 provides for any alterations or amendments to the constitution with the requirement that the new proposed policy or reformatory law be supported by the votes of not less that two-thirds majority of all the social roles within the state. An example is a division between institutions initiating or creating policies and implementing or applying them.

\textsuperscript{173} See Section 4 of the 1999 Constitution of Nigeria and Article I, section 1 of the United States Constitution.

\textsuperscript{174} Article I, section 7 of the United States Constitution provides that every bill, order resolution or vote which requires concurrence between the Senate and the House of Representatives must be presented to the president for approval.

\textsuperscript{175} The United States President takes part in the lawmaking process by issuing executive orders, decrees and proclamations; he recommends legislation on different subjects, preparing budgets for congressional review and signing or vetoing bill passes by both Houses of Congress. There is no specific provision which defines the parameters of the President’s lawmaking powers. For further discussion on the limitations to the President’s executive lawmaking powers, see \textit{Youngstown Sheet & Tube Co. v Sawyer} (1952) 343 U.S. 579, 72 Supreme Court 863, 96 L. Ed. 1153.

\textsuperscript{176} Both the senate and the House must approve all bills before they are submitted to the President for assent and section 7 authorizes Congress to override the President’s veto by a two-thirds vote in both the Senate and the House of Representatives.
members of both the Senate and the House of Representatives. This is to be approved by resolution of the Houses of Assembly of not less than two-thirds of all the states in the federation.\(^{177}\) Section 9 (3) also restricts any amendment of the legislature by declaring that any act of the National Assembly which proposes to amend the provisions of section 9 cannot be passed by the National Assembly unless the proposal is approved by not less than four-fifths majority of all the members of the Senate and House of Representatives and also approved by resolution of two-thirds of all the States Houses of Assembly.\(^{178}\) The role of the Nigerian legislature in amending or altering existing laws of the constitution is further constrained by section 58 and the requirement of Presidential assent before any amendment to existing laws of the Constitution can be made.\(^{179}\) Section 58 specifies that the powers of the National Assembly to make and amend laws shall be exercised by both the Senate and the House of Representatives, and assented to by the President.\(^{180}\) Section 58 (4) qualifies this restriction by asserting that once a bill is presented before the President, he has thirty days to either assent or withhold his assent to the proposed law.\(^{181}\) If the President withholds his assent, then the bill has to be passed again by two-thirds majority of each House, after which it becomes law and the President’s assent is no longer required.\(^{182}\) The issue of whether the role of the legislature in amending, altering or otherwise modifying existing laws of the constitution is constrained by the requirement for the President’s assent was the subject of a recent Federal High Court ruling. It was held that the amendment of the 1999 Constitution carried out by the National Assembly was null, void and inoperable without the assent of the

\(^{177}\) See section 9 (1) and (2) of the 1999 Constitution
\(^{178}\) This draconian restriction on the lawmaking powers of the National Assembly has raised numerous issues on the capabilities of the legislature to amend existing laws of the constitution.
\(^{179}\) See section 9 and 58 of the 1999 constitution of the Federal Republic of Nigeria.
\(^{180}\) See section 58 (1) of the 1999 Constitution.
\(^{181}\) See also section 58 (2) which elaborates on the process which the Senate and the House of Representatives have to take before the proposed law is sent to the President for assent.
\(^{182}\) See section 58 (5) of the Constitution.
Further, the fact that the first and second amendments bills, duly assented to by the President on 10th January 2011, are the second successful amendment of any provisions of the Nigerian Constitution is proof of the erroneous restrictions placed on the amending of any laws of the Constitution. This contrasts significantly with the American federalist stance. Article V of the United States Constitution describes the process of amendment or alterations to the laws of the Constitution and enunciates that amendments to the laws are the sole prerogative of the legislative institution. Contrary to the Nigerian Constitution, alterations to the laws of the United States Constitution can emanate from the Congress or the States themselves. The requirement is two-thirds of both the Senate and the House of Representatives or a national convention which must be assembled at the request of the legislatures of at least two-thirds of the states. This offers up a less cumbersome system of amendment to already existing laws. The Nigerian Constitution is theoretically clear in its goal of institutional separation. However, this is counter balanced by the structural influence that the President has in the appointment of the members of the National Assembly. The executive dominance over the legislature is reflected by the fact that the Nigerian President

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183 Agbakoba v Attorney General of the Federation (2011) Justice Okeke in delivering his judgement relied on section 2 of the Interpretation Act Cap 123, Laws of the federation of Nigeria which provides that “an act is passed when the President assents to the bill, and this determines whether or not the act comes into force.” After the ruling, the President finally gave his assent and signed the first and second Constitution Amendment Bills into law. This is the second time since 1999 that Nigeria has successfully amended any section or provision in its Constitution and the exercise cost over N2 billion to achieve. There is still a great amount of controversy over the recent decision of the Court in deciding the necessity for Presidential assent for any alterations or amendments to the laws of the Constitution by the federal legislature.

184 There is still divergence of opinions and controversy over the Federal High Court’s decision in Agbakoba v A.G of the Federation, and Oladele K. writes that the ruling of the “learned judge that constitution amendment without president’s consent is null and void can best be described as yet another instance of judicial activism devoid of the correct interpretation of the 1999 Constitution. Only the Supreme Court’s decision is final.”

185 Numerous legal scholars have expressed views against any comparisons between the Nigerian Constitution and the United States Constitution. A legal scholar Felix Ayanruoh states that “the arguments that Presidential assent is not required in the amendment of the Nigerian Constitution is erroneous, specious and without sound basis in law. We don’t need the United States law or any other country’s laws as a precedent when our (Nigerian) laws are clear on the issue.”

186 For the proposed amendment to become a law of the Constitution, the amendments must be ratified either by approval of the legislatures of three-fourths of the states or ratifying conventions held in three-fourths of the states. Congress has total discretion in deciding which route to adopt in amending or altering the laws of the Constitution and there have been 27 ratified amendments which have become part of the United States Constitution; with the exception of one, all the other 26 reform proposals became ratified legal amendments through being passed into State Legislature. See Article V of the United States Constitution.
appoints the Chairman and twelve members of the Independent National Electoral Commission (INEC). INEC is a body responsible for and in charge of the registration of voters for federal and state elections, the drawing of federal constituency boundaries, the conducting of federal elections and the registration of political parties. Pre-2010, the powers of the President extended further as he had final approval over the rules and policies to be implemented by INEC with regards to the conduction of federal and state elections. Section 160 has been amended to allow INEC to exercise its powers and make its own rules or otherwise regulate its own procedure without it being subject to the approval or control of the President.

With these new amendments the Nigerian Senate has attempted to minimise the powers of the President over INEC. Consequently, all appointments to INEC are subject to confirmation by the Senate. But the President still has considerable power over the election process of the members of the House of Representatives and Senate. This stems from the retention of the President’s power to appoint the members of INEC. As a result, it is more than likely that the President will take similar ideologies and relativity to his legislative agenda as criteria in considering potential appointments. The President in his capacity as head of the executive branch is involved in the law-making process and the introduction of bills to the National Assembly for passage into law. Therefore, the impact of electing

187 Osieke Ebere The Federal Republic of Nigeria (2009) Forum of Federations, International Association of Centers for Federal Studies. The President in making this appointment, consults with the Council of State which is a body that includes all former heads of government and chief justices of Nigeria, the presiding officers of the two houses of Assembly, all the state governors and the Attorney General.
189 The Electoral Reform Amendment Bill on 25th March 2010 marked the first successful amendment of the 1999 Constitution. The Senate also removed the appointment of state Resident Electoral Commissioners from the President. However, the appointment of the Chairman of INEC still remains within the powers of the President.
190 See the amended Third Schedule, Part 1 (2) which stipulates that the Resident Electoral Commissioners “shall be appointed by the President subject to confirmation by the Senate.”
191 Adameolekun Ladipo Federalism in Nigeria: Towards Federal Democracy (1991) Publius: the Journal of Federalism 21. Both the Senate and the House of Representatives are elected in much the same way although the criteria for becoming a member of the House of Representatives differ slightly from becoming a member of the Senate.
members with similar ideologies becomes significantly instrumental in tailoring any prospective amendments, changes to the laws and creation of new laws during the President’s regime. The Nigerian separation of powers seems more precarious and constrained than the American style separation. The American presidency is not vested with such powers of appointment with regard to its Senate or House of Representatives.\(^{192}\) American political parties are usually responsible for candidate selection. Members of the Senate and House of Representatives are directly elected by the people within the various American states through the process of primary and general elections.\(^{193}\) Section 2 of the United States Constitution provides for the election of the House of Representatives and specifically states that Representatives must be “chosen by the people.” Within the executive institution, the President or the State Governor is not allowed to have any role in the elections of the members of Representatives or indeed the Senate. Even in circumstances where there is a need for a temporary replacement of a seat of a member of the House of Representatives, the Governor of the state is required by clause 4 to call for a special election to temporarily fill the vacant member(s) spot, it is a similar state of affairs for the Senate.\(^{194}\) This state of affairs vests the members and prospective members of Congress with considerably more liberty and freedom in terms of the consideration of executive reform proposals and policies for enactment into law. The issue of their election is only dependent on their being selected as representatives of their respective state governments.\(^{195}\) The Nigerian federal system is further characterised as different from the United States federal system by the balance of


\(^{193}\) Sutton Robert P. “Federalism.” (2002) Westport, CT: Greenwood Press. See also Article I, section 2 and 3 of the United States Constitution. Article I, section 4 provides for the times, places and manner of holding elections for Senators and Representatives as prescribed by each State’s legislature and allows Congress whenever it chooses by law, to make or alter the Regulations except regarding the places to be used while electing Senators.

\(^{194}\) See Article 1, section 2 of the United States Constitution in its entirety. See also Article 1 section 3 and the Seventeenth Amendment which provides for the direct election of the members of the Senate by the respective states voters.

legal powers shared between the executive and legislative institutions in relation to expenditure and access to budgetary spending within the State. The impact of expenditure and budget control cannot be over emphasized as the institution in control of the budget can more or less dictate the reform proposals and legal policies to be prioritized and considered for adoption into constitutional law. The dissimilar way that both states handle their budgetary process is a clear indicator of the differing levels of inter-institutional balances and constraints which exist between the Nigerian federal state and the United States federation. Nigeria has a budgetary process which is unique with regard to the legislative procedure required in the passing of its Appropriation bills. Nigerian constitutional law provides that the President should present the projected budget and annual expenditure to the National Assembly for consideration. Furthermore, it vests the National Assembly with control over the approval of the executive budget and all proposed policies. All Nigerian federal revenue goes into the Consolidated Revenue Account; this is similar to the American revenue

196 In a truly democratic setting, the legislature as elected representatives of the people is constitutionally bound and obligated to give their stamp of approval on the relevant proposals dealing with the imposition of taxes and the appropriation of funds tendered to them by the executive institution.
198 Akaayar Ayua I. and Dakas C.J. Dakas “Constitutional Origins Structure and Change in Federal Countries.” (2005) John Kincaid and G. Alan Tarr, Montreal and Kingston: McGill Queen’s University Press. The process of passing appropriation bills incorporates an amalgamation of both the American congressional style and the British Parliamentary style; proposals come from the President to the joint committee of the House of Representatives and the Senate and then undergo 1st and 2nd Readings. Nigeria’s special procedural style ensues with the Committee on Appropriation taking charge and each Standing Committee which is charged with the specific responsibility of appropriating funds for the execution of proposed policies form sub-committees in order to deliberate over the authorised programmes on the agenda. Each sub-committee prepares a report and the Chairman of the Appropriation Committee pilots the report and moves for a resolution to consider the Report. The House resolves itself into a Committee for the Whole House to pass the resolutions on each item to be presented. The joint Report is presented and deliberated by the whole House over a period of three to four days. Differing from the American style procedure which requires the sub-committees to prepare separate Draft bills at the end of their work, the Nigerian process requires all aspects of the Estimates to be covered by a single Appropriation Bill which is then passed by resolutions by the House. For a more detailed account on the special procedural style adopted for the Appropriation of bill by the Nigerian legislature, see The Budget Process Centre for the Study of the Economics of Africa Reports.
199 Section 160 of the 1999 Constitution states that “the President on receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission shall table before the National Assembly proposals for revenue allocation from the Federation Account…”
process. However, this is where the similarity ends. The Nigerian Constitution establishes a second account, the Federation Account to which the vast majority of federally raised revenues are transferred to from the Consolidated Revenue Account. Funds from the Federation Account are allocated to the federal and state governments and the unusual nature of this second Account is compounded by the strong measure of control that the President and the National Assembly have over it. The Nigerian Constitution categorically provides for control of public funds to be vested in the President and the National Assembly. Although the Constitution states in section 80 that “no moneys shall be withdrawn from the Consolidated Revenue Account or other pubic fund except in a manner prescribed by the National Assembly”, it does not expressly state or prescribe the manner in which the President exercises control over public funds. As a result, Nigerian Presidents have received oil revenues first refusing to place all of the revenue into the Consolidated Revenue Account or the Federation Account. Further, as the Constitution expressly refers to the word “withdrawn” in section 80 quoted above, the Presidents, by never actually placing the money in any public funds account, insist that they are still within the ambiets of the Law. Recently, the issue of whether the Nigerian President has the power and authority to disburse public funds without first obtaining legislative approval was once more brought to the forefront. The

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200 Both jurisdictions require that revenue be kept in a consolidated account to be used on behalf of the States although Article 1 Section 7 of the United States Constitution in dealing with the legislative process provides that all bills of revenue must originate in the House of Representatives before being sent to the Senate.


202 Funds from the federation account is supposed to be allocated by formula between the federal and state governments and the constitution sets out broad principles for allocating the funds between the two orders of government. Supra see Anderson George above at p. 8.

203 Chapter 5 section E of the 1999 Constitution provides for powers and control over public funds and section 80 (4) states that “No moneys shall be withdrawn from the Consolidated Revenue Account or any other public fund of the Federation except in a manner prescribed by the National Assembly.”

The issue that arose was whether the President could exercise his powers of appropriation and vest authority in another executive official to act on his behalf in relation to public funds.\textsuperscript{205} The issue is still being debated and argued in the Nigerian courts.\textsuperscript{206} The main purpose of checks and balances is to constrain the dominance of one institution by another. If the executive institution has control over the budget, where money should be spent, as well as the implementation process, then the power to dictate new policies, constitutional amendments, alterations and legislative reforms will automatically be concentrated in the executive institution. The American Congress in contrast has clearer defined powers in relation to public funds.\textsuperscript{207} The American President’s power over the budget is limited to sending budget recommendations to Congress. The President usually has an uphill struggle persuading Congress to adopt his budget estimates and legislative proposals.\textsuperscript{208} The ultimate power to appropriate federal revenue is vested in the legislature under the United States Constitution.\textsuperscript{209} The issue of whether the executive institution has the power and authority to disburse public funds without first obtaining legislative approval does not apply under the American federal structure. It goes without saying that legislative approval is always necessary. The nearest relevant issue contemplated by the United States occurred where a former American President claimed impoundment, an executive power to refuse to spend

\textsuperscript{205} This is a current topic of discourse as the Governor of the Central Bank of Nigeria in February 2011, acting vicariously through the President’s powers of appropriation, proposed to disburse a 420 billion Naira loan to five ailing Nigerian banks without first obtaining legislative approval.

\textsuperscript{206} See section 80 of the 1999 Constitution generally.

\textsuperscript{207} Article 1, section 8 makes stipulations on all public funds and expenditure and vests all powers in the United States Congress.

\textsuperscript{208} The current United States President Obama is currently involved in a political battle over his budget proposal for fiscal year 2012; this is aggravated by the fact that the Republicans which are a different political party from the President, control the House of Representatives, and increased their seats in the Senate in the last November 2010 elections. Obama’s 2011 budget was also mired because the two political parties, the Democrats and Republicans could not agree on the executive proposals.

\textsuperscript{209} Article 1, section 9 of the United States Constitution vests the power to determine federal spending in Congress and declares that “no money shall be drawn from the treasury but in Consequence of Appropriations made by law.” The separationist theory buttressed by James Madison in \textit{The Federalist No. 58} is that the “power of the purse may be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.”
funds appropriated by Congress. The exact issue in play was not the executive institution appropriating funds on its own cognizance. Rather, it was the executive institution refusing to abide by the legislature after the legislative institution had duly authorized the appropriation of funds in accordance with constitutional law.

It is clear from the above discussion that the effect of a concentration of institutional powers in the executive institution to the detriment of the legislative institution has an impact on the legislative proposals, legal policies and constitutional amendments that get enacted into law. The federalist stance of the United States and Nigeria clearly varies. This variance in the institutional constraints that exist between the two federal states tends to manifest itself in the ability of one institution to dominate the constitutional arena, creating new laws and policies, making amendments and alterations to existing laws, implementing these laws and enforcing them within their respective jurisdictions. After comparing the substantive differences between formal institutional constraints in both the US and Nigerian legal models, the next section considers more specifically the structural limitations to legal reform within Nigeria’s formal institutions.

2.5 Institutional Structural Limitations to Legal Reform

Institutions are the means by which policy decisions are made effective within a state. Consequently, the separationist principle of a federal state is to ensure that the policy making process is subject to review and censure from each order of government. Institutional

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210 See United States v Nixon (1974) 418 US 683. President Nixon attempted to assert an impoundment on funds appropriated by Congress by conferring that the impoundment was derived from the President’s executive obligation to effectively and adequately execute the laws and was therefore within his executive discretion. This was disputed and Article 1 section 8 was proffered to be an adequate provision to determine the amount of funds to be spent, the legislative proposals the funds should be spent on and sufficient to authorise the Executive to execute the laws in accordance with Congress’s appropriation. Allowing the President to impound appropriated funds gave him the power to veto Congress’s appropriation and denied the Congress the opportunity to override the President’s veto.

structures within legal systems can by their very nature constrain the policy options available to their governmental organs. The issue of institutional structural limitations to the legal reform of constitutional law is therefore relevant to this thesis. This is to determine whether the institutional structures in place within the Nigerian federal state hinders or adversely affects the creating, amending, modifying or alteration of existing laws in accordance with an evolving dynamic society. It is essential in the following sections to highlight the limitations inherent in each order of governmental institutions - the executive, legislative and judiciary, and the role played by these institutional constraints in limiting progressive legal reform.

2.5.1 Executive Institutional Limitations

As mentioned earlier, the institutional structures within the Nigerian federal state, with its history of military dictatorship and executive tyranny, chronicles the historical development of Nigerian constitutional law and is reflective of executive dominance through the imposition of countless military decrees and edicts. The 1999 Constitution advocates and promotes the institutional separationist concept of a federal state. But the historical structure of executive institutional dominance remains inherent and representative of the present state of affairs. As a result, any legislative reform, alterations, modifications or necessary amendments to pre-existing laws which adversely affects or inhibits this state of affairs is usually severely restricted by the dominant institutional power.

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212 Odum Ekene Military Administration and Federalism (1997) Punch, Monday, December 29 1997 at p. 22. See also Campbell John “Institutional Change and Globalization.” (2004) Princeton University Press at p. 67 for his view about the executive government deliberately building institutions in such a manner as to make them difficult to dismantle by the imposition of procedural obstacles in order to prevent subsequent governments from later changing the institutions that they have established.

213 There is an inconsistency between the separationist concept of federalism and the historical institutional dominance of the Nigerian executive government.

214 Pierson Paul When Effect Becomes Cause: Policy Feedback and Political Change (1993) World Politics 45 at p. 595-628. It is often considered that institutional arrangements which are inefficient are oftentimes preserved by the tangled web of myriad social layers and interactions that have happened and emerged as a result of these arrangements. North Douglass in “Understanding the Process of Economic Change.” (2005)
2.5.1.1. Nigerian Executive

The executive institution has a vested interest in maintaining its dominance over the legislative and judicial institutions. Therefore, any proposed alteration or modification to the laws that would deprive it of the benefits of this institutional prevalence is naturally resisted. Institutional limitations precipitated by executive dominance in the Nigerian federal state are symptomatic of a certain concentration and centralisation of powers found in unitary legal systems. The Nigerian executive embodies this without the inherent checks and balances accorded by the structural themes of “collective responsibility” and “party principle” concepts that are the order of the day in a Westminster style parliamentary model. The federalist structure set up by the 1999 Constitution provides for the legislature and the judiciary to act as checks on executive powers. But the historical proclivity for institutional dominance of the executive has led to powers becoming consistently centralised.

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Princeton University Press. North believes that “existing institutional structures create organisations with a vested interest in the existing structure.”

One of these benefits was exemplified in 2004 where there was a unilateral imposition of fuel tax by the President, the chief executive of Nigeria. This was an act that violated section 59 of the 1999 Constitution which provides for the method of exercising federal legislative power on money bills. In this case, the bill was proposed by the President and also passed into law by the President without any legislative consideration contrary to section 59 (1) (b) of the Constitution. See also generally North Douglass Five Propositions about Institutional Change in “Explaining Social Institutions” (1998) edited by Jack Knight and Itai Sened, Ann Arbor: University of Michigan Press. North, a rational choice theorist believes that mechanisms like vested interests and other benefits lock participants into a particular path of legal or economic development. Other political and economic scholars who share similar views are Arthur W. Brian “Increasing Returns and Path Dependence in the Economy.” (1994) Ann Arbor: University of Michigan Press, and David Paul A. Clio and the Economics of QWERTY (1985) American Economic review 75 (2) p. 332-337.

Bruce Ackerman believes that the PM has structural limitations to his powers and perceives his party as an “enduring organisation of political activists dedicated to a distinctive set of principles” believing that if the PM is unable to persuade his party towards his own legislative views and ideas, it would be impossible for his leadership tenure to subsist without party support.

Rose Richard Politics in England in Gabriel A. Almond, G. Bingham, Powell Jr, Kaare Strom and Russel J. Dalton Editions “Comparative Politics Today” (2004), New York, Pearson Longman at p. 156-205. See also Mitra Subrata K. Politics in India in Gabriel A. Almond, G. Bingham, Powell Jr, Kaare Strom and Russel J. Dalton Editions, “Comparative Politics Today” (2004) New York, Pearson Longman at p. 634-688. Although there is no separation of institutional powers between the executive and legislature under unitary systems, there are inherent structural limitations within the system and a PM is obligated to act within certain limits in order to retain the support of his party and remain at the helm as head of government. The PM knows that support by Parliament is crucial and therefore he must constantly persuade and bring his party along with his legislative policies and agenda; and this provides checks and restraints to the PM’s executive power.
and focused on the federal executive government.\textsuperscript{218} The pre-disposition for executive dominance over the enactment of new reformatory laws, alterations and amendments to the Constitution is clearly indicated in Nigerian law. This is exemplified by numerous committee proposals and recommendations made by the federal government and the office of the President in 2006 to amend the Constitution to allow for the extension of the tenure of the President and State Governors beyond the constitutionally stipulated two consecutive terms of four years each.\textsuperscript{219} The Constitution allocates the powers of the creation and legislative agenda of local governments to the States House of assembly.\textsuperscript{220} The Nigerian federal executive government has a propensity to act in direct contravention of the vertical separation of powers between the three tiers, the federal, the states and local governments by setting up and instituting legal structural reforms and new legislative agendas on behalf of states or local councils. Further evidence of executive dominance is demonstrated by actions like the declaration of emergency powers, the suspension of the Governor, the suspension of the House of Assembly of Plateau State, the suspension of the laws of the state, and the replacement of an Administrator solely accountable to the President. The former Nigerian President Obasanjo carried out these actions by relying on the provisions of section 305 of the Constitution. Section 305, in its explicit wordings grants the President the power to declare a state of emergency under specified situations; and the declaration of a state of


\textsuperscript{220} This is reflected in the 2004 seizure by the federal government of revenue allocations belonging to some states with regard to the creation and institution of local councils. This is in direct contravention to Nigerian constitutional law. See section 8 (3) of the 1999 Constitution which provides that the creation and legislative agenda of local governments is vested in the state House of Assembly. See also section 7 (6) (a) of the 1999 Constitution which gives the National Assembly the powers to “make provisions for statutory allocation of public revenue to local councils of the federation.”
emergency was validly declared by the former President to be applicable in Platteau State. It is evident that the impact of executive dominance on the balance of institutional powers and the limitations or constraints this has and continues to have on any proposed reformatory measures, alterations, modifications or amendments to existing constitutional and statutory law is significant and far-reaching. The result is that one institution arbitrarily and tyrannically dictates and shapes the laws of the state to the detriment of the other weaker governmental institutions and contrary to the intention and purpose of the federalist separationist concept. Next, we consider institutional limitations which exist within the Nigerian legislature.

2.5.2 Legislative Institutional Limitations

The separationist structure of the Nigerian legal system vests the National Assembly as legislative institution with the legislative powers of the federation by virtue of the 1999 Constitution. This signifies that based on the State’s motto of “justice” and “progress” the legislature has the power to “make laws for the peace, order and good government of the federation.” Implicit in this conveyance is that laws which are contrary to these principles by reason of the fact that these laws have become out-dated, no longer suitable, or applicable

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221 Section 305 of the 1999 Constitution allows for the power to declare a state of emergency but does not grant the President or the National Assembly the powers to make laws on matters within exclusive state competence “unless the State House of Assembly is unable to perform its functions by reason of the situation prevailing in the State”. Further, a state House of Assembly is not deemed to be “unable to perform its function as long as the House of Assembly can hold a meeting and transact business.” The Platteau State House of Assembly at the time the state of emergency was declared by the President, was still performing its functions, holding meetings and transacting business. See section 11 (4) and (5) of the 1999 Constitution. Section 11 (4) of the Constitution completely precludes the National Assembly from removing a State Governor from office solely because of an emergency situation occurring in the State and if the National Assembly does not have the power to make laws for the State or remove a State Governor, it cannot by law, authorise the President to remove or suspend a State Governor either as it can not delegate a power it does not possess. See Nwabueze Ben *The Rape of Constitutionality in Platteau* (2007) culled from Guardian May 20, 2004.

222 See section 17 (1) of the 1999 Constitution

223 See section 15 (1) of the Constitution.

224 Section 4 of the Constitution.
should be repealed, altered, modified or amended in order to maintain a progressively evolving legal system.  

2.5.2.1 Entrenchment

However, in practice, there are restrictions imposed on the legislature in altering or amending any laws entrenched within the Nigerian Constitution. Simply put, the entrenchment of laws into the Constitution restricts the institutional powers of the legislature to amend, alter, modify or repeal existing laws. The term “entrenchment” refers to the enactment of statutes or laws that are binding against subsequent governments, institutions and the society at large. The issue of constitutional entrenchment of laws has the effect of insulating statutes from appeal by a subsequent legislature unless onerous amendment procedures identical to the process needed to amend laws of the Constitution are carried out. This limits the legislature’s lawmaking role of amending or altering pre-existing laws or instituting legislative reformatory measures on existing laws. While the worldwide debate about the legitimacy of entrenchment rages on, along with the question of whether entrenchment is in fact constitutional, it is clear that it is generally acceptable in most democratic constitutions.

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227 Some theorists like Adrian Vermeule and Eric Posner seem to endorse all types of entrenchments while other strict majoritarian theorists oppose all types of entrenchment.

228 McGinnis John O. and Rappaport Michael B. Symmetric Entrenchment: A Constitutional and Normative Theory (2003) Virginia Law Review at p. 101 – 161. McGinnis and Rappaport advocate constitutional entrenchment into two different categories, desirable and undesirable. They believe that constitutional entrenchment is desirable in the instance of symmetric entrenchments. A symmetric entrenchment is an entrenchment that employs the same voting rule to establish or enact the entrenched measure as is needed to amend, alter or repeal it. An example of a symmetric entrenchment is the United States Eighteenth Amendment to the Constitution which employed the same voting measure to repeal it in Amendment Twenty-one.

229 Democratic countries like the United States, Germany, Italy and Finland constitutionally entrench laws into their Constitution.
The entrenchment of certain constitutional provisions is regarded as almost “indispensable” within particular legal systems. Constitutional entrenchment seems to be prevalent within the federalist states and is often used to delineate the separationist features of federalism. Examples of this delineation are the division of powers and responsibilities between the governmental institutions orders, the determination of which order of government has jurisdiction within the legal parameters, and the apportioning of separate and concurrent legal powers and authority between the central government and the state governments. The main objection to the concept of constitutional entrenchment is based on the fact that it is thought to be against the principles of democracy and representative of a certain inter-generational tyranny. This simply means that it is considered to be unconstitutional to create laws and entrench them into the Constitution therefore imposing laws that are consequently binding on future legislatures and other governmental institutional entities. On the opposite spectrum, this adverse stance on constitutional entrenchment has

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230 Constitutional entrenchment is considered indispensable as they are commonly used in most federal states with written constitutions to establish and delineate federalist structural processes and institutional arrangements. See Levy J. *Federalism, Liberalism and the Separation of Loyalties* (2007) American Political Science Review, Volume 101, No 3 at p. 2.

231 There have been wide and diverse debates on the legitimacy of constitutional entrenchment in various countries. Canadian and Australian constitutional law theorists have argued for and against constitutional entrenchment during deliberations by Australia whether to enact a bill of rights and entrench it into their Constitution and in Canada where it culminated in the enactment of the Charter of Rights and Freedoms. Rohan D’Souza in *The High Price of Constitutional Entrenchment* (2005) Australian Federation Review states that “there is a danger that once particular freedoms and values are entrenched in the…Constitution, they will be set in stone…as the understanding of (legal) rights is constantly evolving…the fear is that it would stagnate and inhibit the freedoms of future generations.”

232 Constitutional entrenchment was expressly used in Article V of the United States Constitution to establish the equal suffrage of states in the Senate against constitutional change and amendment.

233 Federal states incorporate constitutional entrenchment in different forms; examples are the German and United States Constitutions. The German Bill of Rights cannot be amended without disregarding the entire constitutional order, see Kincaid John *Comparative Observations* The Forum of Federations, International Association of Centres for Federal Studies, constitutional entrenchment in the United States Constitution promulgates equal representation for each state, the provincial states self-governing autonomy from the central government etc.

234 See Levy Jacob T. *Federalism and Constitutional Entrenchment* (2009) Tomlinson Professor of Political Theory, McGill University at Jacob.levy@mcgill.ca see also Levy J. supra n 229 above. Thomas Jefferson was of the opinion that “the dead have no rights” construing the fact that it was unfair and unjust for one generation to legislate over later generations, and believing that if it was popular practice that all laws be abolished and re-established every new administration, then subsequent governments would be free to reform, undo or repeal inherited laws according to society’s ever-changing dynamics.
been countered by arguments which justify and favour constitutional entrenchment within specific circumstances. Posner and Vermeule have lauded the benefits of entrenchment crediting it with the establishment of predictability and stability of government. They assert that this makes it easier for individuals to arrange their affairs in accordance with long subsisting laws, facilitating the establishment and maintenance of a credible commitment made by government in order to control its relations with other entities. It enables the creation of an environment which permits politicians to exclude contentious issues dealt with by prior governmental institutions while allowing them to focus on other newer business.

In accordance with the positive view about the benefits of constitutional entrenchment, enactments creating certain rights are considered to be acceptable entrenchments in numerous federal states constitutions like the United States. The need for constitutional entrenchment in specific circumstances may well be undeniable. After all, the entrenchment of enforceable private property rights and the protection of these property rights have been accepted as extremely beneficial and fundamental to a developed or developing economy. Good property rights has been credited by legal scholars as providing incentives for making the best use of available natural resources.

It is possible that the entrenchment of certain statutes and legal provisions into the 1999 Constitution was necessary in order to establish the political union of the Nigerian federal state. It may not have been possible without the entrenchment of relevant

235 The United States Constitutional Amendment V Takings Clause makes it impossible for the legislature to revoke property rights once granted by legislation unless due compensation is paid.
237 Marvin Meyers “The Mind of the Founder: Sources of the Political Thought of James Madison” (1973) Letter from James Madison to Thomas Jefferson – February 4, 1790. Madison’s opinion was that if statutory laws expired at the end of each legislative session, it would lead to a situation whereby positive laws like most of the rights of property would become defunct “and the most violent struggles ensue between the parties interested in reviving and those interested in reforming the antecedent state of property.”
and fundamental statutes and provisions\textsuperscript{239} to assure all the parties, states, regions and ethnic groups that form Nigeria that certain general interests would be protected.\textsuperscript{240} The Public Complaints Commission Act\textsuperscript{241} is one such statute, established and entrenched into the 1999 Constitution. It is an independent organisation set up to promote social justice for the people of Nigeria by providing viable options for Nigerians or anyone resident in Nigeria who wishes to seek redress against administrative injustice. The Commission investigates and resolves complaints against Federal, States and Local Governments, Public Corporations and Private Sector Organisations. It also aims to improve public and legal administration by highlighting weaknesses observed in the laws, rules, regulations, procedures and practices of executive and legislative officials. The reason for its establishment and entrenchment is assuredly noble. It is to provide individuals with a forum to complain about government inadequacies. However, there are clearly limitations attached to its constitutional entrenchment. The legislative institution’s power to amend or alter any of the provisions of the Act to bring it in line with modern legal policies and reformatory changes is constrained by such entrenchment. There are clearly benefits to entrenchment were the entrenched laws are desirable and beneficial. In other situations, the effect of constitutional entrenchment on the legislative institution can be prohibitive and constraining. The constitutional entrenchment of statutory laws into the Nigerian Constitution is a factor that clearly limits the lawmaking powers of the legislature. The lawmaking powers of the legislative institution are adversely affected by the constraints and limitations which it faces where the entrenched

\textsuperscript{239} The Public Complaints Commission Act is a relevant statute that has been entrenched into the 1999 Constitution.

\textsuperscript{240} Elkins Stanley and McKitrick Eric “The Age of Federalism” (1993) Oxford University Press. An example of a necessary entrenched provision in the United States Constitution is Article V which prohibits the removal of equal state voting rights by the Senate.

\textsuperscript{241} See Cap 377 Laws of the Federation of Nigeria 1990 and revalidated in section 315 (5) of the 1999 Constitution.
statute or laws are undesirable. Entrenchment vests the statutes with a rigid procedure for amendment or alterations to the laws. Consequently, any reformatory measures and legislative amendments proposed by the National Assembly with regard to these statutory laws will have to be subjected to the same onerous amendment procedures as any other laws which form part of the 1999 Constitution. Particularly where the laws need to be modified, altered, amended or repealed, or where new reformatory measures need to be taken in order to keep up with a dynamic and progressive state. The result is a limitation to the role of the legislative institution. This constitutes in a weaker legislature vis-à-vis other governmental institutions within the Nigerian federal state dynamic contrary to the equal and separationist concept of federalism.

### 2.5.3 Juridical Institutional Limitations to Legal Reform

The arrangement of the structure of the judiciary and the preservation of its independence from the other governmental institutions is justified by the federalist constitutional requirements of ‘separate but equal’ powers and the consequent adoption of institutional checks and balances. Within the federal separationist concept, the judiciary institution is

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242 John McGinnis and Michael Rappaport make the distinction between desirable and undesirable entrenchments and state that desirable entrenchments can “improve democratic legislation in a variety of ways including establishing constitutional provisions that structure government decision making and protect fundamental rights…while undesirable entrenchments…can be harmful…and an incumbent…(government) could use them simply to embed their preferences into the law so that future generations could not easily change the rules, even if circumstances, knowledge, or public values have evolved.”

243 Section 315 (5) contains statutes that are constitutionally entrenched into the1999 Constitution; these include the National Youth Service Corps Decree 1993, the Public Complaints Commission Act, the National Security Agencies Act and the Land Use Act 1978. The provisions of these enactments “shall continue to apply and have full effect…as federal enactments…to the like extent as any other provisions forming part of this Constitution and shall not be altered or repealed except in accordance with the provisions of section 9 (2) of the Constitution.”

244 Barendt Eric Separation of Powers and Constitutional Government (1995) Public Law 599. Barendt advocates for three distinct and separate functions of government to be carried out by three distinct agencies, with no one individual becoming a member of more than one of the separate institutions. The constitutional separationist theory is knowingly based on a system of checks and balances whereby each institution has the constitutional means to resist encroachments from the other institutions. See also Madison James Federalist Paper 51 in Alexander Hamilton, James Madison and John Jay “The Federalist”, (1788) London. The United States Supreme Court in 1803 defined and widened its powers to include judicial review. Judicial review
vested with the responsibility of interpreting the laws of the Constitution and applying its judicial discretion in the exercise of a limited law-making authority. The issue of the “lawmaking” powers of the judiciary is a controversial one. The term “judicial activism” has been used to describe circumstances where the judiciary, under the guise of interpreting the law, goes further to produce new binding law which is significantly different from the existing law. Judicial activism occurs where judges actively influence the direction of the law and “their interpretation of the law goes beyond the mere words of the text at hand and the matters mentioned…when (judges) interpret the law purposefully and say the unsaid through their interpretation.” There are constant attempts by the other governmental institutions to curb judicial activism and limit the lawmaking powers exercised by the judiciary while interpreting existing laws. Proponents of the opposite theory, “judicial restraint” advocate for the narrowest approach to judicial interpretation - never going beyond the authority granted by the Constitution and never attempting to create new interpretations to the laws of the Constitution. The “lawmaking” powers of the judiciary are derived from its constitutional right to interpret law. This allows it to produce and create new laws in circumstances where there is a constitutional law vacuum. Further, it enables the judiciary to

allowed the Court to strike down laws that were in contravention of the tenets of the Constitution, thereby providing the necessary checks and balance against the other government institutional branches.

245 Hart H. L. A. “The Concept of Law.” (1994) 2nd Edition, Oxford, Clarendon Press. Hart states that in “legally un-provided for or unregulated cases…(the judiciary)...makes new law and applies established law which both confers and constrains its lawmaking powers.” See also Raz J. “The Authority of Law: Essays on Law and Morality.” (1979) Oxford University Press. Raz also refers to the lawmaking powers of the judiciary in unregulated cases and connotes that “where the law contains a gap, since it fails to provide a solution to the case, the court can make law without changing existing law. It makes law by filling in the gaps.”

246 The Merriam-Webster Dictionary of Law defines judicial activism as the “practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent.”


248 For a general overview of judicial restraint and the different institutional approaches to judicial restraint, see King Jeff A. Institutional Approaches to Judicial Restraint (2008) Oxford Journal of Legal Studies, Volume 28, No. 3, at p. 409-441. Judicial restraint maintains its authority over the legislature without intervention, only taking action and declaring a statute or law to be unconstitutional if it is clearly and blatantly so. The effect of judicial review and a declaration by the Court that a law or statute is unconstitutional is final. In the United States, Supreme Court decisions based on the Constitution cannot be reversed or altered except by a constitutional amendment. The United States Congress has made various attempts to curb the lawmaking powers exercised by the judiciary in interpreting United States Constitutional law.
instil reformatory amendments and modifications of existing insufficient rules during ongoing cases or judicial review and alter pre-existing laws to bring them in line with modern legal policies. The “lawmaking” power is ultimately dependent on the scope of its constitutional powers and its level of independence from the other governmental institutions. Simply put, this means that the limitation to the “lawmaking” powers of the judiciary is dependent on the powers vested in the judiciary by the Constitution and how independent the judiciary institution is from its legislative and executive counterparts.

The scope of powers and parameters of authority vested in the judiciary institution by the Nigerian federal state is replicated in section 6 of the 1999 Constitution. The independence of the judiciary is credited as an essential aspect within the separationist concept. As a result, limitations to judicial independence are reflected in the different institutional structural arrangements of the three governmental institutions within the different federalist states. The appointment process of judges is often vested in the

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249 Judicial review affords the judiciary with institutional powers to invalidate or declare null and void the acts of the legislature, executive and administrative officials where these institutions act contravention of the laws of the Constitution.

250 Russell Peter H. and O’Brien David M. Judicial Independence in the Age of Democracy: Critical Perspectives from around the world.” (2001) London, University Press of Virginia. The dichotomy of judicial activism and judicial restraint is highlighted in two statements, the first statement made by Lord Esher in Willis v Baddeley (1892) 2 QB 324, where he declared that “there is no such thing as judge-made law because judges do not make law…” The more recent statement made by Lord Radcliffe in 1964 at the annual conference of the Law Society that “there was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?”

251 Section 6 (1) of the 1999 Constitution states that “the judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation…”

252 Bridge John Constitutional Guarantees of the Independence of the Judiciary (2007) Electronic Journal of Comparative Law, Volume 2, 3. Judicial independence is predicated on the principle that the judiciary should not be subject to undue or improper influence by the other institutional governmental branches. The American founding father, Alexander Hamilton believed that “only an independent judicial branch of government would be able to impartially check excessive exercise of power by the other branches of government. Furthermore, see the World Bank Group – Legal Institutions of the Market Economy Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs at www.worldbank.org were it identifies three characteristics of a truly independent judiciary, the first being impartiality, “judicial decisions are not influenced by a judge’s personal interest in the outcome of the case…secondly, judicial decisions once rendered are respected…and thirdly…the judiciary is free from interference, parties to a case, or others with an interest in its outcome, cannot influence the judge’s decision.”

253 The Canadian Constitution has been amended to increase its level of judicial independence, vesting tenure and salary of superior justices in the Parliament of Canada rather than the executive institution. Alternately, the United States Constitution vests the appointment of judges in the executive institution.
executive institution in most federal states. The Nigerian President is vested with the power, on the recommendation of the National Judicial Council to appoint judges to the Supreme Court, Court of Appeal and Federal High Courts of all the States in the Nigerian Federation. This gives the President the power to nominate judges who he thinks may share his ideological views and predilections. Judges have more often than not been nominated based on the similarities between their judicial ideologies and the President’s political and legislative agenda. The executive appointment potentially has repercussions which restrict the judiciary’s independence in the performance of its role as interpreter and law maker. Additionally, constraints to the judicial institution’s role to interpret, create or amend unsuitable or inappropriate law and to effectively produce significant legal and economic reform is caused by its limited enforcement powers, as court decisions usually require implementation rather than being self-executing. The general view held by most legal and political scholars is that without the assistance of the executive and legislative institutions, the judiciary is “an ineffective reformer because it lacks the institutional weapons to enforce its judgments.” This unfavourable view of the role of the judiciary is based on the fact that the executive institution can decide not to enforce or implement court judgments.

254 In the United States, Article III provides for judges appointments and states that judges are appointed by the President “by and with the advice and consent of the Senate.”
255 See the Third Schedule, section 1 (21) (a), see also section 231 (1) and (2) of the Nigerian Constitution for the appointment of the Chief Justice of Nigeria and Justices of the Supreme Court by the President based on the recommendation of the National Judicial Council and subject to confirmation by the Senate. Other federal state constitutions that vest or have formerly vested the executive institution with the power to nominate judges are Australia, Canada and India.
256 Saunders Cheryl Separation of Powers and the Judicial Branch (2006) at www.adminlaw.org.uk Saunders believes that if the executive institution wields its power of nomination in order to ensure patronage and influence the Court, it detracts from the quality and independence of the judiciary.
257 The Federalist Papers (1787-1788) Alexander Hamilton believed that the Court is the least dangerous institution of the three governmental institutions. He believed that the judiciary “has no influence over either the sword (which is vested in the executive) or the purse (which is vested in the legislative institution)...”
In addition, the legislative institution can decide to create new laws overturning the judgments or decisions of the judiciary. The National Judicial Council is the body charged with making recommendations for the judges’ appointments. It is also charged with providing for the salaries and remuneration of judges, regulating the courts, and sanctioning the judges. However, members of the National Judicial Council are appointed by the President subject to confirmation by the Senate. The executive and legislative institutions have the power to establish courts, define the jurisdictions of these courts, set their budgets and impeach the judges of the courts. The lawmaking role of the Nigerian judicial institution is severely limited by the institutional powers of the executive and legislature. The status quo of the judiciary’s “lawmaking” role in the Nigerian separationist arena seems to be “deferential to the federal government and potentially limited by congressional action.”

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261 See section 154 (1) of the 1999 Constitution. Section 153proffers the aim of establishing the National Judicial Council as a way to insulate the judiciary from the caprices of executive power and to guarantee the independence of the judicial arm of government under a constitutional government.

262 See section 6 (4) (a) of the 1999 Constitution which states that “nothing…shall be construed as precluding the National Assembly or any House of Assembly from establishing courts…with subordinate jurisdiction to that of a High Court…”

263 Section 6 (3) of the 1999 Constitution adds a proviso which states that “save as otherwise prescribed by the National Assembly or by the House of Assembly of a State, each court shall have all the powers of a superior court of record.”

264 The United States Congress currently determines the budgets and remuneration of judges. See Schwemle Barbara *Salary Linkage: Members of Congress and Certain Federal Executive and Judicial Officials* (2008) Analyst in American National Government and Finance Division. The Ethics Reform Act 1989 was set up to make recommendations for the salaries of judges to the President by recommending that a Citizens Commission on Public Service and Compensation be established, and requiring that the President and the Commission submit recommendations of salaries to Congress. However, the Commission is yet to be activated, and therefore the recommendations have not yet been made. Under the Nigerian Constitution, section 162 (9) provides that any judiciary remuneration be paid from the Federation Account to the National Judicial Council which would then disburse the salaries to the heads of the courts established for the Federation and the states under section 6 of the 1999 Constitution.

265 Article 1 of the United States Constitution grants the House of Representatives the sole power to impeach judges and the Senate the sole power to try the impeachment; resultantly, one justice of the Supreme Court of the United States and fourteen federal judges have been impeached so far. The Nigerian Constitution provides for the impeachment procedures of judges through the Nigerian Judicial Council which is a federal organisation established by virtue of section 153 (1) of the 1999 Constitution and made up of members appointed by the President under section 154 (1) subject to confirmation by the Senate.

judicial institution is therefore also limited in its role as interpreter. This has an inevitable effect on the progressive development, amendment, alteration or consequent reformatory contributions that the judiciary can proffer to the development of laws. The effect of these inter-institutional limitations to legal reform is that of executive dominance while the Nigerian legislature and judiciary institutions remain handicapped within the federal separationist concept. This is contrary to the purposes for which federalism was adopted by the Nigerian federal state and the goal of societal development through the creation, amendment and modification of out-dated or out-moded laws for the better protection of private property rights to land. The consequence is the prevention or severe limitation of legal reformatory changes to the laws.

2.6 Conclusion

This chapter presented the theoretical underpinnings of the thesis. It explored the concept of institutionalism as a foundation for analysing the lack of legal reform to property rights to land in Nigeria. This was achieved by analysing theoretical institutional approaches and considering old versus new institutionalism. Varieties of new institutionalism theories were examined in relation to their applicability to the laws governing private property rights to land in Nigeria and its relevance for the thesis. Further, the legal origins theory was found to be inadequate in determining the progress or lack of legal reform of property rights laws in Nigeria. The chapter considered the role of institutional structures within the state as a determinant for progressive legal reform. This was achieved by addressing model types of institutional configurations and the effect of different inter-institutional constraints on legal

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reform. An examination of the Nigerian model was carried out by using a comparative analytical approach against the United States model. An analysis of the institutional structures within the Nigerian model was undertaken to determine whether constraints inherent in these institutions have resulted in the lack of reformatory changes to the laws. The next chapter focuses on in-depth analyses of the laws governing property rights to land in Nigeria. In examining the present laws governing property rights to land, the chapter explores whether Nigeria’s present formal institutions, in any way, limit or restrict the legal reform of the laws governing private property rights thereby hindering individual property rights protection under Nigerian law.
Chapter Three:

Formal Institutions as Constraints to the Laws Governing Property Rights to Land in Nigeria

3.1 Introduction

The aim of this chapter is to analyse the laws governing property rights to land in Nigeria through the framework of formal institutional structures that create, implement and interpret laws. This is to determine whether these formal institutions limit or in any way constrain progressive legal reform and stifle the development of laws that offer better protection of private property rights of individuals to land in Nigeria. It is submitted in this chapter, that the present formal institutional structures which promote and perpetuate the laws governing property rights to land in Nigeria serve to undermine, limit and prevent the essential and necessary legal reform required in order to offer better protection of individual property rights to land. It is also established that the laws governing private property rights in Nigeria are inadequate and outdated.\(^{268}\) It is therefore crucial to understand why new laws have not been created, and why these inadequate laws have not been modified, amended or altered to foster a strong protection of private property rights for Nigerian citizens. The chapter proceeds as follows. Firstly, the present laws governing property rights to land are identified and discussed (3.2). Secondly, a thorough analysis of the scope of legally recognised interests on land which may be conferred on individuals under Nigerian law is carried out (3.2.2 – 3.6). Thirdly, the dynamics of the Nigerian federalist state is examined to determine the structure and functionality of formal institutions, their scope and limitations in relation to the protection of private property rights and how they limit or adversely affect legal reform (3.7 – 3.8). This is achieved by considering whether existing formal institutional structures within

\(^{268}\) Nigeria as a developing country is well-known to have weak private property rights protection and there have been persistent complaints by Nigerian scholars about the controversial issues arising from the present laws governing property rights to land. See generally Niki Tobi Existing Laws and the New Constitution (1977 – 1980) Nigeria Law Journal.
the present legal framework can effectively act as checks and balances fostering legal reform and better protection of individual property rights to land in Nigeria. Finally, the last section concludes the chapter (3.9).

3.2 The Laws Governing Private Property Rights to Land in Nigeria

Private property rights to land signify to property owners the exclusive right to use their land as they deem fit. Hernando De Soto a prominent Third World economist proposes that the crucial determinant of a strong legal system is a formal property law and a defined and established legal process to make the property system work. De Soto asserts that “without a system to differentiate and protect rightful ownership of property, capital is dead.” This sentiment echoed by numerous legal and development scholars in Nigeria has resulted in the growing awareness that its private property rights to land is inadequate, out-dated, and in dire need to be reviewed and reformed. It is therefore essential to examine the level of protection that the present laws governing private property rights on land in Nigeria offer to individuals in order to ascertain what needs to be reformed.

3.2.1 The Land Use Act 1978

The Land Use Act 1978 (herein referred to as LUA) is the main body of legislation governing private property rights to land in Nigeria. It is repeatedly and consistently described as the most “revolutionary and controversial piece of legislation in Nigeria’s legal

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269 Armen A. Alchian “Economic Forces at Work.” (1977) Liberty Press. Armen Alchian, Ronald Coase and Harold Demsetz founded the modern property rights school of economics. Their aim being to highlight the importance of private property rights to the economic and financial development of an economy.


271 Ibid, see Hernando De Soto n 271 above.

272 Former Presidents of Nigeria, Olusegun Obasanjo in 2002 and the late Umaru Yar’Adua in 2009 both declared their intentions to revise and reform land and private property rights to land in Nigeria.

The main purpose for the establishment of the LUA is the provision of a uniform land tenure system in Nigeria, to make land easily and cheaply available to the citizens of Nigeria and to prevent fraudulent land practices within the country. The LUA vests all land in the territory of each State in the Governor of each respective State in the country and indicates that “such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act.” By the vesture of all land in the executive institution of Nigeria, the intentions of the promulgators of the LUA was the nationalisation of all the land in the country by giving the State ownership rights to all land and leaving the private citizens of Nigeria with mere interests in land and mere rights of occupancy. The implementation of the LUA extinguished all prior rights to land of all Nigerian citizens and substituted previously alienable rights with two types of rights of occupancy to land. The first type are statutory rights of occupancy which are rights granted to the holder by statutory law and the second type are customary rights of occupancy which are rights granted to the holder under customary law. The present laws governing property rights to land in Nigeria bears a passing similarity to English law in relation to the rights or interests transferred to the people by their respective property rights laws. This similarity is

274 Obaseki JSC in Savannah Bank (Nigeria) Ltd v Ajilo (1989) NWLR describes the revolutionary and controversial nature of the Land Use Act which eliminated all the unlimited rights and interests that Nigerians had to their land before its promulgation and substituted them with limited rights and rigid control over the use and disposal of their rights to the land. See also Justice A.Nnamani The Land Use Act – 12 Years After (1991) Volume 11 Nigerian Law Journal at p. 105.

275 See observations by Kayode Eso J.S.C in Nkwocha v Governor of Anambra State (1984) 6 Supreme Court at p. 312. The real purpose for the establishment of the LUA is stated in the preamble to the Act, “whereas it is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law and whereas it is also in the public interest that the rights of all Nigerians to use and enjoy land in Nigeria and the natural fruits thereof in sufficient quantity to enable them to provide for sustenance of themselves and their families should be assured, protected and preserved.”

276 See section 1 of the Land Use Act 1978.

277 Nigeria was colonised by the British for over 60 years and only gained independence from the British government on October 1st 1960 thereby inheriting the English common law and equity.
superficial because although all land in England and Wales is owned by the Crown\textsuperscript{280} and as a result, all persons own ‘merely’ an ‘estate in land’ rather than the land itself,\textsuperscript{281} however, the rights to land conveyed under English land law make provision for a freehold estate in land despite the wholesale vesture of land in the office of the Crown unlike the Nigerian land law. The English freehold estate interest provides for free alienability of the holders of fee simple estates during the life of the estate owner thereby promoting easy disposability of the estate by way of sale, gift, mortgage or other transfer of property transactions. On death, the fee simple estate is also alienable by will or under the rules of intestate succession in circumstances where there is no will.\textsuperscript{282} In contrast, the Nigerian LUA extinguishes all previously alienable freehold rights to land ensuring that statutory and customary rights of occupancy, granted by the Governor of a state, are the only present and available individual rights to land. Further, these rights are not easily transferrable between individuals within the ambit of the LUA.\textsuperscript{283} The downgrading of previously alienable rights of Nigerian citizens to rights of occupancy by the LUA has served to limit the protection of the property rights of individuals afforded by Nigerian property law. The lack of protection of individual private property rights is also compounded by the fact that the LUA does not define the meaning of the term “rights of occupancy” within its statute.\textsuperscript{284} In the next section, two issues that arise as a result of the lack of a definition of the term “rights of occupancy” will be discussed.

\textsuperscript{280} Section 1 (1) of the 1925 Law of Property Act of England states that “the only estates in land which are capable of subsisting or of being conveyed or created under law are an estate in fee simple absolute in possession and a term of years absolute.

\textsuperscript{281} The Crown is a legal entity and is a representation of the sovereignty of the nation expressed through a constitutional monarchy. It therefore does not refer to the government nor the reigning queen in a personal capacity. See also Martin Dixon “Modern Land Law (2010) Routledge Seventh Edition at p. 6.

\textsuperscript{282} Bray Judith “Unlocking Land Law.” (2010) Transatlantic Publications. Section 1 of the 1925 Law of Property Act of England provides for a perpetual right to land comprising of the right to use and enjoy the land for the duration of the life of the person in which the freehold interest is vested in as well as his heirs and successors.


\textsuperscript{284} Section 1 of the Land Tenure Law of Northern Nigeria Cap 59 Laws of Northern Nigeria which was previously in existence in the Northern States of Nigeria defines a right of occupancy as “a title to the use and occupation of land…”
Firstly, what is the legal nature of the term “right of occupancy” and secondly, what rights does the term convey to any individual who is granted a right of occupancy under the LUA?

### 3.2.2 Legal Rights of Occupancy

The issue of the legal nature of rights of occupancy granted to individuals under Nigerian property law is pertinent because it is essential to know the precise property rights or interests on land that individuals have been granted to successfully assess the protection offered by law to private property rights within the Nigerian legal system.\(^{285}\) As there is no statutory definition of the term “rights of occupancy” in the LUA, it is necessary to assess the level of protection offered by these rights of occupancy. This is measured by considering whether the rights conferred by a “right of occupancy” are analogous or synonymous with the rights conferred by a lease, a license or a freehold.\(^{286}\) The issue of whether a right of occupancy granted by the LUA is the equivalent of a freehold interest in land and whether it offers a similar protection to individual property rights is easy to dispel. The LUA specifically provides that a granted right of occupancy is limited to a definite or certain term or period.\(^{287}\) This means that the “right of occupancy” interest does not offer the alienability or permanence that a freehold or fee simple interest proffers.\(^{288}\) The LUA restricts all rights of occupancy, statutory or customary, granted or deemed\(^{289}\) and provides that the holder of all

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\(^{286}\) This issue was considered in the case of Majiyagbe v Attorney General (1957) N.R.L.R. at p. 158.

\(^{287}\) Section 8 of the Land Use Act 1978. Rather confusingly, there is no requirement of a term certain for deemed statutory rights, granted customary rights or deemed customary rights under the Act.

\(^{288}\) For a thorough analysis of fee simple or freehold interests in land, see the English Law of Property Act 1925. Although the fee simple interest vested by English law, as a statutory description, seems to have a limited duration of ownership, its free alienability criteria effectively accords the owner of a fee simple interest in land with the equivalent of a permanent ownership of the land, thereby rendering the technical ownership of all land by the Crown irrelevant under the English modern law of property. See also Harcup Joy “Green & Henderson: Land Law.” (1995) Sixth Edition, Sweet & Maxwell, London.

\(^{289}\) Deemed grants of rights of occupancy are dealt with by sections 34 and 36 of the Land Use Act. Section 34 provides that a person entitled to a deemed statutory right of occupancy is the person in whom the land was vested immediately before the commencement of the Act. Section 36 similarly conveys a deemed customary
rights of occupancy shall have “exclusive rights to the land against all persons but the…Governor.” A license has also been dismissed by the courts as significantly different from a right of occupancy as it merely grants the holder a personal right which is only binding between the parties who created the license agreement contrary to the rights conveyed by a right of occupancy which is binding against everyone whilst remaining subject to the powers of the Governor of a State. In considering the similarities between a right of occupancy and a lease, the restrictions accorded to the granting of rights of occupancy to individuals under the LUA have been held to bear certain similarities to the granting of a lease. The analysis of the analogous nature of a right of occupancy and a lease has raised certain criteria for comparison. The basic requirements for a lease to be fulfilled are: there must be exclusive possession, at a rent, and for a certain term. The first comparative characteristic of “exclusive possession” already highlights the difference between a lease and a right of occupancy. According to the LUA, the rights to land granted provides the holder of a right of occupancy with actual possession, but does not grant him the right to exclude others from concurrent possession. If the requirement needed is actual possession, then the holder of a right of occupancy certainly has that. However, as the requirement is for exclusive possession, the holder of a right of occupancy does not have exclusive possession of the land.

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290 Section 14 of the Land Use Act.
292 Maiyagbe v Attorney General (1957) N.R.L.R. at p.158. In this case, the Court held that a right of occupancy was in substance a lease.
293 In Street v Mountford (1985) 2 All E.R. at p. 289, Lord Templeton laid out the hallmark characteristics of a lease.
294 Ibid, Street vMountford , see n 294 above.
295 By law the Governor has the right of concurrent possession of the property and there is no guarantee that the holder of the right of occupancy would continue to enjoy his right throughout his occupancy since the rights to the property are not exclusive to him.
under the LUA. The second requirement of a lease is the payment of rent. The LUA only makes statutory provisions for the payment of rent for holders of a granted statutory right of occupancy. Holders of deemed statutory rights of occupancy and granted or deemed rights of customary rights of occupancy do not have a statutory obligation to pay rent under the LUA. The comparative difference of this second criterion has become moot as the current position under Nigerian law is that it is no longer essential to prove payment of rent in order to establish that a lease exists. The third characteristic in fulfilment of a valid lease is that it must be for a term certain. A “term certain” has been defined to mean that every contract to make a lease must at its commencement have certainty in three areas, at the commencement of the term, during its continuance and at the end of it. The LUA only makes statutory provision for statutory rights of occupancy to have a certain term. Once again it does not impose any statutory obligation to make the “term certain” for deemed statutory rights of occupancy or granted and deemed customary rights of occupancy. Thus, there are differences between a lease properly so-called and rights of occupancy under the LUA. It seems clear from the above analysis that the rights accorded by rights of occupancy under the LUA are a distinct proprietary interest in land different from a conventional lease and

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297 This second requirement in order to create a lease has been largely disputed and the case of *Onyechie v Shadiya* (1966) 1 NLR 48 at p. 15 and *Oshinfekun v Lana* (1956) W. R.N.L.R. at p. 93 both held that although in most leases there is a periodic rental payment, a life tenancy is a lease created not necessarily by payment but by an agreement between parties.
298 Section 5 (1) © and section 9 subsection (1), (8) and (10) of the Land Use Act.
299 The Nigerian cases of *Onyechie v Shadiya*, the West African case of *Oshinfekun v Lana*, the English case of *Ashburn Anstalt v Arnold & Anor* (1988) 2 All England Report 147 have all made the point that rent is not necessary in order to establish the existence of a lease.
300 In the case of *Say v Smith* (1530) 1 Plowden, 269, Volume 75 E.R. at p. 410, Anthony Brown J. defined the expression “of a term certain.”
301 In the case of *Savannah Bank Ltd v Ajilo* (1989) 1 N.W.L.R at p. 305, the Nigerian Supreme Court stated that “in terms known to interests in land, the quantum of a…right to occupancy remains unclear. To the extent that it can only be granted for a specific term under section 8 (granted statutory rights of occupancy) of the Land Use Act 1978, it has the resemblance of a lease.”
peculiar to Nigeria alone.\textsuperscript{302} This view is not entirely satisfactory as it still does not clearly define the proprietary interest or rights conveyed by a right of occupancy granted to an individual under the LUA.\textsuperscript{303} Where the precise legal nature of private property rights to land available to Nigerian citizens are ambiguous and uncertain, it makes it extremely difficult to offer adequate and sufficient protection of individual property rights to land. Next, a consideration of the types of property interests and rights to land conveyed to individuals under the LUA will be explored and whether the LUA protects or restricts these private property rights when granted.

3.3 Mortgage on Land

Mortgages on land in Nigeria are governed by the LUA. Surprisingly, statutory definitions of the terms “mortgages” and “land” are not contained in the LUA. Both terms are explained in the Nigerian Interpretation Act\textsuperscript{304} and the Property and Conveyancing Law (PCL).\textsuperscript{305} Land is defined under Nigerian law as “land and everything attached to the earth and all chattels real.”\textsuperscript{306} Mortgage on land is a non-possessory proprietary security interest in which

\textsuperscript{302} Osimiri U \textit{Mortgage Under the Land Use Act 1978 Is Not a Hazardous Business} (1991) The Lawyer’s Journal Volume 2, No. 1 at p. 65-79. Osimiri believes that a right of occupancy is “a form of statutorily created lease that is peculiar to Nigeria. In the case of Osho v Foreign Finance Corporation (1991) 4 N.W.L.R. 157 at p. 197, the Supreme Court held that a right of occupancy is a proprietary interest in land different from the conventional lease.


\textsuperscript{304} The Interpretation Act, Cap 192 Laws of the Federation of Nigeria 1990 was set up to provide for the construction and interpretation of Acts of National Assembly applicable within the Federation of Nigeria.

\textsuperscript{305} Property and Conveyancing Law 1959. The Property and Conveyancing Law 1959 basically adopted the 1925 English real property legislation and is still applicable in Nigeria.

\textsuperscript{306} Section 3 of the Interpretation Act, Cap 192, Laws of the Federation of Nigeria 1990. Section 2 of the Property and Conveyancing Law of Western Nigeria also defines land as “land of any tenure, buildings or parts of buildings and other corporeal hereditaments, also a rent and other incorporeal hereditaments, an easement, right, privilege or benefit in, over or derived from land.” See also Obaseki Andrew JSC \textit{The Judicial Impression of the Nigerian Law of Property: Any Need for Reform?} In the Proceedings of the 26th Annual Conference of the National Association of Law Teachers, Faculty of Law, Rivers State University of Science and Technology, March 1988, Obaseki JSC states that “land is a specie of property…property has been defined to mean
ownership interest in secured property is transferred by the debtor to the creditor in support of the performance of an obligation owed to the creditor. This means that the debtor transfers certain non-possessor ownership rights to the creditor (usually a bank) as collateral, to be held and re-transferred back dependent on the fulfilment of an obligation owed to the creditor. The transfer of ownership interests in a mortgage is subject to a right known as “equity of redemption” which allows the debtor to have the ownership rights re-transferred back to him once he has performed the obligations that he owes the creditor. The debtor’s “equity of redemption” rights can be extinguished by the remedy of “foreclosure” in the event of a default in the performance of the debtor’s obligations. There are two types of mortgages recognizable under Nigerian law: legal and equitable mortgages.

3.3.1 Legal Mortgage

A legal mortgage is an absolute assignment of the full legal title of a secured property to a creditor subject to the contractual right of a re-transfer of the legal title back to the debtor on the performance of his secured obligations. This contractual right has been absorbed by equity so that upon the creation of a legal mortgage over property, there is an immediate separation of the equitable title to the secured property which remains vested in the debtor

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308 Equity of redemption grants a debtor/mortgagor the right in law to redeem his property once the liability secured by the mortgage has been discharged.
309 Foreclosure occurs in circumstances where the debtor/mortgagor is unable to fulfil or pay back the debts owed to the creditor/bank and the creditor takes over possession of the mortgaged property.
311 Smith I.O. “Practical Approach to Law of Real Property in Nigeria.” (1999) Ecowatch Publications Ltd. See also the cases of Santley v Wilde (1899) 2 Ch 474 and Maugham v Sharpe (1864) 17 CB (NS) 443. A legal mortgage properly so-called is a conveyance of legal interest in the property to the creditor bank thereby vesting in the bank the legal estate in the mortgaged land and granting the bank a right to the land itself as well as a right of action against the mortgagor borrower.
giving the debtor an “equity of redemption” right.\textsuperscript{313} By this concept, the debtor/mortgagor retains an equity of redemption while the legal title passes to the creditor/mortgagee. This means that upon the grant of a legal mortgage, the mortgagor has the contractual right to redeem the mortgaged property at the appointed date of the contract. Once this appointed date has lapsed, the mortgagor loses his contractual right to redeem but equity avails him with an equitable right to redeem allowing him an inherent existing equity of redemption.\textsuperscript{314} The inherent equity of redemption offers protection to the debtor/mortgagor giving him recourse under equity.\textsuperscript{315} The protection offered to an individual’s property rights to land under Nigerian Statutory law in relation to legal or equitable mortgages differs due to the fact that a legal mortgage confers on the creditor/bank legal interest in the property which allows the creditor to sell the mortgaged property in the event of a default by the debtor/mortgagor unlike the equitable mortgage which only confers on the creditor an equitable interest in the property. The legal implication of an equitable mortgage is that rather than a legal interest, a charge is created on the mortgaged property.\textsuperscript{316}

\textsuperscript{313} The concepts of legal and equitable interests in Nigerian property law are English law concepts inherited during the colonisation era. See \textit{Pawlett v A-G} (1667) Hard 465; \textit{Fawcett v Louthier} (1751) 2 Vesey Seniors, English Chancery Reports 300 for English law cases that illustrate the distinction and separation of the concepts of legal and equitable interests in property.

\textsuperscript{314} See \textit{Western Region Traders Syndicate v Fasugbe} (1960) WNLR 251; \textit{Ejikeme v Okonkwo} (1994) 8 NWLR (Pt. 362) at 266.

\textsuperscript{315} As mentioned earlier, the distinction between legal and equitable interests in Nigeria is culled from the historical separation under common law between law and equity in English law where certain security rights were only recognisable in courts of equity not common law courts. This distinction is still relevant today and legal interests are said to be enforceable against the whole world while equitable interests are said to bind all except a bona fide purchaser of a legal interest in the same property for value without notice of the prior equitable interest. Therefore a legal mortgage grants a notice to the world of the existence of an encumbrance on the mortgaged property and any third party dealing in any way with the property does so subject to the creditor’s interest. In the event of a default, the creditor has the right to sell the mortgaged land in accordance with the provisions of the legal mortgage.

\textsuperscript{316} See \textit{Ogundiani v Araba & Anor} (1978) Volume 11 Nigerian Supreme Court Cases at p.334. An equitable mortgage entitles the creditor/bank to sue for specific performance under the doctrine of equity.
3.3.2 Equitable Mortgage

The second type of mortgage on land, the equitable mortgage is created when there is an assignment of the full equitable title in a secured property to the creditor with the exclusion of the debtor’s equity of redemption.\(^{317}\) As in a legal mortgage, there is an immediate separation of the equitable title conveyed to the creditor and the equity of redemption right which remains vested in the debtor.\(^{318}\) Equitable mortgages can be created in numerous ways. Firstly, they can be created by a mere deposit of title deeds with a clear intention that the deeds are to be used or retained as security. Secondly, equitable mortgages can be created by an arrangement to create a legal mortgage; and thirdly, by an equitable charge of the mortgagor’s property or a mortgage of the equitable interest.\(^{319}\) The most common method of creating an equitable mortgage in Nigeria is by a deposit of the title deeds to the property. The act of deposit of title automatically constitutes part-performance and the deposit operates as a mortgage. Delivery of the deed accompanied by an execution of a memorandum under seal solidifies the agreement. Most creditors/mortgagees insist upon the execution of memorandum as it grants the mortgagee the powers of a legal mortgage under the Property and Conveyancing Law.\(^{320}\) However, it is a settled principle that delivery to the creditor of the title deeds automatically creates an equitable mortgage and the requirement of a memorandum can be waived.\(^{321}\) An agreement whereby the owner of a legal title in property agrees to create a

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\(^{317}\) Wajuihian Daniel *Can A Bank Sell the Mortgaged House?* The Housing Times Nigeria. Wajuihian asserts that an equitable mortgage is a contract which “creates a charge on the property but does not convey any legal estate or interest to the creditor…its operation is that of an executory assurance which as between the parties as far as the equitable rights and remedies are concerned is equivalent to an actual assurance, and is enforceable under the court’s equitable jurisdiction.”

\(^{318}\) A maxim of equity is that “equity follows the law” and in situations where common law is rigid, equity steps in and allows the creation of mortgages in other ways than allowed by common law. See the cases of Archibong *v Duke*,(1923) 4 NLR 92; Chidiak *v Coker* (1954) 14 WACA 506; Anwadike *v Administrator General Anambra State* (1996) 7 NWLR (Pt. 460).


\(^{320}\) See section 5 of the Nigerian Property and Conveyancing Law 1959.

\(^{321}\) See African Continental Bank Ltd *v Yesufu* (1977) NCLR at p. 212. See also *Ogundiani v Araba* (1978) 1 LRN 280 at 288.
legal mortgage in favour of a creditor establishes an equitable mortgage. The agreement effectively constitutes part-performance, which is enforceable in equity by a decree of specific performance provided that the creditor has already advanced the loan to the debtor, whether the contract is under seal or not. The third method of creating an equitable mortgage over property in Nigeria is where a debtor/mortgagor creates a second mortgage over the same property in favour of a subsequent mortgagee. In this instance, the first mortgage will effectively exhaust the legal title in the property, and the second mortgage will operate as a conveyance of the equity of redemption in favour of the subsequent mortgagee; the effect of this is that an equitable mortgage is created. So far, we have considered legal and equitable mortgages as legally recognised interests to land in Nigeria. In the next section, we will consider charges as mortgages which are also legally recognised interests which may be conveyed to individuals under Nigerian private property law.

3.3.3 Charges as Mortgages

One significant contribution of statutory law in Nigeria to the law of mortgages is the transformation of a charge into a mortgage. The technical distinction between a “mortgage” and a “charge” is the fact that a mortgage involves a transfer of ownership rights by a conveyance of property subject to a right of redemption. A charge on the other hand,

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323 See Ekpanya v Akpan (1989) 2 NWLR (Pt. 101) 86. See also Balogun v Balogun (1934) 2 WACA 290; Osagie v Oyeinka, (No. 2) (1987) 3 NWLR (Pt. 59) 144. As equity looks on that as done which ought to be done, it looks at an agreement to create a legal mortgage and imputes it with an intention to fulfil an obligation once consideration has been advanced by the creditor.
326 See sections 108, 109 and 110 of the Property and Conveyancing Law 1959.
conveys no ownership rights and merely gives the creditor/chargee certain rights or a right of recourse to property as security for the loan. Nigerian statutory law has decided, in relation to private property rights on land, to categorise mortgages and charges under one umbrella despite their technical differences. The first method by which a charge is converted into a mortgage under Nigerian Statutory law occurs where the individual holder of the right of occupancy on land grants the creditor/mortgagee his lease-hold interest in the property subject to a provision for redemption upon the fulfilment of the obligation owed by the mortgagor. At the time of creation of the mortgage by way of demise or charge, both the mortgagor and the mortgagee have legal interests in the mortgaged property. While the mortgagee has the mortgagor’s leasehold interest in the property during the duration of the mortgage agreement, the mortgagor has a legal reversion once his legal obligations have been fulfilled. The mortgagor can also grant a second mortgage in respect of the same property to another mortgagee provided the term of years granted to the subsequent mortgagee is longer than the original term of years granted to the original mortgage by at least one day. The second method of creation of a mortgage is a charge by deed expressed to be by way of legal mortgage. Section 108 of the Property and Conveyancing Law (herein referred to as PCL) creates a statutory mortgage out of a charge by conferring on a creditor/chargee specific

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327 Section 108 of the Property and Conveyancing Law has blurred the distinction between a mortgage and a charge and the provision states that a legal mortgage of a freehold estate can be created by “a demise (sub-demise) for a term of years absolute, subject to a provision for a ceaser on redemption and a charge by deed expressed to be by way of legal mortgage.” (Demise is the term applicable to a freehold interest in land while sub-demise indicates a leasehold.) See also the English case of Re Bond Worth Ltd (1980) Ch 228; see also Smith Marcus QC Security in “Corporate Finance Law in the UK and EU.” Edited by Dan Prentice and Arad Reisberg (2011) Oxford University Press at p. 243, for a general discussion on charges under English law.
328 The Property and Conveyancing Law 1959 describes the numerous ways of creating mortgages from charges.
330 Section 108 of the Property and Conveyancing Law provides that where appropriate words of creation have not been applied in the creation of the mortgage agreement, the appropriate words of creation would be read into it as if the mortgage is created under that provision. N.H.D.S. v Ogunepo (1970) NCLR 170 at 176.
331 See N.H.D.S. v Ogunepo (1970) NCLR 170 at p. 176. The distinction between a mortgage and a charge is that a charge does not transfer ownership rights on the property to the creditor/bank. The ownership rights are retained by the individual debtor as the security right conveyed by a charge is a right to sell property and be paid out of the proceeds of the sale.
power, protection and remedies as if he is a legal mortgagee. Consequently, although a creditor/bank under a charge by deed described to be a legal mortgage does not have a legal estate, the creditor/bank is seemingly vested with a legal estate for the purpose of enforcing payment of the charged debt. These changes introduced by the statutes have the effect of blurring the lines between the rights of the debtor/individual and the creditor/bank in relation to mortgages and charges. Although the PCL has essentially removed the distinction between mortgages and charges, in practice, the results are rather different. Prior to the PCL, with regard to charges on land, the debtor/individual clearly and inexplicably retains his legal title to the property throughout the agreement and is automatically entitled to any increase in the value of the mortgaged property even if he initially purchased the property with borrowed funds. The effect on the creditor/bank is that it realistically takes a mere security interest over the property by way of a lease or charge and is entitled only to a return of the capital with appropriate interest. Post PCL, the effect of the PCL statutory intervention on a charge expressed by way of a legal mortgage is that although it becomes more than just a charge, it does not have the absolute certainty in terms of available remedies in the event of a default that a mortgage properly so-called confers. Charges which in substance secure a loan upon the debtor’s real property, although statutorily pre-determined to operate by way of a mortgage under the terms of the LUA, remain uncertain in practice because the laws reflected

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332 These rights include the right to take proceedings to obtain possession from the person in receipt of rent or profit just as if the creditor bank has a legal mortgage. See also section 110 of Property and Conveyancing Law 1959.

333 See section 13 of the PCL 1959. See also section 123 regarding imports into the statutory mortgage power to sell, insure and appoint a receiver and section 100 of the PCL 1959 for if the mortgagor is expressed to convey as beneficial owner in circumstances where the usual unqualified covenants for title are implied.

334 Although the aim of the PCL 1959 is to eliminate the distinction between mortgages and charges as seen in sections 110 to 132 of the PCL, on a closer inspection of the provisions, legal charges converted to mortgages do not have the absolute certainty that a legal mortgage confers and some of the proprietary remedies automatically granted to a legal mortgage cannot be exercised by the creditor/bank without the intervention of the courts and the creditor would have to apply to the courts to take possession of the property, or in the event of a foreclosure. The relevant sections of the PCL are ambiguous and create confusion and uncertainty to the law in practice.

in the statute in terms of remedies sought are unclear and ambiguous. Wherever there is ambiguity in the law, which in this instance occurs in relation to available remedies for charges operated by way of mortgages, it becomes challenging to adequately guarantee protection of individuals' private property rights.

3.3.4 LUA Restrictions on Mortgages on Land

The LUA imposes a number of restrictions on mortgages. Indeed, in relation to mortgages on land, the protection of individual private property rights in Nigeria has been irrevocably affected by the provisions of the LUA. Yet interestingly, the LUA unlike the PCL does not stipulate or explain how a mortgage should be created. Rather it preserves the existing laws on mortgages in Nigeria subject to certain modifications. The LUA acknowledges existing applicable laws on mortgages in Nigeria while removing all unlimited interests on land and replacing the interests with rights of occupancy. This is reflected in numerous sections of the LUA. The LUA effectively preserves pre-existing rights to land which existed before the promulgation of the LUA by including provisions which make references to the retention of existing laws of mortgages as well as highlighting any modifications to the existing laws made to bring the laws in conformity with its provisions. 

337 The laws on mortgages are defined and explained under the PCL 1959 as well as the Interpretation Act, Cap 192 Laws of the Federation of Nigeria. These Acts are retained by the present Constitution of the Federal Republic of Nigeria Cap 202 LFN 1990, section 48.
338 See sections 1- 6 of the Land Use Act 1978. Section 5 empowers the Governor of a State in respect of property rights to land whether or not it is in an urban area to grant a statutory right of occupancy to any individual for all purposes while section 6 empowers the Local Government in circumstances were appropriate in relation to land in a non-urban area to grant a customary right of occupancy to individuals.
339 Section 5, 6, 34 and 36 of the LUA makes references to existing laws and rights to land. In accordance with the elimination of all unlimited rights to land, the provisions of the LUA has modified certain aspects and sections of the PCL so that in provisions where it is required that a mortgage of land be effected by a “demise for free-hold” or a “sub-demise for lease-hold”, these have been replaced with the terms “sub-grant” and “sub-under grant” respectively in order to bring existing laws in line with the LUA.
340 Directly, however, the LUA remains silent in relation to the creation of mortgages.
341 Grants and sub-grants of land refer to the granting of the rights of occupancy by the Governor of a State to individuals rather than the conveyance of freehold interests which existed prior to the promulgation of the LUA.
between the types of land interests which exist in Nigeria by differentiating between land situated in urban areas and land situated in non-urban/rural areas. Further, it goes on to distinguish rights of occupancy granted by the Governor or Local Government as statutory rights and customary rights of occupancy respectively and differentiate them from “deemed” rights of occupancy granted under the LUA. Statutory and customary rights of occupancy are interests granted by the Governor of a State or the Local Government to holders of interests on land after the enactment of the LUA. Deemed rights of occupancy differ because they are rights converted from ownership rights to rights of occupancy and granted by the Governor or Local Government to holders of ownership rights to land before the enactment of the LUA. In addition to acknowledging pre-existing interests on land, the LUA imposes restrictions on private property rights of individuals to land, limiting their ability to acquire or alienate rights to land in certain circumstances. The main restriction imposed by the LUA is the requirement of the Governor’s permission in order to create a mortgage over land in circumstances where an individual has been granted a right of occupancy whether it is statutory, customary or deemed. The LUA specifies the different types of rights of occupancy granted by the Governor and elaborately imposes an essential consent requirement which is needed in order to create mortgages on the relevant property. Any alienation by way of a mortgage without the requisite Governor’s permission is declared to render the

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See section 48 of the LUA. Also section 34 provides that where land “was subject to a mortgage before the commencement of the Act, such land shall continue to be so subject, provided that the continued operation of the mortgage is not in the opinion of the …Governor inconsistent with the provisions or general intendment of the Act.” Section 34 (4).

Deemed rights of occupancy under the LUA are the rights granted by the Governor of a state to holders of ownership rights to land before the enactment of the LUA. Section 34 and section 36 of the LUA are the statutory provisions that give the Governor the power to grant deemed rights of occupancy to holders who previously had full ownership rights to land before the enactment of the LUA in 1978. See sections 5, 6, 34, 36 and 39 (1) (a) of the LUA.

Deemed rights of occupancy under the LUA are the rights granted by the Governor of a state to holders of ownership rights to land before the enactment of the LUA. Section 34 and section 36 of the LUA are the statutory provisions that give the Governor the power to grant deemed rights of occupancy to holders who previously had full ownership rights to land before the enactment of the LUA in 1978. See sections 5, 6, 34, 36 and 39 (1) (a) of the LUA.

See section 22 of the LUA. A right of occupancy granted by the Governor under section 5 (1) (a) whether the land is situated in an urban or non-urban area, requires the consent of the Governor for its alienation by way of mortgage.
transaction null and void.\footnote{The Governor’s consent is required in order to create a mortgage of a deemed right of occupancy on undeveloped land in an urban area. The Governor’s permission is also required in order to alienate a customary right of occupancy granted by the Local Government under section 6 of the LUA.} The restriction by the LUA on an individual’s ability to alienate his/her property rights by way of a mortgage or create a mortgage on his/her rights of occupancy without the consent of the Governor has dealt a considerable blow to the protection of private property rights to land in Nigeria. Further, the blanket requirement greatly hinders the progressive development of private property rights to land in Nigeria.\footnote{Although compensation is payable on mortgaged property where there has been unexhausted improvements on the land, the creditor/bank under the LUA is not entitled to such compensation.}

Another restriction imposed by the LUA is contained in section 36(5) of the LUA. It prohibits the alienation of land in non-urban areas\footnote{A non-urban area is an area that has not been designated as an urban area by the Governor of a State as prescribed by section 3 of the Land Use Act. Therefore the decision of whether an area is urban or non-urban is determined by the Governor of the State where the land is situated.} which are the subject of a customary right of occupancy deemed granted so that a mortgage cannot be created thereon. This means that holders of existing rights to property in non-urban areas under customary law are prohibited from creating a mortgage on their land by the LUA.\footnote{There were customary rights existing in non-urban areas prior to the LUA.} Where the land is situated in the Federal Capital Territory, the LUA stipulates that only a statutory right of occupancy granted by the Federal Government can be the subject matter of a mortgage or security interest.\footnote{It is not clear why the LUA has prohibited the alienation of land in non-urban areas. See I.O. Smith, “Nigerian Law of Secured Credit” (2001) Ecowatch Publications Ltd at p. 45. In the case of Ona and Anor v Atenda (2000) 5 NWLR Part 656 at p.244, the Court of Appeal held that the combined effect of section 49 (1) of the LUA, section 1 (3) of the Federal Capital Territory Act 1976 and section 261 (2) of the 1979 Constitution was to abolish the existence of customary rights of occupancy in the Federal Capital Territory, and warned prospective mortgagees not to accept a customary right over land situated in the Federal Capital Territory as security since a mortgagor cannot grant a mortgage over property that he does not in fact own.} The LUA makes it possible to create a mortgage security over vacant land subject to the same requirements of consent.\footnote{Governor’s consent and Local Government consent under sections 21 and 22 of the Land Use Act 1978. To be discussed in great detail in the next chapter.} In practice, it is considered advisable for a creditor/bank not to accept a mortgage over a vacant land since in the event of a revocation of the statutory right
of occupancy\textsuperscript{350} compensation under the LUA is payable only on un-exhausted improvements on land.\textsuperscript{351} Section 15 of the LUA allows ‘improvements’\textsuperscript{352} on land which is subject to a statutory right of occupancy to be mortgaged but imposes the essential requirement of consent from the Governor. The effect of the restrictions imposed by the LUA on mortgages on land is to greatly limit individual property rights in Nigeria.\textsuperscript{353}

### 3.4 Sale or Assignment

This section examines another type of property rights to land which may be conferred on individuals through sale or assignment and considers the restrictions imposed on such rights by the LUA. Easy alienability of rights of individuals through sale or assignment indicates positively towards defined and secure private property rights to land. The issue becomes how to adequately protect individual property rights in the event of a sale or assignment.\textsuperscript{354} The LUA has failed to achieve this objective by making the process of transferability of private property rights to land more difficult, cumbersome and expensive thereby adversely affecting the protection of individuals in the process.\textsuperscript{355} The sale or assignment of land in Nigeria is governed by the LUA and the LUA has imposed certain restrictions on transferability by way of sale or assignment of individual property rights to land. The procedure for a sale or assignment of land in Nigeria consists of an individual buyer or entrepreneur, who after

\textsuperscript{350} Section 28 of the Land Use Act gives the Governor the power to revoke a right of occupancy for overriding public interest. Overriding public interest is defined to include a situation where land is required by the government for public purposes and where land is required for mining purposes and for the laying of oil pipelines.

\textsuperscript{351} Section 29 of the Land Use Act.

\textsuperscript{352} ‘Un-exhausted improvements’ is defined by the Act as anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or a person acting on his behalf, increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of long lived crops or trees, but does not include the result of ordinary cultivation other than growing produce.


\textsuperscript{354} The World Bank asserts that long and cumbersome processes for transfer of property transactions and expensive property registration processes is associated with weaker perceived security of property rights.

\textsuperscript{355} Nwogbo Mike \textit{How Land Management Reform Can Ease Home Ownership} (2010) www.businessdayonline.com
expressing interest in a property, hires a lawyer\textsuperscript{356} to handle the property transaction. Once the seller of the property has agreed to the sale or assignment and the lawyer has ensured that the property is free of encumbrances, the lawyer draws up the deed of assignment.\textsuperscript{357} Sale or assignment of the individual’s interests in property is achieved in two stages, the contract stage and the conveyance stage.\textsuperscript{358} The contract stage involves the formation of a binding contract of sale while the conveyance stage vests the legal title of the property in the buyer by means of the appropriate instrument under seal.\textsuperscript{359} It is after the contract stage but before the conveyance stage that the issue of the Governor’s consent requirement which is mandatory in every transfer of property rights by sale or assignment needs to be dealt with.\textsuperscript{360}

The LUA restriction of Governor’s consent is applicable before a transfer of individual property rights to land by sale or assignment comes into operation. It occurs after the contract of sale has been agreed between the parties to the land transaction agreement but before the conveyance stage when legal title to the property passes from the seller to the buyer. After the first stage but before the second stage, the agreement is submitted to the Governor of the State for the requisite consent.\textsuperscript{361} The LUA requirement of Governor’s consent has a bottleneck effect which greatly limits property rights transactions on land in

\begin{footnotes}
\item[356] The hiring of a lawyer is a compulsory requirement for a sale or assignment of property in Nigeria.
\item[357] The deed of assignment is a contract of sale stating the agreement between the buyer and the seller for the relevant property. This process is a cumbersome one that involves the filling of application forms, tax clearances, securing a plan of the property, payments of stamp duties, deposit fees, and the conduction of elaborate searches of the land registry.
\item[358] Akintunde Ayodele Of the Alienation of Land and Governor’s Consent (2010) \url{www.thisdayonline.com}
\item[360] Uwaifo J.S.C further states that “it follows that only after a binding contract for sale is arrived at that the need to pursue the procedure for acquiring title will arise. That is when the obtaining of the necessary consent to alienate the property becomes an issue in order to make the alienation valid. The transaction under the first stage i.e. the agreement or contract stage does not require the consent of the Governor...this is because when parties enter into a contract for the sale of land, no alienation has taken place as envisaged by section 22 of the LUA...”
\item[361] Igah J.S.C. in the case of Awojusige Light Industries Limited v Chinakwe (1995) NWLR Part 390 at p. 435 asserts that “the holder of a...right of occupancy is certainly not prohibited by the LUA from entering into some form of negotiations which may end with a written agreement for presentation to the Governor for his necessary consent or approval...”
\end{footnotes}
Nigeria. The limiting effect of the consent requirement leads to delays in the process of a sale or assignment of property transactions. It causes delays to the legal process of registering the purchased property, which is the subject matter of the sale or alienation, at the land registry of the state where the landed property is located. In practice, the restriction has added at the very least a six month delay to any sale or assignment of rights of occupancy between individuals and generated exorbitant costs due to the numerous processes and fees that need to be paid in order to acquire legal title in landed property in Nigeria. The limitations discussed so far contribute to the reasons why Nigeria is perceived to have weak private property rights to land and why individuals’ rights or interests in land are considered to not be adequately protected by the present laws governing private property rights in Nigeria. Having discussed sale or assignment of property rights to individuals, the next issue to be addressed are all other transfer of possession transactions which confer individuals’ rights or interests in property and the LUA’s restrictions on the resulting rights. Transfers of possession generally refer to the handing over of possession of property interests or rights to land between parties to the transaction. The LUA’s imposition of Governor’s consent extends to all transfers of possession in relation to private property rights to land including pledges and gifts which involve the transfer of possession of property rights on land between individuals.

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362 See an article by The World Bank *Doing Business in 2005: Removing Obstacles to Growth* (2005) This requirement of government consent before property rights to land is transferred has been identified by the World Bank as one of the main problems which has led to weaker private property rights protection, unnecessary delays in acquiring or transferring property, exorbitant fees and charges and corruption within the legal system. Lesotho, Malawi, Rwanda, Senegal, Zambia and Nigeria are all African States which have consent requirements as part of their laws governing private property rights to land transactions.

363 On an average, the requisite governor’s consent takes about six months to obtain, therefore, the whole process of purchase of a landed property in Nigeria, including the application, searches, submission for consent and the registration of the property at the land registry involves 21 procedures, 27% of the property value in official fees and takes about 274 days to achieve. This varies greatly from the process in Norway where an individual is able to go to the land registry, submit an application, pay the registration fee and 2.5% of the property value in stamp duty and completely register the property within one day. See The World Bank *Doing Business in 2005: Removing Obstacles to Growth*.

364 The effect of the LUA restrictions in Nigeria is evident; transfer of interests in property is painstakingly cumbersome and expensive. The World Bank states that registering of property is almost twice as efficient in rich countries as it is in poor countries.
3.5 Pledges

The term ‘pledge’ under Nigerian law refers to the customary pledge which is part of the local laws and customs. A customary pledge is defined under Nigerian customary law as an arrangement whereby the owner/pledgor of land in order to secure an advance of money or money’s worth, gives possession and use of the land to the creditor/pledgee until the debt is fully discharged. The relevant issue in the LUA restriction is the transfer of possession which occurs in pledge agreements between parties. Before any transfer of possession can be made by the debtor to the creditor, the requisite Governor’s consent needs to be sought first and obtained. Nigerian law infuses two essential features into the customary pledge possessory interest in land. Firstly, that the pledge provides the creditor/pledgee with security for the performance of the debtor/pledgor’s obligation of repaying the money owed. Secondly, that the security takes the form of giving the creditor/pledgee possession of the debtor/pledgor’s property. Customary pledges have sometimes been confused with mortgages on land and this has arisen due to a failure to use precise language to indicate the nature of the transaction. The distinguishing feature between a customary pledge and a mortgage is in the nature of the security granted. If the agreement seeks to grant the creditor a proprietary interest in the secured property, then whether or not the creditor takes possession of the property under express stipulation or by operation of law, the transaction is a mortgage.

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365 Similarly, the term “pledge” exists under English common law. See the English case of Maynegrain Property Ltd v Compafina Bank (1984) 58 ALJR 389, a pledge was defined as a possessory interest in land whereby the possession of the secured property is vested in the creditor to support the performance of an obligation owed by the debtor.


367 See sections 21 and 22 of the LUA. These sections buttress the powers of the Governor and the Local Government to provide consent for statutory rights of occupancy on land situated in the urban areas and customary rights of occupancy in relation to land in rural areas respectively.

368 In relation to interests and rights to land, though the LUA recognises the legal interests of persons vested with developed land before its commencement, in the case of undeveloped land in urban areas vested in a person before the LUA’s commencement, only one portion of land not exceeding a half hectare is to continue to be held by the person as if he has been granted a statutory right of occupancy over the half hectare. After the LUA commencement, the undeveloped land which is situated in an urban area within a State falls within the ambit of the Governor’s powers and all other rights in excess of the half hectare of land held by the land owner are extinguished under the LUA and revert back to the Governor of the State. See section 34 (5) of the LUA.

369 Nwabuoku v Ottih (1961) 1 All NLR at p. 487.
If actual possession is to be given to the creditor under the agreement, then it is in fact a Nigerian customary pledge.370

The LUA has imposed certain restrictions on the transfer of property rights to land through pledge agreements and this has had an adverse effect on the protection accorded to private property rights of individuals within the Nigerian legal system. The first LUA restriction which is applicable to a debtor/pledgor who had pre-existing rights to the land before the commencement of the LUA relates to undeveloped land situated in an urban area. The LUA restricts individual property rights by asserting that the debtor cannot pledge more than a half hectare of the land as that is the maximum quantum that he is entitled to by law.371

In relation to developed land situated in an urban area, the LUA makes reference to the Nigerian federal capital and provides that land situated in the Federal Capital Territory of Nigeria can only be the subject of a statutory right of occupancy granted by the Governor of the Federal Capital Territory.372 Inevitably, the Governor’s consent requirement is mandatory with regards to a statutory right of occupancy where there is alienation or a transfer of possession of the land in question.373 As Nigerian pledges involve the transfer of possession of the property, the consent requirement is needed by law in order to make the pledge agreement valid. In circumstances where there exists a customary right of occupancy, the

370 See the case of Adjei v Dabanka (1930) 1 WACA, p. 66-67 where the distinguishing feature between a Nigerian pledge and a mortgage was highlighted. Michelin J. referred to the pledge in the property agreement as a “native mortgage” and stated that “it is an essential of a native mortgage (pledge) that possession should be given at the time when the transaction takes place between the parties. It is out of the possession granted under the agreement that the pledgee’s right spring.”
371 See section 34 (5) of the LUA. All undeveloped land situated in urban areas at the promulgation of the LUA became vested in the Governor of each State in the Nigerian federation and the pre-existing rights to the land were extinguished with the exception of half a hectare which still remained with the original holders of the rights to the land before the commencement of the LUA.
372 See generally section 34 of the LUA. The implication of these provisions is that customary pledge agreements can only be created over land which is the subject of a statutory right of occupancy. As land in the Federal Capital Territory does not qualify as non-urban or rural land, therefore customary rights of occupancy are not possible in the Federal Capital Territory (Abuja).
consent of the Local Government of the land in question is also mandatory.\textsuperscript{374} The greatest restriction is contained in section 36 (5) of the LUA which appears to prohibit any transfer of land in non urban areas deemed granted.\textsuperscript{375} This sub-section seems to imply a total ban on “transfer of land” transactions on land situated in a rural area where the rights of occupancy on the land are deemed granted.\textsuperscript{376} The issue of whether the blanket ban of “transfer of land” is applicable to a pledge which is in essence the transfer of possession of landed property between parties to a transaction is one that is still being argued under the Nigerian legal system.\textsuperscript{377}

\subsection*{3.6 Gifts}

Gifts of landed property involve a transfer of possession of property between two parties. A gift signifies the voluntary transfer of property from one person to another without valuable consideration.\textsuperscript{378} When land is transferred by way of a gift between parties, the requisite consent of the Governor is needed in order to validate the property transaction.\textsuperscript{379} The LUA’s imposition of the consent requirement encroaches on the private property rights and prevents

\textsuperscript{374} Ona & Anor v Atenda (2000) 5 NWLR (Pt. 656) at p. 244. It was held that the key characteristic of a Nigerian pledge is a transfer of possession of the land from the debtor/pledgor to the creditor/pledge. The LUA also goes further to restrict individuals by stating in section 6 (2) of the LUA that “the holder of a customary right of occupancy granted by the Local Government is not entitled to more than 500 hectares in the case of agricultural land and 5000 hectares in the case of land meant for grazing. Such holder cannot therefore create a pledge over land which exceeds the maximum quantum allowed by law.”

\textsuperscript{375} Section 36 (5) states that “no land not in an urban area which was immediately before the commencement of the Act held or occupied by any person shall be sub-divided or laid out in plots and no such land shall be transferred to any person by the person in whom the land was vested aforesaid.”

\textsuperscript{376} The salient provisions that deals with “deemed grants” are section 34 and 36 of the LUA. Deemed grants of rights of occupancy indicate pre-existing rights to property which were in existence before the commencement of the LUA and which become vested in the holders of the property rights after the LUA by virtue of section 34 and 36 as if a statutory or customary right of occupancy had been issued by the Governor or Local Government respectively.

\textsuperscript{377} Nigerian legal scholars like Omotola J.A. in Essays on the Land Use Act 1978 (1983) and Utuama A.A. in the “Nigerian Law of Real Property.” (1989) Shannonson Publications hold differing opinions on the applicability of this ban on all transfer of land to pledges for landed property situated in rural areas under deemed grants of rights of occupancy. The Nigerian courts are also uncertain about the scope of this ban.

\textsuperscript{378} Under the Nigerian law of property, the donor of the gift must have the intention to give the gift to the donee/recipient and the gift must be delivered and accepted by the donee.

individuals from transferring property rights as gifts without first and foremost obtaining consent from the Governor of the respective State within which jurisdiction the land which is the subject matter of the gift is situated. The issue of whether the blanket ban imposed by section 36 (5) of the LUA which refers to all “transfers of land” is also applicable to gifts of landed property from a donor to a donee remains unclear. The Nigerian courts are still unable to determine whether section 36 (5) applies to gifts of land granted between parties. It is apparent that there are considerable restrictions imposed by the LUA on any transfer of property between parties to property transactions and these limitations restrict the ability of individuals to freely alienate and deal with their interests or rights in property. This constitutes inadequate property rights protection and weak individual property rights within the Nigerian legal system. Hence, by way of conclusion, it is suggested that the laws governing private property rights to land do not adequately protect individual property rights within the Nigerian State and are therefore in dire need of reform. Next to be considered are the formal institutional structures that enable these laws and their functionality; and the in-built constraints to the reform of these existing laws governing landed property within the Nigerian legal system.

3.7 Formal Institutional Structures and Constraints to Reform

As mentioned in an earlier chapter, North’s definition of formal institutions as “representative structures of codified and laid out rules and standards that shape interaction among members of the society” is generally accepted among legal and political scholars. Formal institutions

380 Nigerian courts have been unable to set the boundaries on what constitutes a “transfer of land” for the purposes of the LUA and whether the blanket ban on all transfers of land in rural areas that are subject of a deemed grant is applicable to the transfer of land which is the subject of a gift between a donor and a donee.

381 North Douglass “Institutions, Institutional Change and Economic Performance.” (1990) Cambridge University Press. North defines institutions as “humanly devised constraints that structure human interaction” and asserts that “institutions are made up of formal constraints…which translate to rules, laws and constitutions…”
are therefore established in a legal system to provide stability and order by the setting up of rules and standards in order to influence societal actions and behaviour. Rules and standards created to solve problems that obstruct the ability to achieve goals deemed important within legal systems ultimately crystallise into formal institutions. But what happens when the goals in which the rules and standards are based on are inconsistent with the protection of private property rights to land? To ascertain the limitations of the formal institutional structures within the Nigerian legal system and the impact of existing constraints on the legal reform of the laws governing private property rights to land, an analysis of the numerous formal institutions within the Nigerian legal system will be carried out. The analysis primarily assesses constraints which adversely limit the functionality of formal institutions, hinders the progressive development of better laws and ultimately restricts the development of reformatory measures essential in order to adequately protect individual property rights. The issue of why there has been a failure in competently and effectively reforming the laws governing property rights on land naturally turns to the institutions that produce legislation, determine the legal system and coordinate the processes that create and enforce law and regulation. The three formal governmental institutions within the Nigerian federalist state - the executive, legislature and the judiciary are emblematic of constraints

384 Wiarda Howard J. “Political Development in Emerging Nations – Is there Still a Third World?” (2004) Belmont, Thomson Wadsworth. Wiarda asserts that “The problem for most developing nations is not just that they have low levels of socio economic development but also weak institutions – especially those institutions that are supportive of democracy. Legislatures are weak and do not often serve as effective checks on excessive presidential authority. Courts and court systems are weak and often lack independence from police, military or presidential powers. Local government is weak and lacks independent taxing and policymaking authority. Public bureaucracy is often unprofessional and is dominated by patronage, cronyism, and corruption. Both presidential and legislative staff are often weak, untrained and inexperienced.”
within their structure which adversely affect the progressive development of the laws governing property rights of individuals.\textsuperscript{386} The executive, legislative and judiciary institutions within the Nigerian legal system have undergone major changes from the country’s independence to date. To effectively examine formal institutions and the limitations imposed by the relevant institutions on private property laws, the origin of the LUA needs first to be considered.

\subsection*{3.7.1 Land Use Decree to LUA}

The LUA was originally drafted, created and promulgated as a decree\textsuperscript{387} by the federal military government during the military regime. It was the end product of a widespread seizure of all the constitutional and democratic powers of the Nigerian Federal State. The rule of the military in Nigeria was characterised by the suspension of the Constitution, the vesting of all the policy making powers in the Supreme Military Council and the ban on all other institutions providing legislative and judicial functions within the State.\textsuperscript{388} The Land Use Decree turned Act is therefore representative of an authoritative piece of legislation stemming from a military dictatorship which is symbolised by a concentration of all legislative, judicial and executive functions in the Military Executive Government.\textsuperscript{389} Even more significantly, the LUA was and still remains the primary comprehensive legislation regulating the

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  \item The LUA was originally established by the military government as Decree No. 6 of 1978 but upon the departure of the military government and the handing over to the civilian government, the LUA was converted and re-designated under section 1 of the Adaption of Laws Order No. 13 of 1980 which is an Act that redesigns decrees into law and subsequently became part of the Constitution of the Federal Republic of Nigeria. It was republished in the Laws of the Federation of Nigeria 1990 and is now entrenched under section 315 as an existing law in the Constitution of the Federal Republic of Nigeria 1999.
  \item The military rule in Nigeria is a significant aspect of Nigeria’s institutional structure as between the periods of 1966 and 1999, apart from the 4 years of the Second Republic, the country was consistently ruled by the military government.
  \item A \textit{Country Study – Nigeria: Federalism and Intergovernmental Relations} (1992) Library of Congress, Call No. DT515.22.N53. Under the military rule, state governors were appointed military personnel who carried out policies created by the federal military government.
\end{itemize}
\end{footnotesize}
acquisition, use, disposition and extinguishment of all rights to land in Nigeria. The LUA was established “to make land available to all including individuals, corporate bodies, institutions and governments…and to promote fast economic and social development at all levels and in all parts of the country…” In practice, the promulgation of the Land Use Decree turned Act resulted in the vesture of powers in the federal military executive institution to the detriment of the other two arms of government and contrary to the separationist concept of a federal system of government on which Nigeria’s federalism is based. The structural premise on which the LUA was founded is the military concept of executive dominance and centralised powers and this is still evident in the statutory provisions of the LUA. The military executive’s desire to impose their policies and laws and subjugate the other tiers of government is apparent in section 47 of the LUA which asserts that the provisions of the LUA are to have effect “notwithstanding anything to the contrary in the Constitution.” Section 47 goes on to oust the jurisdiction of the Court to determine any matter relating to the vesting of all ownership rights to land in Nigeria in the

390 See the case of Nkwocha v Governor of Anambra State (1984) 6 Supreme Court 362 at p. 363.
391 See extract of the broadcast of the then Nigerian Head of State, General Olusegun Obasanjo in 1978.
392 Once the military government seized power of the legitimate federal democratic government, they ensured that all existing laws and the constitution were suspended and imposed laws which ensured that all power was concentrated at the centre under the Executive Supreme Council. In the prolonged twenty-nine years out of fifty-one years of Nigeria’s independence from colonial rule, it is evident that the nature of military rule constricted democratic expression, entrenched authoritarianism and nurtured militarism in the country. Adebayo Adedeji, an economics scholar and former Executive Secretary of United Nations Economic Commission for Africa in Adedeji A, Transiting from Low Intensity Democracy to Participatory Democracy: What Prospects for Nigeria? In Abayomi F, Atilade D. and Matswanigbe M. “Constitutional Reform and Federalism in Nigeria. (2003) Lagos, Ajasin Foundation, asserts that “whenever the military exercises political power, military administration is perforce infected by the command system. Power is centralised and the approach to governance is inevitably top-down. Debate, discussion and dialogue are replaced by order, decree and command. Disagreement is tantamount to rebellion, and demonstrations are analogous to mutiny. Popular participation in governance is unthinkable. Almost thirty years of military government did succeed in turning Nigeria into a highly centralised polity.”
393 An example is section 1 of the LUA which extinguishes all alienable rights of individuals to land in Nigeria and vests ownership rights to land in the Governor (originally included in the Act as “Military Governor”) of the State.
394 See section 47 of the LUA. Further, see the case of Nkwocha v Governor of Anambra State & Ors (1984) 1 SCNLR at p. 634 where the Supreme Court held that a State Governor under the Constitution of the Federal Republic of Nigeria succeeded to the powers of the Military Governor under the LUA.
Governor of the State on behalf of the citizens of the country.\textsuperscript{395} The extent of the conversion of the original Land Use Decree to the LUA consists of the mere change of the word “Decree” into “Act” in the title.\textsuperscript{396} The issue becomes whether any law or Act that stems from dictatorship and militarism can lead to the facilitation of legal reforms and reformatory measures to ensure the protection of private property rights to land. It is submitted that the LUA was established on the premise of a structural defect— a military dictatorship, and although it was duly converted from a decree to law, the nature of its establishment has greatly influenced the development of the institutions within. The effect of the LUA’s original establishment as decree has been to limit certain institutional powers to adequately function and fulfil roles and responsibilities and adversely affect any attempts to propose or institute reformatory measures in order to provide better protection of private property rights to land. The effect of the LUA on the Nigerian legislative institution needs more careful examination.

\textbf{3.7.2 Constitutional Entrenchment and Interpretation}

As established in an earlier chapter, the Nigerian legislature is conferred with the lawmaking powers of the federal state by the Nigerian Constitution.\textsuperscript{397} The LUA is based on the principle of the nationalisation\textsuperscript{398} of all land in the federation and the reason given for its entrenchment

\textsuperscript{395} Section 47 (1) of the LUA states that the “Act shall have effect notwithstanding anything to the contrary in any law or rule of law including the Constitution of the Federation or of any State, and without prejudice to the generality of the foregoing, no court shall have jurisdiction to inquire into: (a) any question concerning or pertaining to the vesting of all land in the Governor in accordance with the provisions of the Act (b) any question concerning or pertaining to the right of the Military Governor to grant a statutory right of occupancy in accordance with the provisions of the Act (c) any question concerning or pertaining to the right of a Local Government to grant a customary right of occupancy under the Act.”

\textsuperscript{396} Even the term “Military Governor” has not been changed and is still in the LUA although the civilian democratic government does not have military governors and the applicable term is “Governor”. However, all the powers conferred on the Military Governor when the Act was a decree remain the same and are still conferred on the Governor of a State under the present civilian democratic government.

\textsuperscript{397} Section 4 of the 1999 Constitution confers the power to make laws in the Legislature.

\textsuperscript{398} The preamble to the LUA states the objectives of the Act as “whereas is in the public interest that the rights of all Nigerians to the land of Nigeria be asserted and preserved by law…”
in the Constitution was that “the Supreme Military Council has approved the same subject to such changes as it has deemed necessary in the public interest and for purposes of fostering the promotion of the welfare of the people of Nigeria.” The LUA proceeds to limit the lawmaking powers of the legislature by its assertion in numerous provisions that the LUA shall have effect “notwithstanding…any law or rule of law including the Constitution of the Federation or any State…” The result is that the role of the Nigerian legislative institution is greatly undermined by the LUA declaration of being literally “above the law” and impervious to the rule of law or the Constitution of the Federal Republic of Nigeria. The limitations of the Nigerian legislature by the LUA is compounded by the rigid procedure for amendment of the LUA and the status of the LUA vis-à-vis the Nigerian Constitution. The LUA was promulgated and entrenched into the Nigerian Constitution vesting it with a special status which prescribes a special procedure for its amendment. The normal legislative process for amending an Act under the Nigerian Constitution requires that a proposal for amendment be supported by a majority of the members of the National Assembly. The special procedure for amendment of the LUA is stipulated in Section 9 (2) of the Constitution of the Federal Republic of Nigeria 1999 and states “that a proposal for the alteration of the Land Use Act should be supported by not less than two-thirds majority of all the members of the National Assembly and approved by a resolution of the Houses of Assembly of not less than two-thirds of all the States in Nigeria.” The special procedure for amendment has had the effect of conferring a rigid status on the LUA. This simply means that although there are

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399 This extract is from the preamble to the Constitution of the Federal Republic of Nigeria Enactment Act, Cap 62, Laws of the Federation of Nigeria 1990.
400 See section 1, 47 of the LUA.
401 See section 315 (5) of the Constitution of the Federal Republic of Nigeria which states that “Nothing in this Constitution shall invalidate the following enactments, that is to say…the Land Use Act 1978…and the provisions of those enactments shall continue to apply and have full effect in accordance with their tenor and to the like extent as any other provisions forming part of this Constitution in accordance with the provision of section 9 (2) of this Constitution.”
countless criticisms of numerous provisions of the Act there have been no successful amendments to its provisions.

The conferred special status of the LUA provisions is significant and far-reaching. The Nigerian Courts have made concerted efforts to interpret the constitutional status of the LUA and the significance constitutional entrenchment has proffered on its applicability and validity. They have attempted to do this by considering whether the LUA is in fact an existing law under the Constitution of the Federal Republic of Nigeria or an integral part of the Constitution.403 The consideration of the LUA as an existing law under the Constitution would mean that the LUA falls into the category of the continued application of existing laws that were in existence before the coming into force of the 1999 Nigerian Constitution.404 The second proposition of whether the LUA is an integral part of the Constitution is an issue that has been dealt with by the Supreme Court.405 The decision of the Supreme Court406 reiterates that the entrenchment of the LUA into the Nigerian Constitution vests the LUA with the “same status and effect as any other provision forming part of the Constitution.” It is argued that by virtue of section 47 of the LUA and the constitutional safeguard vested in the LUA by

403 Nigerian courts have pondered the issue of whether the LUA is an existing law under the Federal Constitution of Nigeria or an integral part of the Constitution.
404 Section 315 (4) (b) of the Constitution defines an “existing law” as any law and includes any rule of law or enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date and comes into force after that date.”
405 In the case of Nkwocha v Governor of Anambra State supra, the Supreme Court in determining the constitutional status of the LUA rejected the view that the LUA is an integral part of the Constitution. Eso JSC in delivering the lead judgment held that “the LUA is not an integral part of the Constitution. It is an ordinary statute which became extraordinary by virtue of its entrenchment under section 315 (5) of the Constitution for if the Act has been made part of the Constitution it would not be necessary to insert the words of section 315 (5) which states ‘Nothing in this Constitution shall invalidate’ as the draftsman of the Constitution cannot make the Constitution to invalidate part of itself, nor would it be necessary to state in section 315 (6) that the Act shall continue to have effect as a ‘federal enactment’ that is a law made by National Assembly, the Constitution itself not being a federal enactment.” However, it is important to note that the provision of section 9 (2) with regard to the special status of the LUA was initially not part of the Draft of the Constitution of the Federal Republic of Nigeria, but was inserted into the Constitution by the Supreme Military Council.
406 Nwokedi JSC in the Nkwocha case reiterated the decision of the Supreme Court that the “language of section 315 (5) makes the provisions of the Land Use Decree equivalent to any other provisions of the Constitution by the use of the words ‘to the like effect as any other provision forming part of this Constitution’…therefore…no reliance can be placed…for the purpose of attacking the validity of the provisions of the Land Use Decree since the Constitution has itself provided that the provisions of the Land Use Decree are to have the same force and to be equivalent to any provisions of the Constitution…”
section 315 (5) of the Constitution, the provisions of the LUA supercede the Nigerian Constitution. This is an uncomfortable viewpoint as Section 1 of the Constitution of the Federal Republic of Nigeria proclaims the Constitution’s supremacy over all other laws. The Court of Appeal re-visited the Supreme Court decision in the Nkwocha case holding through a majority decision that “the Act is not an integral part of the Constitution but an ordinary statute made extraordinary by its entrenchment in the Constitution…” Ultimately, the debate on whether the LUA is an “existing law” and a “federal enactment” as ascertained in the Nkwocha case or “an integral part of the Constitution” is still on-going and has not been finally resolved. The Nigerian legislature finds itself in a position where it is helpless to create or make new laws except if it can circumvent the rather onerous process of amending the LUA provisions. The limitation caused by the constitutional entrenchment of the LUA renders the legislative institution powerless to amend the laws governing property rights to land in Nigeria and prevents the legislature from adequately protecting individual rights and interests hitherto. Section 315 (5) of the Constitution has been interpreted as making the provisions of the Act equivalent to any other provisions of the Constitution. This indicates that the provisions of the LUA can only be altered in the same process and only to the same extent as any other provision under the Constitution. The record catalogue indicated so far by Nigeria’s legal history highlights the difficulty for the legislative

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407 Raimi Agande & Others v Busari Alagbe & Ors Judgment delivered April 20, 2000 and reported in the Guardian, Tuesday, February 6, 2001 at p. 63.
408 The Court of Appeal held further that the Land Use Act is subordinate to the Constitution and comes within the provision of “any other law” under section 1 (3) of the 1999 Constitution so that any inconsistency between the provisions of the LUA and the Constitution renders the provision of the LUA to the extent of the inconsistency void as against the Constitution. The issue today remains the same, uncertain as to whether the LUA is an existing law, the equivalent to the Constitution, supercedes the Constitution or is an integral part of the Constitution; however, it is clear that the LUA is entrenched into the Constitution, and therefore, the special procedure for amending the laws of the Constitution is also applicable to the LUA.
409 Umar Ali & Co, Nigeria Ltd v The Commissioner for Land and Survey & 3 others No. ID/115/81, 28th May 1982, Ikeja High Court (Unreported); J. M. Aina & Co Ltd v Commissioner for Land and Survey & others Suit No 1/439/81 of 24th May 1982 Ibadan High Court (Unreported). Further two eminent Nigerian legal scholars Professor Ezejiofor and Dr Okafor, both Senior Advocates of Nigeria hold the contrary view that the LUA is indeed an integral part of the Nigerian Constitution.
410 As affirmed by section 9 (2) of the Constitution.
institution to secure the required majority to effect such an amendment to the LUA. This means that due to its rigid amendment process, provisions of the LUA have proved to be impossible to amend within the time span of the thirty-three years of the existence of the LUA. The result is that the LUA has adversely limited the powers of the legislature with regard to the creation of new laws and reformatory measures required to ensure adequate protection of private property rights to land in Nigeria.

### 3.7.3 Executive Dominance

Executive dominance in the Nigerian legal system has further exacerbated the problems of successful reform. Indeed, to accurately determine the executive structure of the Nigerian legal system in relation to private property rights and legal reform, the manner in which its institutions are set up is crucial.\(^{411}\) The institutional structure of the LUA was set up and promulgated during the military era by the military government in Nigeria. The present LUA rather unavoidably incorporates a concentration of centralised powers in the executive institution reminiscent of the dictatorial regime of its origin.\(^{412}\) In light of its promulgation, the underlying and recurrent theme of the LUA is a vesture of wide powers in the executive institution to the detriment of the legislature and judiciary institutions.\(^{413}\) As the LUA remains the main body of law governing property rights transactions on land, its prevalence towards executive institutional dominance is inevitable and pervasive.

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\(^{411}\) The process of how information was gathered and processed during the military era is relevant, examining the patterns of deliberation, representation and pronouncement by the military government, and how decisions were implemented under the military regime; these are all relevant in order to understand and accurately assess an Act established and promulgated by the military government.

\(^{412}\) Bienen Henry *Populist Military Regimes in West Africa* (1985) Princeton University. See also Bienen Henry *Military Rule and Political Process: Nigerian Examples* (1978) Comparative Politics, Volume 10, No 2, p. 205-225. See an extract from Bienen’s article p. 213-214 culled from members of the cabinet of commissioners appointed by the military government during the military era of the late 1960s and early 70s, a commissioner stated that “I resigned because I had responsibility without power. The military tried to say we had a constitution to operate but they kept reminding us it was a military regime…decisions are not party decisions, the governor says X and signs an edict, the edict is published and becomes law.”

\(^{413}\) Bienen states that “the military in Nigeria created institutions in which civilian politicians could participate but where they could also be used and controlled…”
3.7.3.1 Executive Consent Powers

The most controversial aspect of the LUA and a stellar example of executive dominance is the absolute and discretionary nature of the consent provisions of the Act. The main executive consent provisions are sections 22 and 21 of the LUA.

Section 22 of the LUA states that:

“It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise, howsoever without the consent of the Governor first had and obtained.”

Section 21 of the LUA states that:

“It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, transfer of possession, sub-lease or otherwise howsoever (a) without the consent of the Governor in cases where the property is to be sold by or under the order of any court under the provisions of the applicable sheriff’s and civil process law or (b) in other cases without the approval of the appropriate local government.”

The effect of the LUA has been established - radical ownership of land is vested in the Governor of a State and individuals are only entitled to a leasehold-type interest through a right of occupancy which could be either a statutory right (which is a right granted to the holder by statutory law) or a customary right of occupancy (which is a right granted to the holder under customary law).

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414 See section 22 of the LUA.
415 See section 21 of the LUA.
416 In its attempt to harmonize private property rights, the LUA in sections 34 and 36 specifically preserves pre-existing interests in land; pre-existing indicating individuals or businesses that had interests in property prior to the promulgation of the LUA in 1978. By these provisions, the LUA recognizes the rights to land existing under customary law and preserves them coquettishly referring to these pre-existing customary rights to land as ‘deemed grants’ under the Act. On the other hand, actual grants are defined by section 5 of the LUA and are
that any right of occupancy conveyed by the Act whether statutory or customary cannot be
transferred without the written consent of the Governor of the State or Local Government
first had and obtained. The hallmark case that illustrates the importance of the Governor’s
consent is the Supreme Court case of Savannah Bank Nigeria Ltd v Ajilo. The issue for
determination in the case was whether a holder of a deemed statutory right of occupancy in
respect of developed land under section 34 (2) of the LUA requires the consent of the
Governor under section 22 in order to alienate or mortgage his right of occupancy in any
manner. In addressing the issue, the Supreme Court held that any right of occupancy, whether
deemed under sections 34 and 36 or actual under section 5 are subject to the same legal
control and consent requirements stipulated by the LUA. The Supreme Court in a
unanimous decision resolving the erstwhile consent applicability controversy upheld the
decisions of the Court of Appeal and the Court of first instance. It held that every property
rights holder whether under section 5, 34 or 36 of the LUA requires the consent of the
Governor before he can transfer, mortgage or otherwise dispose of his interest in any right of
occupancy in Nigeria. The military promulgators claimed that the main intendment of the

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417 Adigun Olayide The Land Use Act and the Principles of Equity or the Equity of the Land Use Act in J. A.
418 See Savannah Bank Nigeria Ltd v Ajilo (1989) 1 NWLR (Pt. 97) at p. 305. The facts of the case are as
follows: in a deed of mortgage dated 5th September 1980, land was mortgaged to the defendant/appellant bank to
secure money owed it by the plaintiff/mortgagor. When the mortgagee attempted to exercise the statutory power
of sale conferred by law on a mortgagee of a legal estate, the mortgagor brought an action claiming that the deed
of mortgage was invalid on the ground that the consent of the governor was not obtained for the creation of the
mortgage as required by section 22 of the LUA.
419 Obaseki JSC in delivering his lead judgment in the Supreme Court decision of Savannah Bank v Ajilo (1989)
1 NWLR (Pt. 97) at p. 305, declares “that there is a distinction between a deemed grant and an actual grant goes
without saying. That the same incidence flows from both grants also goes without saying…Both the actual and
deemed grants being grant, the deemed grants being regarded by the Law as if made by the Governor also
become subject to legal controls as if granted by the Governor.”
420 See the lead judgment of Kolawole J.C.A. who declared that “the logical conclusion flowing from this view
is that every rights holder whether under section 34 or 36 of the Land Use Act requires the consent of the
military Governor before he can transfer, mortgage or otherwise dispose of his interest in the right of occupancy.
In other words, section 22 or 21 of the Act applies to every rights holder pursuant to section 34 or 36 of the
Act.” It should be noted that in the judgment, the Kolawole J.C.A. refers to the Governor as a “military”
Governor in accordance with the LUA as changes have not been made to the LUA to bring it in line with the
LUA in introducing the consent requirement on a former privately oriented land tenure system was to unify the country by ensuring proper control and management of lands throughout the length and breadth of the country in the interest of all Nigerians.421 The claims seem hollow as there appears to be a fundamental flaw inherent in the LUA in relation to the Governor’s exercisable powers.422 There are no apparent criteria instilled in the LUA to guide the exercise of the Governor’s executive powers and the inevitable result is that Governors, much like their military counterparts, have tended to believe that their powers are absolute and all encompassing.423 Governors have also been empowered by the provisions of the LUA to provide regulations under which their consent may or may not be given and this has lent more invincibility to the seemingly absolute executive powers of the Governor.424 The wide powers vested in the executive institution and the disparity of its powers to the powers vested in the legislative and judicial institutions is clearly contrary to the Nigerian separationist concept of “separate but equal powers.” As will be shown next, this has triggered the Nigerian judiciary to attempt to fulfil the role vested in it under section 6 of the
terms of a civilian democratic government. Consequently, the use of the term “military governor” still provokes a sense of a military government even in the present era of a democratic government.

421 Akujobi O. R. “Governor’s Consent under Section 22 of the Land Use Act: The Position Since Savannah Bank v Ajilo”, Department of Private Property Law, Faculty of Law, University of Lagos.

422 The Governor’s wide powers to grant and withhold consent to any alienation of rights of occupancy are contained in the following sections: section 15 (b), 21 (a), 22, 23, 24 (b) and 34 (7). Section 15(b) asserts that during the term of a statutory right of occupancy, the holder may, subject to the prior consent of the military Governor “transfer, assign or mortgage any improvements on the land which have been effected pursuant to the terms and conditions of the certificate of occupancy relating to the land.” Section 23 (1) ensures that a sublease of a statutory right of occupancy may with the prior consent of the military Governor and with the approval of the holder of the statutory right of occupancy “demise by way of sub under lease to another person the land comprised in the sub lease held by him or any portion of the land. Section 24 (b) states that “a statutory right of occupancy shall not be divided into two or more parts on devolution by death of the occupier except with the consent of the military Governor.” Section 34 (7) confers that “no land to which subsection 5 (a) or (b) applies held by any person shall be further sub-divided or laid out in plots and no such land shall be transferred to any person except with the prior consent in writing of the military Governor.”


424 See the case of Stitch v A.G. Federation and Ors (1986) 1 NWLR, Part 46 at p.1007 where the Nigerian judicial institution successfully curbed the wide, discretionary powers of the executive.
Constitution\textsuperscript{425} stepping in to curb the executive institution’s powers by attempting to constructively interpret the laws of the LUA within the rather limited parameters afforded it by the LUA.

\textbf{3.7.3.2 The Independence of the Judiciary}

The Nigerian Constitution declares its goal in relation to the judiciary institution as “the independence, impartiality and integrity of Courts of Law and easy accessibility thereto shall be secured and maintained…”\textsuperscript{426} In order for this goal to be achieved, there needs to be institutional independence of the judiciary from the other institutions.\textsuperscript{427} Institutional independence involves independence from the other two arms of government, the executive and the legislature, and also independence from the influence, coercion or pressure being applied by any individual, group or other factor which would impair the ability of the judiciary to fulfil its judicial role.\textsuperscript{428} The ability of the judiciary institution to be independent is greatly hampered by the strong influence wielded by the Nigerian Executive over the appointment process of judges into Courts of Law,\textsuperscript{429} as well as other budgetary and bureaucratic process controls\textsuperscript{430} which the executive employs to ensure that the powers of the

\textsuperscript{425} See section 6 of the 1999 Constitution of the Federal Republic of Nigeria which vests the judiciary with the power to interpret the law.
\textsuperscript{426} See section 17 (1) (e) of the Nigerian Constitution of the Federal Republic of Nigeria.
\textsuperscript{428} Oputa C. “The Law and the Twin Pillars of Justice.” (1981) Published in Owerri, Nigeria.
\textsuperscript{429} As mentioned in an earlier Chapter, all judges are appointed by the President of Nigeria on the advice of the National Judicial Council subject to confirmation by the Senate; but the final choice lies with the President.
\textsuperscript{430} Members of the Constituent Assembly set up to debate the provisions of the Nigerian Constitution before its establishment were of the view that the executive institution was trying to control the judiciary by maintaining control over the “technical and recurrent expenditure of the judiciary.” See an extract of Dr Nwakama Okoro’s comments on judicial independence in Official Report of the Proceedings of the Constituent Assembly, Volume 25, Monday, 12 December 1977. See also Justice Oputa in \textit{All Nigeria Judges Conference Papers} (1982) where he states that “The practical situation in which the Chief Justice of Nigeria, every Chief Judge and Chief registrar finds himself, is that he must rely on the executive arm of government for the provision of these physical and human skills and resources without which the courts will cease to function…the court halls and judges’ chambers, the record books and other stationery, the judicial libraries, all these cannot be provided without the necessary release of funds by the executive arm to the judicial branch.”
judiciary remain subordinate to its powers. The pervasive influence of the Nigerian executive over the judiciary was properly represented during the military era where “special tribunals” were set up to handle sensitive government matters and the jurisdiction of the Courts to deal with these matters were ousted. The special tribunals were set up in any manner that the military decided, and were in some instances retrospective in nature or based on the principle that a person accused of a crime had a duty to prove his innocence rather than the judicial slogan of “innocent until proven guilty.” The military government interference with the jurisdiction granted to the judiciary by the Nigerian Constitution and the consequent encroachment that this has generated led the Supreme Court to make several attempts to enforce its judicial power in accordance with the separationist theory and declare several offending decrees of the military government ultra vires and void. However, the military government always reacted by immediately passing a subsequent decree nullifying the decisions of the Supreme Court. It is clear that the Nigerian executive dominated the judicial institution during the military regime in Nigeria. As the LUA was established

431 Stephen Ninian Judicial Independence – A Fragile Bastion (1982) Melbourne University Law Review. Stephen asserts that “the traditional courts and their judiciary may be left outwardly untouched but their jurisdiction steadily diminished by the assignment to special tribunals of all those areas in which an authoritarian government wishes to intervene. The Special Tribunals, creatures of the regime, will then administer those sensitive areas according to the wishes of government, while the courts, retaining apparent independence will, in the innocuous areas left to them, have no occasion to exercise it. Yet such a government may display a façade of judicial independence.” See also Nwabueze B. O. “A Constitutional History of Nigeria.” (1982) Hurst, London, where Nwabueze was of the opinion that the establishment of special tribunals to try certain offences was an encroachment on the powers of the judiciary.

432 Examples of special tribunals set up by the military government are the Counterfeit Currency (Special Provisions) Decree No 22 of 1984; it was passed in July 1984 but was deemed to have come into force on December 31 1983, the Special tribunal (Miscellaneous Offences) Decree No. 20 1984 was also retrospectively decided to have come into force in 1983 where in reality, it was passed in 1984. There was usually a presumption of guilt for all the offences tried by the special tribunals and there were no available appeals from the decisions of the tribunals.

433 See the case of Lakanmi and Anor v Attorney General and Anor (1971) University of Ife Law Review, 201.

434 One of such decrees is the Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 28 of 1970. Other decrees were passed by the military government ousting entirely the jurisdiction of the judiciary; examples are the Civil Service and Other Statutory Bodies (Removal of Certain Persons from Office) Decree No. 16 of 1984 and the Public Officers (Special Provisions) Decree No. 17 of 1984 which state in their preamble that “No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done by any person under this decree and if any such proceedings have been or are instituted before or on or after the making of this decree, the proceedings shall abate, be discharged and made void.”
originally as a military decree, it is no surprise that the provisions of the LUA vests superior powers in the executive to the detriment of the other arms of government consequently limiting the powers of the judiciary institution. Nevertheless, the Nigerian judiciary has attempted to mitigate the constraints imposed by the dominant powers of the executive and this is examined in the next section.

3.7.3.3 Executive Consent Powers and Judicial Policy Trends
The role of the Nigerian judiciary is significantly limited by the LUA. This is evident in section 47 of the LUA which attempts to oust the jurisdiction of the court “to inquire into any question concerning or pertaining to the vesting of all land in the Governor in accordance with the provisions of the Act…”435 The Court struggles to uphold the purpose of the Act whilst at the same time attempting to qualify and contain the overwhelming powers vested in the Federal Executive institution. This is reflected in the concerted effort that the Nigerian judiciary has made to ameliorate and interpret the provisions of the LUA. The Nigerian judiciary has vowed to ensure that the LUA is given a “broad and purposive interpretation”436 upholding the “purpose and intendment of the Act …maintaining that the court must resist the invitation to apply mere mechanical rules of interpretation of statutes in a way so as to defeat the object of the Act”.437 The wide powers conferred on the office of the Governor to grant or withhold consent to an alienation, mortgage or transfer of any right of occupancy has been asserted by the LUA to be not just absolute and all encompassing, but also discretionary in nature.438 The judicial authorities, in a bid to contain these hitherto wide discretionary

435 See section 47 (1) of the LUA in its entirety.
437 See Savannah Bank v Ajilo Supra.
438 In the case of R v Minister of Land and Survey (1963) NRNLR 58, where the applicant applied for an order of mandamus to compel the Governor to give his consent to the mortgage deed; the argument was that the purpose of the consent provision of the Act is merely to keep the Governor or such person as he delegates his power to informed of the dealings in land and not to confer wide discretionary powers on the Governor. The
powers, have decided to qualify the powers vested in the Governor. The commonly accepted interpretation given by the Court is that the power of the Governor under the LUA, though discretionary in nature, is coupled with a duty on the Governor to exercise his discretion in favour of the citizen.\textsuperscript{439}

The current position in Nigeria is that all Governors have made regulations regarding the method of application for Governor’s consent. The fulfilment of the conditions are now used by the Courts and act as a barometer whereby the discretionary powers of the Governor are measured against the satisfaction of the conditions set out in the regulations of the Governor of each State.\textsuperscript{440} The Supreme Court in a progressive ruling, admirably held in \textit{Stitch v A. G. Federation & Ors}\textsuperscript{441} that the “discretionary powers of the Governor is clearly within the reviewable jurisdiction of the courts in considering whether the Governor failed to exercise his discretion, refused to exercise his discretion, or misused his discretionary power, and whether he gave reasons for the exercise, it being a principle established by the courts that once a prima facie case of misuse of power had been established, it would be open to the courts to infer that the Governor acted unlawfully even if he declined to supply a justification at all or supplied a justification which is untenable in law. The Governor must act fairly and not to the prejudice of the citizen.”\textsuperscript{442} The Nigerian judiciary institution has consistently fought back to check the powers of the executive institution in relation to the protection of

\textsuperscript{439} In the case of \textit{Shitta-Bay v F.P.S.C} (1981) 1 Supreme Court 40, Idigbe J.S.C. in an attempt to qualify and contain the powers of the federal executive held that “there is no doubt that where power is vested in a body to do certain things, there is a prima-facie a discretion on the part of that body to do so. Where however, as here, there is power to act ministerially (as opposed to judicially) then although ex facie, there is a discretion to act one way or the other, in such a case there is a duty to exercise the discretion.”

\textsuperscript{440} There is generally a prescribed form that needs to be completed. In Lagos State, the Form is tagged IC and it contains questions on the land being alienated, the nature of the grant, particulars of the grant, particulars of the grantor and grantee and other related issues.

\textsuperscript{441} (1986) 1 NWLR (Pt. 46) at p. 1007.

\textsuperscript{442} Aniagulu J.S.C. remarks in \textit{Stitch v A.G. Federation & Ors} (1986) 1 NWLR (Pt. 46) at p. 1007.
private property rights of individuals and rights of occupancy to land in Nigeria. Periodically, though not in all cases, the Courts have displayed flashes of progressive decision-making successfully mitigating the federal executive’s powers. In support of the fulfilment of conditions set out by the Governor of a State, the Supreme Court held that “where the exercise of a discretionary power is based upon the satisfaction and fulfilment of a condition precedent by the beneficiary of such power, the exercise of the power may be refused only where the condition has not been satisfied or fulfilled. Where the beneficiary of the power has satisfied or fulfilled the condition precedent to the exercise of the discretionary power, there is a duty reposed on the donee of the power to exercise his discretion in favour of the beneficiary.”

The pro-active stance of the judiciary has provided recourse to aggrieved citizens and allowed them to have access to the courts to challenge unjustified uses of the consent provisions by an incumbent Governor. Aggrieved citizens have two types of redress in this situation. Firstly, an application for an order of mandamus directing the Governor to discharge his duty by exercising his discretionary power in favour of the citizen or alternatively, asking for a declaration that the refusal of the Governor is improper and the court should make appropriate consequential orders. A recurrent issue which has
generated numerous applications by aggrieved citizens for redress to the courts is where applications for the consent of the Governor remain unapproved for two, three, sometimes four years. Unfortunately, this is a very common occurrence in Nigeria. The effect of this prolonged and unreasonable delay in exercising the powers of the Governor is that limitations or constraints automatically exist in any alienation, mortgage or transfer of landed property between individuals or transfer of property rights to land between businesses. If the Governor’s consent is not granted, there can be no valid legal mortgage, sale or transfer of property from one to the other. Nigerian courts insist that they have jurisdiction to hear consent cases by virtue of section 39 of the LUA and section 272 (1) of the 1999 Federal Constitution of Nigeria which vests jurisdiction in State High Courts to entertain matters pertaining to the private property rights of Nigerians. However, the realistic position is that the Nigerian judicial institution remains limited by the provisions of the LUA and still has to struggle to qualify the executive institution’s wide discretionary powers with regard to the transfer of property rights between parties to landed property transactions. Further, the consent provisions of the executive governor is still required in order to validly sell, mortgage or otherwise transfer possession of rights to land thereby limiting the individual property rights of Nigerian citizens to land in Nigeria.


450 Contrary to section 47 of the LUA which purports to oust the jurisdiction of the Courts, the Court of Appeal held in *Zango v Governor of Kano State* (1986) 2 NWLR (Pt. 22) at p. 409, that “every power has legal limits or control however wide the language of the empowering Act. Where the court finds that the power has been exercised oppressively or unreasonably or if there is a procedural defect in the exercise of the power, the Act may be condemned as unlawful. It is an established principle of law that an unfettered discretion in the exercise of a power granted by law cannot co-exist with the Rule of law.

451 The Supreme Court locus classi quis case of *Savannah Bank Ltd v Ajilo*, still stands as the legal authority on the Governor’s consent powers. The effect created is that the process of the legal transfer of rights to land in Nigeria is generally arduous and difficult and any transfers or assignment of interests or mortgages still requires the consent of the Governor to be legally enforceable.
3.7.3.4 Executive Revocation Powers

Another contentious provision of the LUA which has encroached on the private property rights of individuals to land in Nigeria and emphasized the dominance of the executive institution over the legislature and judiciary institutions is the revocation powers vested in the Federal Executive/Governor by section 28 of the LUA.\(^{452}\)

Section 28 of the LUA states that:

> “It shall be lawful for the Governor to revoke a right of occupancy for overriding public interest.”\(^{453}\)

The effect of the powers of revocation vested in the Executive/Governor by the LUA has manifested in a plethora of cases where Executive/Governors have revoked individuals rights to landed property claiming that the relevant properties were compulsorily acquired “for public purposes” but in most instances it turned out that the revocation had been for improper motives.\(^{454}\) The LUA does not define all the circumstances that may constitute grounds for an application of the Governor’s power to revoke a right of occupancy for “overriding public interest” or for “public purposes”. The LUA does however give instances of overriding public interest to include the requirement of land for “mining or oil pipelines or where the holder of the property alienates the land without the consent of the Governor and other public purposes.”\(^{455}\) Unfortunately, the Nigerian Constitution also does not define the circumstances whereby land in Nigeria may be compulsorily acquired but it asserts that the right of an individual to own, access and enjoy his/her property is guaranteed,\(^{456}\) and private property

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\(^{452}\) See section 28 of the LUA.

\(^{453}\) Section 28 (2) of the LUA goes on to elaborate on the term ‘overriding interest’ to mean “the requirement of the land by the Government of the State or the Local Government in the State, in either case for public purposes within the State, or the requirement of the land by the Government of the Federation for public purposes of the Federation.”

\(^{454}\) See the case of Awagbo *v* Eze (1995) 1 NWLR 393. Several governors were discovered to have compulsorily revoked land for private and fraudulent purposes such as acquisition for sale of land or for private use, revocation of land and allocation to wives, friends, and relations or for politically motivated reasons.

\(^{455}\) See section 28 (3) of the LUA 1978.

\(^{456}\) See section 43 of the Constitution of the Federal Republic of Nigeria.
rights should be protected against governmental encroachment. The stance taken by the Constitution is that private property rights to land can be compulsorily acquired for “overriding public interest” provided “prompt compensation” is paid and “the right of access to court to challenge the quantum of compensation payable is not denied.” The relevant issue becomes what the exact definition of the terms “overriding public interest” or “for public purposes” are in relation to the property rights of individuals. The purpose of this definition is to ascertain the limits, if any, to the powers of revocation vested in the Governor in a bid to prevent or curtail any abuses of the revocation powers exercised by the executive institution. Due to the limitations imposed by the provisions of the LUA, the powers of revocation vested in the Governor and the ambiguous nature of the terms “overriding public interest” and “for public purposes” the Nigerian judiciary institution has once again stepped in to attempt to mitigate the wide powers vested in the executive institution and qualify the executive revocation powers.

3.7.3.5 Executive Revocation Powers and Judicial Policy Trends

In considering the powers vested in the Governor by section 28 of the LUA, the Nigerian judiciary, in a bid to act as an effective “check and balance” to the executive institution in accordance with the separationist concept of the Nigerian federal state, has accorded a restrictive interpretation to the provisions of section 28. The judiciary has achieved this by stipulating that in order to preserve a functional rule of law, every power should have a legal limit notwithstanding how wide the language of the empowering Act. The strategy employed by the judiciary in dealing with the revocation of individuals’ rights to property by

457 See section 44 (1) of the 1999 Constitution.
458 Oludayo Amokaye The Land Use Act and Governor’s Power to Revoke Interest in Land: A Critique in “The Land Use Act: Twenty-five Years After.” I.O. Smith Edition (2003) Folar Prints at p. 255. Oludayo states that “the power granted by section 28 to the Governor to revoke the proprietary interest in land should not be without limitation, circumscription or procedural rules which must be observed.”
the Governor for “public purposes” has been indirect. Rather than attack the inherent statutory power of the Governor to revoke interests in the land and acquire land “for public purpose”, the Nigerian judiciary has chosen to focus on strict compliance with statutory procedure which the Governor is obligated to adhere to in order to revoke such interests on land. This procedure is laid down in section 28 (6) of the LUA. Attempting to curtail executive powers, the Nigerian judiciary expressed its view that an Act or law that seeks to deprive an individual of his rights to property should be strictly construed against the acquiring authority. With this as its focal point, the Supreme Court reiterated a litmus test to curb the Governor’s powers of revocation. The first aspect of the litmus test expounded by the Court to mitigate the Governor’s revocation powers is the declaration that it a question of law and not fact as to whether the Governor’s compulsory acquisition of a property under his revocation powers is for public interest. Further, the Court asserts that the revocation of interest in land must be within the statutory definition and permissible purpose of the LUA. In order to revoke a right of occupancy for public purposes, the Court insists that the letter and the spirit of the laws must be adhered to. As the consequence of a revocation of a grant of a right of occupancy is severe, namely, the deprivation of the holder’s proprietary interest, the terms of revocation must adhere with the strict construction of the provisions made by the LUA. However, the judicial effort to limit executive dominance, though commendable, has been insufficient. The Nigerian judiciary is still unable to redefine or illuminate the scope of

459 The procedure for revocation of interest in land is laid down in section 28 (6) of the Land Use Act. The procedure entails that the revocation be signified under the hand of a public officer duly authorized in that behalf by the Governor and notice thereof given to the holder. The holder of the property’s title is extinguished on the receipt by him of the notice or at such later date as may be stated in the notice. Where land is required by the Federal Government, the Governor is obliged to revoke a right of occupancy if a notice is issued by the Head of State or on his behalf if he declares the relevant land to be required by the Government for public purpose.

460 Peenock Investment Ltd v Hotel Presidential (1983) 4 NWLR 122 at 168.


462 See the case of Awaogbo v Eze (1995) 1 NWLR at p. 393 where the Court extended their strict adherence to the statutory powers and procedure to curtail excessive exercises of revocation by the Local Government. See also ibid, Oludayo Amokaye, The Land Use Act and Governor’s Power to revoke interest in Land: A Critique, in “The Land Use Act, Twenty-five years later.” I. O. Smith, 2003, Folar Prints, at p. 261.
the term “for public purpose” or “overriding public interest.” This has allowed a stem of recurrent and blatant abuses of power by Executive/Governors who compulsorily revoke and reclaim rights to property vested in individuals and businesses claiming the revocations to be “for public purpose”, and subsequently reallocating the rights to such land to government officials or other individuals in accordance with the Executive/Governors’ wishes.\footnote{The potential for abuse of the Governor’s power of revocation is the most problematic aspect of the revocation powers granted by the LUA to the Governor of a State. As Nnaemeka-Agu JSC in Attorney-General of Bendel State v Aideyan (1989) All NLR at p. 663 stated “It must be borne in mind that acquiring a person’s property compulsorily is prima facie a breach of his entrenched fundamental right to his property…” therefore abuses of Executive/Governor’s powers should be prevented in order to protect individuals property rights to land in Nigeria.} In the case of \textit{Olatunji v Military Governor of Oyo State}\footnote{Olatunji v Military Governor of Oyo State (1995) 5 N.W.L.R. at 587.} the Governor exercised his power of revocation under section 28 of the LUA to acquire property which was privately owned and secured by a mortgage agreement. The Governor claimed the property was reclaimed “for public purposes” namely the erection of electricity grid and power stations but the Governor later reallocated the land to private individuals who converted the land for other purposes outside public purposes. The Court of Appeal held in this case that a property compulsorily acquired for public purposes but later directly or indirectly diverted to serve private needs does not amount to a valid acquisition.\footnote{Dahiru Saude v Halliru Abdullahi (1989) SC 197.} The conclusion reached by the Court was that if the Governor could no longer find a public purpose for the land compulsorily acquired, the only avenue to be taken was to relinquish it and let the property revert back to the previous holder or holders of the rights of occupancy on the land.\footnote{See a general discussion on the position of the Nigerian judiciary in relation to the Governor’s revocation powers, see the case of \textit{Dahiru Saude v Halliru Abdullahi} (1989) SC 197.} The issue remains uncertain because the courts have been unable to answer further questions as to whether a revocation by the Governor of property which is the subject of a right of occupancy vested in an original private property holder, and, the subsequent reallocation by the Governor to another private individual who utilizes the property for a socially beneficial purpose will qualify under the
The second aspect of the litmus test applied by the judiciary to curb the Governor’s powers of revocation is more easily ascertainable than the first. It indicates that revocation of the rights of the holder of the right of occupancy in the property by the Governor must comply with the statutory procedure for revocation and service of revocation notice. Yet again, the Nigerian judiciary, rather than challenge the Governor’s statutory powers of revocation, have decided to focus on the procedure to be taken before a revocation may be validly implemented. The Court achieves this by establishing the procedure for revocation by a Governor. The Court insists that the Governor or any public officer duly authorized by him must duly sign the revocation notice and the notice must be properly served on the property owner. To determine “proper service” of the revocation notice, the Court generally focuses and insists on personal service on the property rights holder except in special circumstances where attempts to ensure that personal services are complied with have proved futile or impossible, only in those circumstances would the Court consider accepting substituted services. The Nigerian courts have constructively decided to read into the LUA the requirement that a notice of revocation must specify the reason for revoking a person’s right of occupancy even though the LUA does not expressly state that

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467 Oduntan Oluwakemi *The Right To Revoke* (2010) at [www.next.csp.com](http://www.next.csp.com) Oluwakemi discusses the public notice given by the Lagos State Government Lands Bureau in 2010 based on the Governor’s order of a three month ultimatum issued to holders of property rights to land in Lekki Lagos to take physical possession of their land or face revocation under section 28 of the LUA. This highlights the limitations to individual property rights to land in Nigeria. Individuals’ property rights are further limited by the conditions of certificates of occupancy issued by the Governor which state that the property granted to individuals must be developed within two years. (Development entails erecting a building and making improvements to the land.) If this criterion is not fulfilled, then by virtue of section 28 (5) (a) of the LUA, the governor has a right to revoke the individual’s rights to property for non-compliance with the terms of the allocation of land. This state of affairs, echoed in most parts of Nigeria further encroaches on individuals private property rights

468 Achike JCA highlighted the importance of ensuring that the proper procedure for revocation be carried out by stating that “the purpose of giving notice of revocation is to duly inform the holder of a right of occupancy of the steps being taken to extinguish his said right of occupancy it will be quite invidious to accept any substituted service as a proper service of notice of revocation when the residence and whereabouts of the holder are within the knowledge of the party serving the notice…it is only by service of a true and proper notice in the manner prescribed by law that the expectations of the owner’s entrenchment constitutional rights in the matter could be guaranteed and satisfied.”

469 *Osho v Foreign Finance* (1992) 1 N.S.C.C. at p. 521. The Supreme Court held that the notice of revocation had not been duly served on the holder of the right of occupancy and did not amount to exceptional circumstances where substituted services may be accepted; therefore the revocation notice was declared invalid.
specific grounds must be stated in the notice.\textsuperscript{470} This simply means that the courts have actively interpreted the LUA, stipulating that the Governor’s notice of revocation must spell out the public purpose which the Governor wishes to use the revoked land for in the notice.\textsuperscript{471} The question becomes when the Governor duly and accordingly revokes the rights to land of the holder of a right of occupancy, what is the holder of the property rights to land left with? This highlights the next issue to be dealt with which is whether there is any compensation for revocation of property rights to land carried out by the executive institution.

3.7.3.6 Executive Powers of Compensation

The prevalent ideology in any civilized society is that any governmental regulation that renders a private right essentially worthless is a taking of property for which compensation must be paid.\textsuperscript{472} The LUA takes this into consideration by acknowledging that compensation should be paid. It however limits payable compensation by stipulating that compensation based on the revocation of a right of occupancy by the Governor for public purpose is only applicable to “un-exhausted improvements” to land and not on bare land.\textsuperscript{473} It justifies the rationale for limiting payable compensation by indicating that as all land is owned by the State under section 1 of the LUA there is no legal basis for the State to compensate the owner of rights or interests on land for bare land. The LUA fails to take into consideration the fact that prior to the promulgation of the Act there were pre-existing interests on land vested in private individuals and businesses. Further, the LUA fails to recognize and acknowledge the

\begin{itemize}
  \item \textsuperscript{470} See the case of \textit{Nitel v Ogunbiyi} (1992) 7 N.W.L.R. 543.
  \item \textsuperscript{471} See generally the Supreme Court decision in the case of \textit{Osho v Foreign Finance Corporation} (1987) 1 N.W.L.R. (Pt. 50) at p. 413.
  \item \textsuperscript{472} Michelman, “Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation” (1967) Law, 80 Harvard Law Review at p. 1165
  \item \textsuperscript{473} Un-exhausted improvement to land is defined by section 51 (1) of the LUA as “anything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of long-lived crops or trees, fencing, wells, roads and irrigation or reclamation works, but does not include the result of ordinary cultivation other than growing products.”
\end{itemize}
proprietary right of the holder of interests on land who has toiled on the land and enjoyed the benefit of the land.\textsuperscript{474} The dominant and wide powers vested in the Governor of a State is once again apparent with regard to the compensation of holders of property rights to land in Nigeria whose interest have been revoked. The Governor is granted powers under the LUA to direct the State Chief Lands Officer or Federal Chief Lands Officer to determine the appropriate compensation to be paid to the original property rights holder.\textsuperscript{475} In flagrant demonstration of the tenuous restrictions on the private property rights of holders of interests in land, the LUA completely excludes the jurisdiction of the courts in the determination of the adequacy or otherwise of the compensation payable under section 47 (2) of the LUA.\textsuperscript{476} The LUA proclaims that in the event of a revocation by the Governor of a State of a right of occupancy on land vested in an individual, if the subject matter of the agreement is bare land, no compensation is payable. If there has been un-exhausted improvements to the land, then the amount of compensation to be paid to the holder of the right of occupancy is determined solely by the Governor or any other public officer duly appointed by him. In all cases, the jurisdiction of the courts is completely and inexplicably ousted by the LUA.\textsuperscript{477} Yet again, the result is that the LUA conveys wide powers to the executive institution whilst simultaneously limiting the powers of the legislative institution to amend its powers due to the special status accorded to it through its entrenchment. Further, the LUA ousts the jurisdiction of the Court to determine issues of consent, revocation and adequacy or otherwise of suitable compensation for holders of property rights to land. It is submitted that the state of affairs in relation to the Governor’s powers adversely affects the private property rights of Nigerian


\textsuperscript{475} Section 29 (4) of the LUA. It is completely at the discretion of the Governor and his duly authorized public officers to determine appropriate compensation for revoked land.

\textsuperscript{476} Section 47 (2) of the LUA states that “No court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act.”

\textsuperscript{477} See generally section 29 of the LUA which grants the Governor the discretion to determine the compensation to be paid for un-exhausted improvements to land. See also section 47 (2) above which ousts the authority of the Courts to intervene in the matter of compensation for revoked land.
citizens and limits all sale or alienation on land, mortgages and transfer of possession of property transactions in relation to landed property.\footnote{Nnaemeka-Agu JSC in A.G. Bendel v Aideyan (1989) 4 NWLR, Part 118, expounds that “our law reports are replete with cases in which some of such compulsory acquisitions “for public purposes” turned out to be mere bogus smokescreens for malefaction.”}

\section*{3.8 Legal Implications of Trust}

So far, a thorough discussion of formal institutions and the constraints which limit reform of the laws of property rights to land in Nigeria has been carried out. This section considers whether the concept of trust referred to in section 1 of the LUA can be used by the Nigerian judiciary as an effective check or balance to curb the hitherto dominant powers of the executive institution. There has been considerable controversy over the “concept of trust” debate which seems to be juxtaposed in the powers granted to the Governor by section 1 of the LUA. The “concept of trust” debate has raised questions on whether a trusteeship status, if accorded to the Governor by the LUA would alleviate the limitations of the laws governing the sale or alienation of interests on land and other transfer of property transactions under the Act. The trust debate arises through the provisions of section 1 of the LUA which states:

“Subject to the provisions of this Act, all land comprised in the territory of each state in the Federation are hereby vested in the Governor of that state and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of the Act.”\footnote{See generally section 1 of the LUA.}

Some legal scholars\footnote{Scholars like Olayide Adigun in The Land Use Act Report of a National Workshop in J.A. Omotola Edition, (1982) Lagos University Press. See also Banire M.A. The Nigerian Law of Trusts (Excel Publications, Lagos, 200) for a discussion of the numerous definitions of trust that have been suggested.} are of the opinion that the trust criteria created by the above quoted section of the LUA and vested in the office of the Governor confers a “trusteeship status” on
the Governor akin to a conventional trust under English law. The implication of this assertion is that the Governor’s wide statutory powers may be curtailed and he may be held accountable for a failure to carry out his fiduciary duties under the trust which are the granting of consent to applicants wishing to sell, alienate, mortgage or otherwise transfer possession of property rights to landed property. The supposition being explored is that if it can be established that it was the LUA’s intention to create a valid trust equivalent to the English law “trust”, the Nigerian judicial institution may find it easier to compel the Governor to fulfil his fiduciary duties to the beneficiaries of the trust, the beneficiaries in this instance being the Nigerian citizens seeking consent for transfer of property rights, sale of land or mortgage security transactions. If this supposition is viable, then the remedies available to applicants seeking Governor’s consent would be all the remedies available to beneficiaries of a conventional trust under English law. In considering whether the trust created in section 1 of the LUA is equivalent to that which exists under conventional English law, Adigun asserts that “the question…is this, does the Governor become a trustee in the conventional sense known to English jurisprudence. It is easy enough to argue that the test of the three certainties (for creating a trust under English law) has been satisfied. The Governor is the trustee, the subject is the land comprised in the territory of each state and the cestuis que trust (beneficiaries of the trust) are the people of Nigeria.” For the purposes of this

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482 See Adigun Olayide “Cases and Texts on Equity, Trusts and the Administration of Estates.” (1987) Ayo Sodimu Publishers, Abeokuta. Adigun states that “the Act establishes a trust by which all land in a state is vested in the Military Governor of the state to be held on trust and administered for the use and common benefit of all Nigerians.”
483 The use of the word “trust” in section 1 of the LUA has generated a widespread debate as to the nature of the powers of the Executive Governor.
485 Adigun Olayide ibid The Land Use Act above J. A. Omotola Edition at p. 66.
486 Ibid, Adigun above; see also a discussion on the three certainties required in order to create a valid trust under English law in Glanville L. Williams The Three Certainties (1940) The Modern Law Review, Volume 4, Issue 1, pages 20-26.
discussion, a definition of the concept of trust under the English law is required. A trust under English law is defined as “the relationship which arises wherever a person (called the trustee) is compelled in equity to hold property whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some other object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other object of the trust.” For a valid trust to be created under English law, firstly, there must be a clear and certain manifestation of an intention to create a trust by the person or persons who own the trust property. Secondly, the property that is to form the subject matter of the trust must be identifiable and precisely defined. Thirdly, it must be possible to ascertain the beneficiaries of the trust at the time of the creation of the trust. In highlighting the essential characteristics of a valid English law trust it becomes apparent that the “trust” vested in the Governor by the LUA is significantly different. The first characteristic of “a clear intention to create a trust” cannot be established. The pertinent issue is who is to be credited with manifesting a clear intention to create a trust in favour of the beneficiaries under the LUA. Assuming that some may claim that the Military Committee set up to recommend the land use policies prior to its enactment, in creating the land use policies, clearly manifested an intention to create a trust, another issue arises. The fact that at the time of the enactment of the LUA, the Federal Government Military Committee set up to recommend these land use policies did not own the land in the territory of the states of Nigeria. This establishes that the federal government or military committee were not in a position to manifest an intention to create a trust of the land.

489 The position under English law is that there must be a clear manifestation of an intention to create a trust and there must be a clear obligation on the trustee to apply the property for the purpose of the trust.
490 The LUA nationalised all the land in the Federal Republic of Nigeria. Prior to the LUA, land was privately owned and individuals had freehold interests in land within the country.
as the ownership of the land was not prior to the enactment of the LUA vested in the government but was privately owned by communities, families and individuals.⁴⁹¹ The second characteristic of an English trust which is that the “property forming the subject matter of the trust must be clearly identifiable” may arguably be considered present, as the relevant property which is the subject matter of the trust could refer to all land comprised in the territory of each state in the Federation.⁴⁹² However, the third characteristic which is that it must be possible “to ascertain the beneficiary or beneficiaries of the trust at the time of the creation of the trust” is not sustainable within the ambit of the LUA. The argument that the beneficiaries of the alleged “trust” created by the LUA can be identified as “all Nigerians” has been raised but this is by no means certain or definite within the definition of a trust under English law.⁴⁹³ This is reinforced by the fact that members of the “intended class of beneficiaries” which are the “Nigerian public” cannot march up to the Governor and demand to be granted a right of occupancy as a matter of right. It is also impossible to ascertain the share or portion of each “beneficiary” within the class of beneficiaries that constitutes the Nigerian public. This is a necessary requirement in the fulfilment of the “certainty of beneficiary” criteria under the English law trust. Shares or portions of the property held under a trust by each beneficiary must be clearly and distinctly out-lined for it to constitute a valid trust.⁴⁹⁴ In light of the characteristics that constitute an English law trust, the Nigerian judiciary has been unable to appropriately infer the English law concept of a trust and apply it

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⁴⁹¹ See Banire M. A. Senior Lecturer, Department of Private and Property Law, Faculty of Law, University of Lagos, Nigeria.
⁴⁹² The English law cases of Watson v Holland (1985) 1. 290 and Re Golay’s Will Trust (1965) 1 W.L.R. 969 which illustrate the second characteristic of an English law trust which is that the trust property in whatever form, must be identifiable with certainty.
⁴⁹³ As stated by Sir William Grant in Morice v Bishop of Durham (1804) 9 Vesey Juniors English Chancery Reports 399 at p. 405-406.
⁴⁹⁴ The case of McPhail v Doulton (1971) AC 424 fundamentally restated the law in relation to certainty of objects and Lord Wilberforce, in his judgment reiterated that for a trust to be valid “it is clear law that a trust must be for ascertainable beneficiaries.”
to the trusteeship status conferred on the executive institution by the LUA. Ogundare J.\(^{495}\) states that “the use of the word “vested” in section 1 of the LUA has the effect of transferring to the Governor of a state the ownership of all land in that state…” He asserts that section 1 does not however establish the “nature of the trusteeship status” vested in the Governor by the LUA. Characterising the nature of the Governor’s trusteeship powers under the LUA, more differences exist between a trust under English law and the “trust” alluded to by the LUA. The rights enjoyed by a beneficiary under a trust in English law are always equitable not legal.\(^{496}\) In circumstances where a trustee conveys a trust property in breach of trust to a person who had no prior notice of the beneficiary’s interest and who gave consideration for the conveyance, the beneficiary’s interest is defeated as it is merely an equitable interest.\(^{497}\)

Alternatively, the rights created by the holder of a right of occupancy under the LUA, whether actual or deemed, is always legal. The maxim “first in time, first in law” rule does not apply. In the event that the Governor purports to grant a right of occupancy in a land wherein a prior right of occupancy subsists in another person, the latter grant will not confer on the earlier owner any right superior to that of the latter holder even if he gave consideration for the grant.\(^{498}\) The Nigerian Courts have also considered another factor which negates the position of the Governor as an English law trustee. This is the fact that the LUA does not mention any obligations imposed on the Governor as a result of this trusteeship status and the Governor is not saddled with any of the onerous duties imposed by the English

\(^{495}\) Akinloye v Chief Oyejide (Unreported) High Court of Ondo State, Suit No HC/GA/83. See also Irikefe JSC’s statement in Nkwocha v Governor of Anambra State ibid, where Irikefe states in reference to the LUA that “by this piece of legislation a legal trust affecting every inch of Nigerian land is created constituting every Governor trustee in respect of the land within the limits of his state.”


\(^{497}\) Judicature Acts 1873-1875 on common law courts; Pitcher v Rawlings (1872) 7 Ch. App. 259 on courts of equity, Supra, M. A. Banire.

\(^{498}\) Dzungwe v Gbishe (1985) 2 N.W.L.R. (Pt. 8) 528; See also Ogunleye v Oni (1990) 2 N.W.L.R. (Pt. 135) 745.
law of equity upon a trustee. This is evident in the overwhelmingly common situations where the Governor causes unreasonable delays in the granting of a right of occupancy to applicants by virtue of the consent powers conferred on him by section 22 of the LUA. In practice, some Governors have refused outright to grant rights of occupancy without feeling the need to give any reasons or justification for their refusal. All these are inconsistent with the characteristics of a trust under English law and not permissible under a conventional trust agreement. The unlikely existence of an English-style trusteeship is indicated in the power of revocation granted to the Governor under section 28 of the LUA to revoke rights and certificates of occupancy for overriding public purpose or in the public interest. Its very existence and availability to the Governor, is antithetical to the concept of a conventional English law trust. This is because an English law trust provides that once property which forms the subject matter of the trust is appropriated or alienated, no form of recall of the subject matter of the trust can be carried out by the trustee. In other words, the very existence of the powers of revocation which are embodied in the LUA and part of the powers exercisable by the Governor under the LUA negates the conventional concept of a valid trust under English law. The Governor does not have a duty to account to holders of rights of occupancy under the LUA and most of the remedies available to beneficiaries against a trustee in breach of his trust are not available against a Governor under the LUA. The Nigerian judiciary has failed to infer an English style trust on the status of the Governor, consequently, the Governor cannot be called upon to account by aggrieved applicants in the

500 The Nigerian Courts have struggled to regulate the wide powers of consent, revocation and compensation conferred on the Governor in cases where there have been arbitrary and blatant abuses of their executive powers.
501 See the cases of Eperokun and Ors v University of Lagos (1986) 4 NWLR Part 34, 162; Garba and Ors v Unimaid (1986) 1 NWLR Part 18, 550. The Nigerian Supreme Court has made concerted efforts to mitigate executive powers but the limitations imposed on the Courts by the LUA have restricted their judicial authority.
same manner that a beneficiary can call his trustee to account under English law. The more likely consensus is that the term “trust” which is used in section 1 of the LUA is different from the term used by the English law of equity and trust, therefore the obligations conveyed by the LUA upon the Governor in respect of land within his state are not enforceable by the courts in the same manner as the obligations of a trustee under English law can be enforced.

Another important aspect to consider is whether the English law trusteeship status, if accorded to the Governor of a state, would alleviate the issues of consent, revocation and compensation in relation to alienations of land, mortgage securities and other transfer of property interests under the LUA. This contemplates whether an inference of the English law trust would enable the Nigerian judiciary to effectively check executive dominance and curtail their excessive powers over private property rights to land in Nigeria. It is unlikely that trusteeship status predicated on the concept of trust under English law and conferred on the office of the Governor would be sufficient in ameliorating the bottlenecks created by the Governor’s powers under the LUA. It seems clear that the intentions of the promulgators of the LUA was not to create an English law trust, and the characteristics, duties, obligations and responsibilities of a trustee under English law are noticeably absent in the office of the Governor. More drastic measures need to be taken to limit the power of control and management of all land in the states of the Federation vested in the executive institution by section 1 of the Act. The Nigerian legislative and judicial institutions have been unable to sufficiently curb these executive powers, and the vesting of an English law trusteeship status on the Governor will not instil an effective check on Nigerian executive dominance over the

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505 As stated by Professor R. W. James in James R.W. Nigerian Land Use Act: Policy and Principles; Ile-Ife, (1987) at p. 85 “the trust concept under the Act is not by nature the technical institutions of the received (English) laws but implies principles to ensure that the land is administered for the benefit of all Nigerians.”
legislative and judicial institutions. In light of the above, a comprehensive examination has been undertaken of the constraints and limitations within formal institutional structures which perpetuate the laws governing private property rights to land serving to undermine, limit and prevent the essential and necessary legal reform required in order to offer better protection of individual property rights in Nigeria.

3.9 Conclusion

In this chapter, analyses of the formal institutional structures and the laws governing private property rights to land have been carried out. Formal institutional structures that have a direct impact on individuals’ property rights to land in Nigeria have been examined to understand the constraints and limitations to progressive legal reform and why there is a hindrance to the development of better, more suitable and effective laws for the protection of private property rights. The issue of the set up structure of the applicable laws governing property rights to land and the reasons for the establishment of the draconian provisions of the LUA have been discussed. The dominance of the executive institution over the legislature and judiciary institutions and the effects of this dominance on the protection of individual interests in land have also been analysed. It has been established that there is a great need to amend the provisions of the LUA to curtail the wide discretionary powers vested in the executive institution in relation to private property rights on land in Nigeria. Presently, the amendment process is extremely difficult due to the limitations which ensue from the rigid amendment process of the LUA and its constitutional entrenchment. The legislative institution is therefore restricted in its ability to create new law or modify and alter pre-existing laws. This is contrary to the separationist intentions of Nigerian federalism. The Nigerian judiciary is further limited by the provisions of the LUA ousting its jurisdiction to hear matters in relation to the private property rights of individuals to land in Nigeria. All this adversely affects the
protection of the property rights to land of individuals under the present laws governing property rights in Nigeria. The next chapter focuses on informal institutional structures and will consider whether informal institutional structures that exist within the Nigerian state limit, undermine or have an adverse effect on the reform of the laws governing property rights to land in Nigeria.
Chapter Four:

Informal Institutional Structures as Constraints to Legal Reform

4.1 Introduction

The aim of this chapter is to examine informal institutional structures which co-exist concurrently with the formal institutions in Nigeria. This is to determine whether the informal institutional structures adversely affect, limit or in any way constrain progressive legal reform and stifle the development of laws for the better protection of private property rights of individuals to land. It is submitted that existing informal institutional structures in Nigeria serve to undermine, limit and prevent the essential and necessary legal reform required to offer better protection of individual property rights. In order to encapsulate and determine the complexities of laws and legal change within a society, a comprehensive institutional analysis that takes into account both formal and informal constraints within the given legal system is essential. 506 Having analysed the formal institutions that create, implement, interpret and enforce the laws governing private property rights, 507 it is of paramount importance to also examine the informal institutional structures which exist concurrently with these formal institutions to achieve a thorough and well-rounded analysis of institutional constraints to legal reform in Nigeria. 508 The chapter proceeds as follows. Firstly, an analysis of the role of informal institutions will be carried out (4.2). This is to determine their relevance to formal institutions and legal reform and to establish the importance of informal institutions in

506 See Katharina Pistor et al Evolution of Corporate Law and the Transplant Effect: Lessons from Six Countries (2003) 18 The World Bank Research Observer 89, see also North Douglass Five Propositions of Institutional Change in “Explaining Social Institutions.” (1995) edited by Jack Knight and Itai Sened, Ann Arbor, University of Michigan Press. North states that “rule enforcement depends not only on the existence and quality of norms and state power; it is the mixture of informal norms, rules and enforcement characteristics together that define the choices set and results in outcomes.”
507 See Chapter 3 of the Thesis
508 See Weyland Kurt Limitations of Rational Choice Institutionalism for the Study of Latin American Politics (2002) Studies in Comparative International Development 37 (1) at p. 57-85; see also O’Donnell Guillermo Another Institutionalization: Latin America and Elsewhere Kellogg Institute Working Paper 222, Institute for International Studies, Notre Dame where there is discussion about current literature’s view that society is shaped primarily or exclusively by formal rules and the inherent problems that this may cause in explaining and understanding societal behaviour in totality.
relation to the reform of the laws governing property rights to land in Nigeria (4.3). Secondly, an examination will be undertaken to assess informal institutional norms which enable and reinforce present formal institutions and their inadequate protection of individual property rights to land in Nigeria (4.4 – 4.6). Thirdly, the chapter will consider how these informal institutional norms inadvertently limits, constrains and otherwise adversely affect reform of the present laws governing property rights to land within Nigeria’s formal institutions (4.7). Finally, the last section concludes the chapter (4.8).

4.2 The Role of Informal Institutions

As discussed in an earlier chapter, the acknowledgment of the role and importance of institutions is predicated on the recognition that “most of human interaction and activity is structured in terms of overt or implicit rules.” It makes sense to assert that legal rules and laws are only one institutional element, informal norms are another aspect, and are essential to better understand constraints within the relevant legal system that undermine and limit legal reform of private property rights to land. Overemphasis on the formal and legal aspects of institutions without any consideration or acknowledgment of the reliance of legal systems on informal rules and norms seems insufficient and incomplete. All institutions

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whether legal, social, political, formal or informal, influence each other.\textsuperscript{512} Institutions are generally defined as the “constraints that human beings impose on human interactions,”\textsuperscript{513} and informal institutional constraints have been lauded as “norms of conventions and self-imposed codes of conduct.”\textsuperscript{514} Numerous scholars\textsuperscript{515} are suggesting that many “rules of the game” that structure legal systems and institutions “are informal, created, communicated and enforced outside of officially sanctioned channels.”\textsuperscript{516} The distinction between formal and informal institutions\textsuperscript{517} has oftentimes proved problematic. Some scholars have distinguished formal and informal institutions by allotting state enforced rules as formal whilst apportioning societal rules within civil society as informal.\textsuperscript{518} Other scholars have asserted that informal institutions are consistent with the cultural traditions of society,\textsuperscript{519} whilst others


\textsuperscript{513}See Douglass North’s definition of institutions in North Douglass C. “Institutions, Institutional Change and Economic Performance” (1990) Cambridge University Press. North fully defines institutions as “the rules of the game in society or, more formally, the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social or economic…”

\textsuperscript{514}Ibid, see North above. North distinguishes between formal and informal institutional structures by identifying “formal rules” with “legal rules enforced by courts,” while “informal norms are enforced usually by your peers or others who impose costs on you if you do not live up to them.” See also Carey John M. \textit{Parchment, Equilibria and Institutions} (2000) Comparative Political Studies 33 (6) at p. 735-761 and Knight Jack “Institutions and Social Conflict.” (1992) New York, Cambridge University Press, where other standard definitions of institutions are given as the “rules and procedures, both formal and informal which structure social interaction by constraining and enabling actors’ behaviour.”


\textsuperscript{516}Helmke Gretchen and Steven Levitsky \textit{Informal Institutions and Comparative Politics: A Research Agenda} (2004) Perspectives of Politics, Volume 2, No. 4.

\textsuperscript{517}North Douglass “Institutions, Institutional Change and Economic Performance” (1990) Cambridge University Press. North underlines this crucial role of informal institutions and infers that informal norms have an important impact on legal, economic and political development.


\textsuperscript{519}See scholars like Pejovich Svetozar \textit{The Effects of the Interaction of Formal and Informal Institutions on Social Stability and Economic Development} (1999) Journal of Markets and morality 2 (2) at p. 164-181. Pejovich defines informal institutions as “traditions, customs, moral values, religious beliefs, and all other norms of behaviour that have passed the test of time…thus, informal institutions are the part of a community’s
have contended that the distinction between formal institutions and informal institutions lies in the fact that informal norms are self-enforcing while formal rules are enforced by the state.\textsuperscript{520} Helmke and Levitsky\textsuperscript{521} define informal institutions as “socially shared rules, usually unwritten, that are created, communicated and enforced outside of officially sanctioned channels.”\textsuperscript{522} Informal institutions are based on their effectiveness within the society in which they exist and function. They derive their power of sanction through societal mechanisms of exclusion or ostracization; notably, the fact that non-participation in informal norms may lead to unacceptability or penalisation by society.\textsuperscript{523} Informal norms have no legal or formal basis. However, within society their role is of great importance. They “specify what actions are regarded by a set of persons as proper or correct, and improper or incorrect.”\textsuperscript{524} Informal norms derive their validity and functionality gaining institutional status when “actions taken by actors (within a society) according to their subjective preferences, beliefs and expectations, become mutually consistent over a certain period (and)...the observed reality created by their choices...confirm their beliefs, ...(and) are then reproduced as a guide for further actions.”\textsuperscript{525}

The role of informal institutions vis-à-vis formal institutions in a legal system is determinant


\textsuperscript{522} In contrast, Helmke and Levitsky define formal institutions as rules and procedures that are created, communicated and enforced through channels widely accepted as official...this includes state institutions (courts, legislatures, bureaucracies) and state enforced rules (constitutions, laws and regulations)...”


on the relationship that exists between them and this varies from jurisdiction to jurisdiction. In some legal systems, the relationship between formal and informal institutions is complementary. This means that both institutions co-exist harmoniously, supporting and reinforcing each other.\textsuperscript{526} In other legal systems, the relationship is substitutive. This occurs where state structures are weak and formal rules are not routinely enforced, allowing for substitutive informal institutions to achieve what formal institutions have been unable to achieve.\textsuperscript{527} The third type of relationship is the conflicting type. It occurs when there is conflict between both formal and informal institutions due to the fact that both systems are incompatible.\textsuperscript{528} Finally, the fourth type of informal institutions is described as accommodating informal institutions. These occur where informal institutions are adaptive, creating incentives to behave in a manner which changes the substantive effects of the formal institutions without actually violating the formal rules per se.\textsuperscript{529} The role of informal institutions in Nigeria and their relationship vis-à-vis formal institutions is both complementary and accommodating. Both characteristics are usually seen as positive. It is therefore important to determine how Nigerian informal institutions limit or adversely affect legal reform. The next section explores the existing relationship between formal and informal institutions in Nigeria and how their inter-relationship limits legal reform.

\textsuperscript{526} Supra see Lauth Hans-Joachim \textit{Informal Institutions and Political Transformation: Theoretical and Methodological Reflections}.

\textsuperscript{527} Supra see Lauth Hans-Joachim on the types of informal institutions, n 524 above.

\textsuperscript{528} It has been observed in some developing countries where formal institutional structures are insufficient, absent, or in a poor state that informal institutions have been used as an avenue of influence or a route to gain more prominence to influence economic growth and development.

\textsuperscript{529} Supra Lauth Hans-Joachim n 524 above at p. 9.
4.3 Informal Institutions, Formal Institutions and Legal Reform

As many rules that structure society are informal, “created, communicated and enforced outside of officially sanctioned channels”\textsuperscript{530} the importance of informal institutions within society, their relationship to formal institutions, and whether they limit or constrain legal reform of formal laws becomes very pertinent and relevant.\textsuperscript{531} Interactions between formal and informal institutions have yielded numerous complex and intricate formal/informal institutional relationships which determine or shape the rules, laws and norms within different societies. These institutional relationships often enable or constrain the progressive development of suitable laws within the relevant legal system. Traditionally, characterisations of the inter-linked formal and informal institutional relationships have tended to be two pronged. The first type refers to informal institutions as problem solving and functional, effectively accentuating the efficiency and performance of the formal institutions.\textsuperscript{532} The second type refers to informal institutions as dysfunctional and problem creating, limiting or restricting the effectiveness and performance of existing formal institutions.\textsuperscript{533} Scholars have highlighted the fact that in reality, a more complex picture, in relation to formal and informal institutional relationships, exists than was once believed. Helmke and Levitsky state that informal institutions at times “reinforce or substitute for the formal institutions that they


\textsuperscript{531} In adopting this view, an institution exists only where actors mutually believe and abide by the existence of explicit or implicit rules which coordinate their beliefs. See Aoki Masahiko “Towards a Comparative Institutional Analysis.” (2001) Massachusetts Institute of Technology, Cambridge Mass.


\textsuperscript{533} See Borocz Joszef Informality Rules (2000) East European Politics and societies 14 (2) at p. 348-380. See also O’Donnell Guillermo Delegative Democracy (19940 Journal of Democracy 5 (1) at p. 55-69. Traditionally, the this second type of informal institutions is considered problem creating and norms like corruption, clientelism and patronilism are considered to adversely affect the performance of formal democratic institutions.
appear to undermine.” 534 The relationship between formal and informal institutions in Nigeria falls within this category. Helmke and Levitsky have created a typology of informal institutions, see below: 535

![Figure 1: A typology of informal institutions](image)

In analysing informal institutions, the first issue raised by Helmke and Levitsky is whether “following informal rules produces a substantially similar or different outcome from strict and exclusive adherence to formal rules.” 536 Their analysis is that where following informal rules leads to a considerably different outcome, formal and informal institutions diverge. On the other hand, if outcomes reached by both formal and informal institutions are similar or not substantively different, then there is a convergence of both institutions. 537 In considering the applicability of Helmke and Levitsky’s analysis to property rights to land in Nigeria, we have already established that Nigeria’s formal institutional structures are strong

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534 See Helmke and Levitsky *supra* n 517 above at p. 728. The relationship between formal and informal institutions varies depending on whether formal institutions are weak or strong. Strong formal institutions exist where formal rules are well formulated and specified, where there is strong leadership and effective mechanisms for implementation. In these circumstances, the existing informal institutions may reinforce or adapt to the formal institutions in place thereby perpetuating and prolonging their continuity.

535 Source: Helmke Gretchen and Levitsky Steven *Informal Institutions and Comparative Politics: A Research Agenda supra*, see n 517 above.

536 See Helmke and Levitsky *supra* n 517 above

537 *Supra*, Helmke and Levitsky, n 517 above.
and centralised, and executive/state control is overly dominant. The informal institutions that exist inadvertently enhance the performance or effectiveness of these existing formal institutions by supporting them reinforcing their longevity and resistance to legal reform. This means that there is a convergence between existing formal and informal institutions in Nigeria. The result of this convergence is a similarity in outcome from both Nigeria’s formal and informal institutions. The similarity in outcome perpetuates the maintenance of the present state of affairs in relation to laws governing property rights to land. Helmke and Levitsky’s second issue highlights the effectiveness or strength of the relevant formal institutions, and considers the extent to which formal laws and rules replicated on paper are enforced and adhered to in practice. Helmke and Levitsky clarify that their reference to the term “effective” formal institutions does not indicate efficiency, or how efficient the relevant formal institutions are. Rather, their use of “effective” formal institutions is merely in reference to how strong and enforceable the formal laws are within the jurisdiction in question. With Helmke and Levitsky asserting that “effective formal institutions” do not mean “efficient formal institutions”, the issue in relation to Nigeria is what occurs if existing formal institutions are strong and effective but also dictatorial and undemocratic. It is widely accepted that converging informal institutions generally

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539 In relation to property rights to land, there is strong executive governmental control within the formal institutions that exist in Nigeria and the informal institutions that have been created in the Nigerian society have perpetuated and supported this present state of affairs.
540 Helmke and Levitsky supra n 517 above.
541 Historically, there are numerous examples of inefficient institutions that have still effectively shaped actors’ and societies’ behaviours and expectations. See also North Douglass’s view on inefficient but effective institutions in Institutions, Institutional Change and Economic Performance ibid.
542 Supra Helmke and Levitsky at n 517 above.
543 As indicated, “effective” does not mean “efficient” as lauded to by North, Helmke and Levitsky.
544 This is unsurprising as in relation to property rights to land, the LUA and its resultant institutions stem from a military dictatorship regime.
support and reinforce strong, positive, effective and democratic formal institutions. In this instance, existing informal institutions may still serve to reinforce and support these strong but flawed formal institutions enabling their continuity and resistance to change. The position in Nigeria is therefore that informal institutions converge, complementing and accommodating formal institutions even when the existing formal institutions are dictatorial and undemocratic. As already established, existing formal institutions in Nigeria consist of a strong, centralised and dominant executive and weaker legislature and judiciary institutions. An interesting factor to consider becomes what the role of informal institutions is in relation to formal institutions. It seems that in Nigeria, informal institutions play the role of complementing and accommodating existing formal institutions. Further, in relation to property rights to land in Nigeria, complementary informal institutions support and reinforce the formal institutional structures by “filling in the gaps” within the formal laws, addressing issues not dealt with by formal law and encouraging the primary pursuit of individual goals and interests within the formal institutional framework. Nigerian informal institutions not only complement but also accommodate existing informal institutions by creating reasons or incentives to behave in a manner that changes the substantive effects of

545 This is a view shared by scholars like Douglass North, William Summerhill and Barry R. Weingast Order, Disorder and Economic Change: Latin America versus North America in “Governing For Prosperity.” (2000) Edited by Bruce Bueno de Mesquita and Hilton L. Root, New Haven, Yale University Press at p. 17-58 believe that the effectiveness of the United States Constitution is due to a complementary set of shared beliefs and expectations among its citizens.


547 See Stokes Susan C. Do Informal Institutions Make Democracy Work? Accounting for Accountability in Argentina Paper presented at the conference for Informal Institutions and Politics in Latin America (2003) Kellogg Institute for International Studies, University of Notre Dame. The informal institutional norm of Authoritative leadership which exists in Nigeria fills in the gaps where there are gaps in the formal laws. This will be discussed later on in the Chapter.

the rules of formal institutions whilst remaining within the ambit of formalities. Accommodating informal institutions are usually created by disgruntled actors within a society and manifest due to a prevalent dissatisfaction with the outcome and effects of the formal laws and institutions. Actors within the society, unable to alter or openly violate the formal rules, diverge from the formal rules by using accommodating informal institutions to reconcile their interests to existing formal laws. Informal institutions in Nigeria contribute to the maintenance of the persevering and rigid formal laws governing property rights to land due to the fact that although there might be some dissatisfaction with the present formal laws, informal institutions have been created which reconcile the interests of actors within society with existing formal rules thereby reducing or dampening the demands for change. Informal institutions in Nigeria therefore promote a focus on individual goals and interests over collective goals and values. It is apparent from the analysis of the LUA that legal reform is crucial and necessary in order to offer better protection of individual property rights to land. However, despite criticism of the laws of the LUA, informal institutions exist within society which ameliorate and dampen the ardour of the agitations for legal change within the formal institutions promoting the maintenance of the present state of affairs to the detriment

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550 See Helmke and Levitsky supra n 517 above, Informal Institutions and Comparative Politics: A Research Agenda Helmke and Levitsky are of the view that “although accommodating informal institutions may not be efficiency enhancing, they may enhance the stability of formal institutions by dampening demands for change.”

551 The norm of corruption which exists in Nigeria is one such informal institutional norm which is used by actors to reconcile their own personal interests within society to the detriment of the society in general. See also Lijphart Arend “The Politics of Accommodation: Pluralism and democracy in the Netherlands,” (1975) 2nd Edition, Berkley, University of California Press. Lijphart describes the Dutch consociational practices in post 1917 democracy as accommodating informal institutions; based on informal, unwritten rules of elite accommodation and power sharing which included extensive consultation in policy making, proportional allocation of government jobs among political parties and other types of informal norms.

552 The focus on individual goals and interests promoted by complementary informal institutions reduces or dampens any agitations for legal change or reform of the laws as individuals become focussed on personal gain and advancement.
of much needed reform of property rights laws in Nigeria. The next sections will identify the informal norms of corruption, authoritarian leadership and narrow-radius trust structures. By the same token the sections will also explain how these norms limit or constrain the progressive development of the laws governing private property rights to land thereby hindering legal reform.

4.4 The Norm of Corruption

The first informal norm to be discussed is the existence of the informal institutional norm of corruption within the Nigerian society. Corruption as a concept has been vigorously and tirelessly defined. It is considered difficult to ascribe a specific definition to the term “corruption” and numerous scholars have offered differing views on what corruption encapsulates. One definition of corruption is “the perversion of integrity or state of affairs through bribery, favour or moral depravity…it takes place when at least two parties have interacted to change the structure or processes of society or the behaviour of functionaries in order to produce dishonest, unfaithful or defiled situations.” Another definition of corruption is as “an act which differs from legal and formal rules of conduct which govern and determine the behaviour and actions of a person in a position of authority due to private

553 In an article by Siavelis Peter Executive-Legislative Relations in Post Pinochet Chile: A Preliminary Assessment in “Presidentialism and Democracy in Latin America.” Edited by Scott Mainwaring and Matthew Sobot Shugart (1997) New York, Cambridge University Press at p. 321-362, Siavelis expresses his view on the complementary and accommodating informal institutions that existed in Chile which ameliorated agitations for change and enhanced coalitional trust within the Chilean society.


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motives or gain.” Yet another definition describes corruption as the conscious attempt to deliberately divert resources from the satisfaction of the general interest to that of personal or private interest. Notably, definitions of corruption highlight a common feature - the perversion of societal values for personal benefit with a consequent negative effect on the state and the society at large. In Thompson’s view, the assertion “that corruption is institutional does not mean that only the institutions (are) defective. It is still individuals who are the agents of institutional corruption and individuals who are to be held accountable for it.” In order to establish the existence of the informal institutional norm of corruption, it is essential to analyse the perceptions, attitudes, beliefs and views within the Nigerian society in relation to corruption. Omotola describes the perception of corruption within the Nigerian society as “practically a way of life (to the extent) that one finds it difficult to differentiate between what is and what is not corruption.” It has been observed that corruption within the Nigerian legal system and society is not rightly condemned by individuals but accepted and treated with cynicism and a sense of justification. Pope refers to the level of corruption reflected in Nigeria as alarming and systematic. He classifies countries like Nigeria as one of

556 See Khan M.H A Typology of Corrupt Transactions in Developing Countries (1996) IDS Bulletin. Ojaide Francis in The Professional Accountant and Anti Corruption Crusade (2000) ICAN News, July – September 2000 defines corruption as “any systemic vice in an individual, society or a nation which reflects favouritism, nepotism, tribalism-sectionalism, undue enrichment, amassing of wealth, abuse of office, power, position and derivation of undue gains and benefits…it also includes bribery, smuggling, fraud, illegal payments, money laundering, drug trafficking, falsification of documents and records, window dressing, false declaration, evasion, underdevelopment, deceit, forgery, concealment, aiding and abetting of any kind to the detriment of another person, community, society or nation.”

557 See Lawal Gbenga Corruption and Development in Africa: Challenges for Political and Economic Change (2007) Humanity and Social Sciences Journal 2 (1) at p. 3.


560 Omotola Shola supra n 559 above at p. 215.

561 Tell magazine, a leading weekly magazine in Nigeria states in an editorial that “an unusual and disturbing trend is emerging in which behaviour openly suggestive of large-scale corruption in the polity are not out rightly condemned but treated with utmost cynicism, and defended with self serving arguments, even by very senior citizens often considered as the fathers of the nation.” See Susan Rose-Ackerman Corruption and Development in Pleskovic and Stiglitz Edition (1997) at p. 69.

such countries “whose national integrity system has effectively collapsed.”\footnote{The level of corruption is so endemic in Nigeria that scholars refer to the “culture” of corruption which exists in the country. See Omotola Shola Corruption and the Crisis and Contradiction of Development in Nigeria: An Overview (2007) Journal of Development Alternatives and Area Studies, University of Stockholm, Sweden.} Corruption within the country is referred to as multi-dimensional because it exists within the political, economic and legal institutions as well as within the Nigerian society.\footnote{Shola Omotola supra n 559 above.} The most prominent and influential study of corruption is considered to be Transparency International’s Corruption Perceptions Index herein referred to as CPI.\footnote{Transparency International Corruption Perceptions Index (CPI) is the standardised table used to measure corruption worldwide. CPI was established in 1995 with the aim of raising awareness on the issues of corruption and by publicly criticising the governments of corrupt countries and it hopes to contribute to the fight against corruption.} CPI publishes an index that ranks countries according to their level of corruption. Transparency International carries out these rankings by indicating on a scale of 1 – 10, 1 meaning “highly corrupt” and 10 meaning “very clean” how clean or corrupt countries are. See diagram below.\footnote{Source: Transparency International 2010 CPI Reports at \url{www.transparency.org}}
Transparency International’s CPI rankings is a composite index which incorporates the perceptions of business people, the general public and country analysts and is widely relied on as an indicator of the levels of corruption that exist in different countries.\textsuperscript{567} Nigeria’s ranking for the CPI in 2010 was 2.4 which put Nigeria in the region of being very

\textsuperscript{567} Although Transparency International’s CPI has been criticised as being based on perceptions as CPI relies on independent country experts by assessing their perceptions of the degree in which corruption exists within countries. Criticisms of assessments based on the perception of corruption highlight the fact that perceptions can be distorted by numerous factors like media coverage, culture and personal experiences or interests. See Stefes Christoph H. Measuring, Conceptualizing and Fighting Systematic Corruption: Evidence from Post-Soviet Countries (2007) Perspectives on Global issues, Volume 2, Issue 1, New York University.
corrupt, underlining the level of corruption which is endemic within the Nigerian state. Endemic corruption within a society perverts the “normal use of connections, networks and reciprocity and leads to an increased personalisation of power.” The informal institutional norm of corruption within the Nigerian society is perfectly encapsulated in the phrase “an average Nigerian sees corruption and the inefficiencies and distortions it creates as an inevitable facet of life.” Individuals become used to a reliance on “connections” and “favours” instead of formal political and social rules. Kolawole refers to corruption in Nigeria as being “grounded in social expectations and conventions.” His article reiterates that the Nigerian society encourages, promotes and nurtures corruption. The existence of the informal norm of corruption within Nigerian society has led to individuals exploiting present laws and the legal system by bribing government officials in order to secure the Governor’s consent. Corruption also allows individuals to use connections solicited through the existence or the development of a relationship with a “government official”, a “person in power” or the Governor to acquire property rights to land which ordinarily they might not be entitled to.

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568 In 1996 and 1997, during a military regime in Nigeria, Transparency International ranked Nigeria as the most corrupt country among the 52 countries ranked. In 2002, during a democratic civilian rule, Nigeria was ranked the most corrupt country, in 2003, the second most corrupt country and in 2004, the third most corrupt country. See the reports of Transparency International and Amnesty International on the CPI for the quoted years.

569 It can be argued that independent country experts’ perceptions are still self-reported perceptions as opposed to objective measures of corruption. However, it is obvious that in relation to how corruption affects growth and economic development on the world stage, perception may actually matter in relation to foreign investment and in flow of capital into an economy.


572 The norm of corruption fuels the ruthless pursuance of personal interest, gain and advancement.

573 Simon Kolawole is a journalist for the well known Nigerian national newspaper, This Day and he published an article on Corruption in the Nigerian Society on October 8th 2006.

574 See also Smith Daniel Jordan “A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria” supra where Smith describes his attempts to obtain a Nigerian driving licence and other necessary documentation in order to legally drive a vehicle on Nigeria’s public roads. He takes along a Nigerian friend and introduces him as an “in-law” (using connections) and proceeds to bribe the relevant officials to acquire the documents in a matter of days.

575 See Lauth Hans-Joachim Informal Institutions and Democracy (2000) Democratization 7, 4 Routledge at p. 21 – 50. Lauth believes that where formal and informal institutions are inter-connected, interconnection demands a precarious co-existence on the part of both institutions. He asserts that the reason for this is that
Amidst all the abuses of executive consent, revocation powers, the illegitimate use of state property and resources for personal interests which exists within formal institutions, corruption become acceptable within the society. In the same vein, the informal norm of corruption has as its primary focus, the conscious attempt to divert resources or benefits from the satisfaction of the general interest to that of personal interest. Individuals lose any drive or initiative to vehemently protest existing formal laws on property rights or the abuses of powers carried out by incumbent Governors once they see an advantage or “connection.”

Rather, they exploit it for their own personal benefit. The existence of the informal norm of corruption within the Nigerian society greatly limits or constrains any legal reform of the present laws governing property rights to land because it allows individuals to “reconcile their personal interests with existing formal institutional arrangements.” In promoting a focus on personal interests and goals, the norm of corruption hinders demands for change and legal reform. The result is a diversion from the collective need for better protection of individual property rights. This has led to the restriction or limitation on any efficient or purposeful strides towards reform or the making of much needed changes to the laws governing property rights to land in Nigeria.

“Informal institutions are dependent upon the existence of formal institutions. They live, as it were, at the expense of the former, by exploiting them for their own purposes, by either partially occupying or penetrating them...They are parasitic institutions which, for example, find there expression in corruption...at the same time, however, their relevance is not to be underestimated, as they are capable of exerting quite considerable pressure upon the way in which formal institutions function.” See also Smith Daniel Jordan “A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria.” (2006) Princeton University Press where he refers to the existence of a culture of corruption in Nigeria.

Individuals in countries were the formal institutions are corrupt are more likely to accept corruption as an inevitable part of life and make allowances for corrupt practices.

A “connection” could mean a relationship with the Governor, or the bribery of a Government official to secure Governor’s consent even when it is not legally deserved.

As Helmke and Levitsky state in their article Informal Institutions and Comparative Politics: A research Agenda supra n 517 above “although...informal institutions may not be efficiency enhancing, they may (unwittingly) enhance the stability of formal institutions by dampening demands for change.”

Executive dominance and abuse of executive powers are accepted with inevitable cynicism amidst a search for personal benefit within the existing formal laws and institutional structures.

People treat the fact that there is corruption within the formal institutions with cynical acceptance and resignation because corruption is inherent within the society.
4.5 The Norm of Authoritarian Leadership

It has been established by scholars\(^{581}\) that the “primary institutional heritage in Africa is neo-patrimonial rule”\(^ {582}\) and Nigeria is by no means an exception to this rule. Neo-patrimonialism is defined as an informal personal rule that operates through clientelistic networks of “hierarchical particularistic exchanges, patronage, nepotism, and favours for official actions.”\(^ {583}\) Clientelistic network structures connote “personalized relationships between a patron (leader) and clients (followers) commanding unequal wealth, status or influence, based on conditional loyalties and involving mutually beneficial transactions.”\(^ {584}\) Neo-patrimonial and clientelistic structures which manifest within patronage and kinship relationships in Nigeria form a fundamental part of the Nigerian culture and custom.\(^ {585}\) The neo-patrimonial and clientelistic structure of patronage and kinship relationships in Nigeria is based on hierarchical authoritarian leadership by the patron over his clients or followers. Similarly, existing formal institutional structures in Nigeria are based on executive dominance and authoritarian leadership.\(^ {586}\) Informal institutional norms therefore limit and constrain reform of the laws governing property rights to land due to the similarities between the authoritarian and dominant structures of existing formal institutions and the informal institutional norms of


\(^{582}\) Supra Lindberg above.


\(^{585}\) Examples of neo-patrimonial and clientelistic structures which exist within the Nigerian society are patronage and kinship relationships.

\(^{586}\) Individuals are thereby infused with a sense of resignation, acceptance and familiarity towards the existing formal institutional structures of executive dominance and authoritarian leadership due to their similarity with the authoritarian leadership structure within their informal institutions. See also Lindberg Staffan I. *It’s Our Time to Chop: Do Elections in Africa Feed Neo-Patrimonialism Rather than Counteract it?* (2010) Democratization 10, 2 at p. 121-140.Lindberg discusses the patrimonial tradition that is entrenched within the structure and culture of most African countries making specific reference to Ghana.
kinship, patronage and clientelism. As individuals within the Nigerian society are used to the dynamics of authoritarian leadership inherent in both the state and society, this has led to resigned acceptance and the dampening of agitations for legal change or reform of present laws. In the same vein, the existence of patronage and kinship clientelistic structures exacerbates the norm of corruption within the Nigerian society. Kolawole asserts that the norm of corruption stems from the structure of the Nigerian society in relation to it’s “patronage systems and the expectations of the extended family.” Patronage and kinship relationships are rampant in Nigeria, and often form a basis for the principle of corruption whereby the person(s) in a position of power awards privileges and benefits to persons within their network(s) in exchange for loyalty and support from friends and family. The patronage and kinship relationship structures which are a fundamental part of Nigerian society and their complacency with corruption has fuelled the institutional norm of corruption and perpetuated the focus on personal benefit and gratification. The next section examines informal institutional norms of authoritarian leadership within the Nigerian society. It achieves this by considering two types of informal clientelistic relationships: kinship and patronage systems and the ways in which both limit and constrain the reform of the laws governing property rights to land in Nigeria.

587 Individuals often get used to what has consistently happened over the years, and they grow to accept it as a way of life.
588 Supra see n 575 above, Kolawole’s article on Corruption in the Nigerian Society. Patronage is defined as the “support, encouragement, privilege or financial aid that an individual bestows on another. Kolawole talks about societal expectations of patronage and favours which exist and soliloquies about the fact that if he suddenly gets an important new job, the expectations of his friends, extended family and neighbours would be that they in some way benefit from his new job or political/governmental appointment.
589 Kolawole postulates in his article that “the (Nigerian) society condones it, the society budgets for it. If you go into public office and don’t come out rich, you are a failure. Your immediate and extended families will curse you, your community will alienate you…” Corruption is not restricted to Nigeria alone; see Andrew Walder’s view on corruption in China in Walder Andrew “Communist Neo-Traditionalism.” (1986) Berkeley, University of California Press. Walder asserts that throughout the Chinese society, there is a development of a network of individuals who exchange their loyalty for career opportunities and preferential treatment.
4.5.1 Kinship

The structure of the informal institutional norm of kinship within Nigeria’s social and cultural history bears considerable similarity to the structure of present formal institutions in Nigeria due to the common characteristics they both share, namely, relations based on hierarchy and authority. The existence of these familiar patterns of hierarchy and authoritarian leadership prevalent within the Nigerian society complement, support and reinforce existing formal institutions which are also based on similar patterns of hierarchical and authoritarian leadership through executive dictatorship. Thus, the institutional norm of kinship based on its structures of hierarchy and authority tempers vehement agitations for change or reform of the laws as individuals are already used to authoritarian leadership structures within their societal values and perceptions. In this manner, the pre-existing informal institutional norm of kinship has contributed to instilling in individuals within the Nigerian society an acceptance for authoritarian leadership, making the authoritarian and dictatorial leadership of the executive institution a familiar pattern. The result is yet again, a dampening of any agitations for legal reform of the present laws governing property rights to land. The clientelistic structure of a traditional kinship is manifested in Family Heads and Chiefs. Traditionally, a Family Head symbolises a person appointed as the head of the family within Nigerian culture. The Family Head is a person in a position of authority within the clientelistic structure of kinship and he makes decisions for and on behalf of the individuals within the

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590 Lauth Hans-Ioachim in *Informal Institutions and Democracy* supra n 548 above states that “kinship structures are common in less developed countries...they reflect the traditional patterns of societal organisation as well as the limited performance of the state in protecting individual rights.”

591 Kinship are a form of clientelism based on relational relationships and ethnic communities, whereby there exists a link through blood, ethnicity, friendship or other forms of interaction and within this forum, the relationship is precipitated from a mutual benefit between a person or persons occupying a higher place in the social hierarchy and a following concerned with protection and the acquisition of certain advantages, benefits and privileges. Kinship within the Nigerian society is based on forms of personalised interactions of fixed roles and dominance structures.

592 See Elias T. “Nigerian Land Law.” (1971) Sweet and Maxwell 4th edition. The family head is usually the oldest male member of the family within the Nigerian tradition.
Similarly, the Chief of a village is also in a position of hierarchical and authoritarian leadership whereby he makes major decisions on behalf of the members of his village. He essentially controls the relationship and provides certain privileges and benefits in exchange for an acceptance of his authority as the leader and the loyalty of his followers. Before the LUA, the common practice was that the consent of family heads and village chiefs with regard to family and communal land respectively were required before there was any alienation or transfer of any property rights or interests in land. Individuals within the society were used to a person(s) in a position of authority determining transfers of interests or alienations of rights to land on behalf of all the members of the family, clan or community. Although there are no direct interactions between kinship structures within the Nigerian society and existing formal institutions, formal institutions are nonetheless indirectly affected. Lauth states that kinship clientelistic structures “can promote particularistic attitudes and perceptions which are then reflected in formal participative behaviour… in the same way it should not be ruled out that patterns of authority and paternalist orientations (which are practised in kinship-based clans) translate into (formal) behaviour.” Familiar patterns of authoritarian leadership inherent in kinship structures have determined that individuals within the Nigerian society accept more easily existing formal institutional features of executive dominance and dictatorial leadership. The similarities between the

593 Traditionally, it was common practice that the consent of the Family Heads were sought in any transaction for transfer or alienation of land or interests in property and the consent principle was a common occurrence. However, in the case of Lukan v Ogunsusi (1972) 5 SC 40, the Court held with reference to consent in the alienation of family land that the head of family that the head of family cannot singularly alienate family property without the support of the family.
595 This was an informal practice that existed within kinship structures allowing the heads of families or the village chiefs to determine any transfer of rights to land within the community.
596 These paternalist orientations of kinship structures bears a certain similarity to the role of the executive governor of a state who decides whether to grant consent to an individual who wishes to alienate, mortgage or otherwise transfer property rights to land under the LUA.
597 See Lauth Hans-Joachim supra n 548 above at p. 28 where he asserts that “the network of interactions with state actors is only weakly developed” in kinship structures.
598 Supra, see Lauth Hans-Joachim Informal Institutions and Democracy n 548 above at p. 30.
599 The presence of these kinship clientelistic structures is prevalent in many West African countries.
paternalist orientations of authoritarian leadership in the informal institutional norm of kinship structures serve to dampen any vigorous agitations for reform of the formal laws in relation to property rights to land. As a result, the familiar patterns of the informal institutional kinship structures indirectly reinforce, support and complement existing formal institutions within the Nigerian legal system limiting and constraining any reform or changes to the laws governing property rights to land in Nigeria. The second type of clientelistic relationship to be discussed is the informal institutional patronage norm.

4.5.2 Patronage

Patronage is defined as the support, encouragement and privilege or financial assistance that a person bestows on another. Patronage systems in Nigeria simply means informal means or networks predicated on a vertical dependent relationship between a group of people, which often extends beyond blood relationships to include friends and ethnic groups, where expectations are shared and directed towards a person who has an influential job or is in a position of power. As earlier mentioned, patronage structures are prevalent within the Nigerian society. The clientelistic patronage structure in Nigeria is predicated on inbuilt

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600 As the saying goes: The more used to a particular circumstance you get, the less you protest about it.
602 Lande C.H. in Political Clientelism in Political Studies: Retrospect and Prospect (1983) International Political Science Review 4 (4) at p. 435-454 states that “What have been called patron-client relationships and horizontally dyadic alliances have been observed in a wide variety of national and institutional settings where they have taken many different forms. They have been found in early chieftdoms, in ancient city-states and empires, in feudal systems, in Western and the Third world democracies, in military dictatorships, and in modern socialist states. They have been observed in operation at various levels of societies: among the poorest of the poor, among the rural and urban middle classes, and at the very centre of the struggle for power between members of ruling elites. Patron-client relationships and horizontal dyadic alliances exist within civilian and military bureaucracies, inside parliaments and political parties, in urban and rural political machines, and in the relationships between those who till the soil and those who own it, between religious teachers and their disciples, between unskilled workers and labour contractors, between small factory owners and their employees, and between superiors and inferiors in large modern corporations and in certain professions.”
social relations of power between the more privileged individuals (patrons) who exchange goods, benefits and privileges for the loyalty of the less privileged ones (the clients). Examples of patronage/clientelistic structures prevalent in Nigeria are explored by Omobowale and Olutayo who discuss the extensive history of informal patronage institutions within states in Nigeria. Omobowale and Olutayo describe the authoritarian nature of existing informal patronage structures in Ibadan, the capital of Oyo State in Southwestern Nigeria, by analysing how a well-known patron in the 1950’s “perfected the means of extending goods to clients and injury and/or death to...opponents.” Their article reflects the dictatorial and dominant nature of patronage structures within the Nigerian society, showing how powerful patrons wielded authority and dominant control over their clients/supporters. The traditional patronage structures have built-in hierarchical and authoritative traits which are similar to the formal institutional structures within the Nigerian legal system. Informal institutions are pre-disposed to accommodate the continuity of authoritarian leadership within Nigeria’s formal institutional structure manifested through

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603 See Taylor L. Clientship and Citizenship in Latin America (2004) Bulletin of Latin American Research 23 (2) at p. 213-227. See also Landes supra in Political Clientism in Political Studies: Retrospect and Prospect where he expresses the view that patronage cuts across all aspects of socio-political and economic structures within a given society, surviving over a long period of time through informal norms and values, enabling an actor within a society to secure what he needs to survive within the societal structure.

604 Omobowale A.O. and A.O. Olutayo Chief Lamidi Adedibu and Patronage Politics in Nigeria (2007) Journal of Modern African Studies 45 (3) at p. 425-446. Omobowale and Olutayo describe an important patron of Ibadan in Western Nigeria from 1991 till his death in 2008, Chief Adedibu who wielded a huge clientelistic influence by feeding a large number of poor clients daily and providing them with basic needs, privileges and benefits. Omobowale and Olutayo assert that “Adedibu’s excesses and brazen utilization of thuggery and violence to fashion...power and authority were largely overlooked by the political class who benefited from his patronage and compensated him from the state treasury.”

605 Alhaji Adelakun, another famous patron in the 1950’s was popularly called Erubodo (the river is never afraid) and rose to become a powerful patron in Ibadan through his identification with the cause of the Ibadan common man.


executive dominance and centralised power. Due to the familiar patterns of authoritarian leadership in both formal and informal institutions, individuals within the Nigerian society tend to react to hierarchical and authoritarian leadership traits and see them as the norm. As these patronage structures with their inherent traits of authority and hierarchy are normal practice within the Nigerian society, individuals become more accepting and accommodating of the authoritarian leadership traits which are also represented in their formal institutions. This effectively promotes maintenance of existing laws restricting or limiting reform or changes to the laws governing property rights to land.\(^{608}\) Informal powers vested in patrons within Nigerian communities are significant. Firstly, they represent the community in the struggle for resources, property rights and advantages against other communal groups. Secondly, they are the link or conduit through which there is communication between the state and the community members.\(^{609}\) Patronage structures are so much a part of the Nigerian society consciousness that there is a strong belief within communities that if their kinsmen or patrons are not in a position of power or part of the ruling government, the society as a whole would hardly benefit from any governmental provisions of basic amenities like “electricity, portable water, schools, hospitals and awards of contracts to individual community members.” \(^{610}\) Hierarchical patronage structures are therefore seen as instrumental in determining the benefits and privileges that accrue to members of communities within Nigerian communities. There is vesture in the patrons of wide powers of authority and control over the members of their communities and the ability to dictate what rights or privileges should be allotted to their communal groups in exchange for their loyalty and support. Informal patronage structures within the Nigerian society confer on patrons in

\(^{608}\) Supra see Lauth above n 548 above. Lauth believes that patronage signifies an “indirect mechanism which has its origins in the state domain… it is not so much a matter of influencing the state decision-making process but rather one of a special use of formal institutions in the area of implementation.”


patron-client relationships dominant and authoritative powers over members of their communal groups.\(^{611}\) Helmke and Levisky\(^{612}\) assert that informal institutional structures often reflect and shape the performance of formal institutions. They also insist that “neo-patrimonial/patronage norms permit (and allow) unregulated presidential control over state institutions in Africa… and often yield a degree of executive dominance that far exceeds a president’s constitutional authority.\(^{613}\) Relating this to formal institutions in Nigeria, individuals have become so desensitized from the authoritative control of strong, dominant and powerful patrons. As a result of these informal patronage norms of authoritarian leadership, they become receptive and accepting of the authoritarian and centralised powers of the state executive over property rights to land and allow a degree of executive dominance that far exceeds what is constitutionally fair or just.\(^{614}\) Once individuals within a society become complacent, receptive and accepting of “the way things are”, they do not agitate or clamour for any changes to the laws but permit the continuity of existing formal laws.\(^{615}\) The norm of authoritarian leadership which is instilled within Nigerian informal institutions fosters complacence, acceptance and resignation towards existing laws greatly reducing or dampening agitations for changes to the laws and inadvertently limiting or constraining reform of the formal laws governing private property rights to land.


\(^{612}\) Helmke Gretchen and Levitsky Steven Informal Institutions and Comparative Politics supra n 517 above.

\(^{613}\) See Helmke and Levitsky supra n 517 above. See also Sandbrook Richard and Oelbaum Jay Reforming the Political Kingdom: Governance and development in Ghana’s Fourth Republic (1999) Centre for Democracy and Development, Critical Perspectives, Paper No. 2.

\(^{614}\) Hartlyn Jonathan Crisis-ridden Elections in the Dominica Republic: Neo-Patrimonialism, Presidentialism and Weak electoral Oversight (1994) Journal of Inter-American Studies and World Affairs 36 (4) at p. 91-144. See also Helmke and Levitsky supra n 517 above who refer to a consideration of informal institutions as critical to explaining institutional outcomes. Formal institutions in Nigeria run along familiar lines to the powers of authority and dominance vested in informal institutional patronage structures.

\(^{615}\) As discussed in an earlier chapter, the consent and revocation powers of the Executive/Governor vests dominant and authoritative powers in the executive institution. As I have discussed, it is my view that individuals have a sense of familiarity and resignation which permits the continuity of the present formal laws on property rights which are based on executive dominance and authoritarian leadership because of the existence of the norms of authoritarian leadership and hierarchical dominance inherent within their informal institutions.
4.6 Narrow-Radius (NR) Norms of Trust

So far, we have discussed the two types of authoritarian leadership norms which are prevalent within the Nigerian society. The next informal institutional norm to be examined are the narrow-radius norms of trust which exist within the Nigerian society and how these norms limit and constrain reform of the present laws governing property rights to land. Norms that facilitate collective action have been credited with the generation of social capital, social ties and social relations which can be directed towards the achievement of legal goals within a country. Informal institutions have been credited with making an impact on legal outcomes by the generation of the value of social ties and the incorporation of the strength and influence of these social ties and relations in developing new policies and promoting legal reform. The existence of the informal institutional norm of trust fosters and improves the efficiency of a society by generating coordinated actions which could be directed towards the development of better laws for the protection of private property rights to land for individuals. According to Putnam, successful interactions and relationships within societies allow “trust to become transitive and spread: I trust you, because I trust her and she assures me that she trusts you….in societies with high levels of trust, there is cooperation and feelings of reciprocity among its members which makes the environment more efficient than a distrustful society.” Another scholar Coleman emphasizes the importance of trust by interjecting

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617 See Dakhli M. and Clercq D. Human Capital, Social Capital and Innovation: A Multi-Country Study (2004) Entrepreneurship and Regional Development, Volume 16, No. 2. In their article, they discuss the value of social ties and connections which translate into social capital and the fact that informal institutions are largely responsible for generating social capital within a community.


619 Supra, see Putnam above generally for his view on how social networks of social exchange builds up norms of trust among the members of a society.
the criteria for a society to be more legally and progressive as “a group within which there is extensive trustworthiness and extensive trust is able to accomplish much more than a comparable group without that trustworthiness and trust.” 621 Scholars agree that informal institutional norms like the norm of trust within a society enhance the effectiveness and efficiency of formal institutions.622 Where there is a need for the reform of laws to achieve better protection of individuals’ property rights to land, the norm of trust within society is essential to generate collective goals for suitable legal policies to benefit society in general. Where the norm of trust does not exist within society, individuals become increasingly focussed on individual goals and advantages. The absence of the informal institutional norm of trust in society limits or constrains the social collective drive and common purpose needed to push for the reform of existing formal laws within a legal system. According to Fukuyama,623 the norm of trust or trustworthiness could exist within a society and cover either a “narrow or wide radius”.624 This means that norms of trust could on the one hand, remain relegated within a smaller margin consisting of families, ethnic groups and social classes or extend to a wider margin across a large and extensive society.625 Scholars have found that societies with a wide radius of trust and trustworthiness are generally considered to

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621 The general discussion on the social norm of trust and trustworthy behaviour having a significant impact on whether societies can overcome obstacles; and the use of the norm of trust in engineering collective action that would otherwise hinder the development of the society is explored exhaustively by scholarly research in the field of “social capital.” Social capital is defined by Woolcock Michael in Social Capital and Economic Development: Towards a Theoretical Synthesis and Policy Framework (1998) Theory and Society 27, at p. 151-208 as “the norms and networks that facilitate collective action.”

622 See Boix Carles and Posner Daniel N. Social Capital: Explaining its Origins and Effects on Government Performance (1998) British Journal of Political Science 28 at p. 686-693. See also Knack Stephen Civic Norms, Social Sanctions and Voter Turnout (1992) Rationality and Society 4 at p. 133-156. Boix, Posner and Knack believe that in societies where there is a high level of trust and trustworthiness, individuals are more interested and concerned about collective goals, benefits for all individuals, creating checks on the ability of politicians and bureaucrats to enrich themselves and preventing the focus on narrow interests in which politicians may ally themselves to. However, in societies where there is a low level of trust, individuals are usually self-interested and focus on individual rather than collective goals.


624 See Fukuyama Francis ibid n 624 above.

625 Narrow radius informal norms of trust generally lead to the exclusion of individuals who do not fall within the category of either family, social class or ethnicity on which the group is based.
be reliable partners in contractual agreements, legal, political and economic goals. Individuals within these societies are also more likely to be reliable in upholding the interests of others at some expense to themselves.\(^{626}\) It is strongly believed that the larger or wider the radius of the people in the society who share norms of trust and trustworthy behaviour in collective action settings, the more likely the society is to have overcome problems of credibility in legal policies, political development and social cohesiveness.\(^{627}\) High trust societies are considered to foster honest and more trustworthy formal institutions.\(^{628}\) Lower trust societies or societies with narrow-radius (herein referred to as NR) trust are characterised by smaller margins of trust which are limited to families, social classes, ethnic or religious groups.\(^{629}\) The same strong ties that bind these members of NR trust groups can be used to exclude other community members who do not fall into the appropriate categories from the benefits and privileges of collective action.\(^{630}\) Nigeria is representative of a society were NR norms of trust exist. The informal NR norms in Nigeria are divided along ethnic and religious lines.\(^{631}\)

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626 See Keefer Philip and Knack Stephen Social Capital, Social Norms and the New Institutional Economics (2003) MPRA Paper, University of Munich. See also Knack Stephen and Keefer Philip Does Social Capital Have an Economic Payoff? A Cross-Country Investigation (1997) Quarterly Journal of Economics 111, 4 at p. 1251-1288. See also Zak Paul and Knack Stephen Trust and Growth (2001) Economic Journal 111 at p. 295-321. Keefer and Knack discuss the standard measure of trust used in World Values Surveys in comparing the level of trust or trustworthiness that exists in cross country comparisons. The question used is: “Generally speaking, would you say that most people can be trusted or that you can’t be too careful in dealing with people?” Less than 10% of Brazilians, Peruvians and Filipinos in the World Values Surveys stated that most people can be trusted when they were asked the question. Alternately, more than 50% of Norwegians, Finns, Swedes and Danes responded that most people can be trusted. This reflects the differences in the levels of trust that exist between different countries.


628 Alternatively it has also been stated that with regard to corrupt societies with low level trust “if government leaders, judges and bureaucrats are corrupt… (Individuals within society)… can more easily justify and rationalise their own dishonest behaviour.” See Kiefer and Knack (1997) above.


631 See Zucker Lynne Production of Trust: institutional Sources of Economic Structure 1840-1920 (1986) Research in Organizational Behaviour 8 at p. 53-111. Zucker states that “Just as ethnicity, sex, or age may be used as an index of job skills by employers, they can be used as an index of trust in a transaction. They serve as indicators of membership in a common cultural system of shared background expectations. In general, the greater the number of social similarities (dissimilarities), the more interactants assume that common background expectations do (do not) exist, hence trust can (cannot) be relied upon.”
The impact of NR norms and its consequence for property rights to land in Nigeria is that individuals within NR trust societies struggle to generate the collective action, purpose and goals required to prompt a reform of the laws. NR trust groups are wholly focussed on the specific benefits, goals and advantages of their respective communal groups and have no wish to shift their attention to the collective benefits of the general Nigerian society. This point is relevant because as discussed in an earlier chapter, for any of the provisions of the present property rights laws to be amended or altered, two-thirds majority of all the members of the National Assembly must support the amendment and it must be approved by resolution of the Houses of Assembly of not less than two-thirds of all the States in the Nigerian federation. Members of the National Assembly and Houses of Assemblies are first and foremost, members of the Nigerian society. As members of the Nigerian society, any informal institutional norms strongly shared and reflected within society will inadvertently spill over and influence or affect the views and decisions of governmental officials. In this way, any norms of trust prevalent within the Nigerian society will automatically have an effect on Nigerian formal institutions. But where NR norms of trust exist between members of the Nigerian society, it becomes very difficult to have one collective goal or purpose. If the purpose is to reform the laws governing property rights to land, then NR norms of trust which divide the Nigerian society along ethnic and religious lines greatly limit and restrict any collective drive for the reform of the property rights laws even if such reform...
is for the common benefit. The first type of NR norm to be addressed in the next section are informal NR norms of trust based on ethnicity which exist within the Nigerian society and greatly limit and constrain reform of the laws governing property rights to land. The second one, to be discussed in a second section, is religious affiliations.

4.6.1 Ethnicity

NR norms of trust based on ethnicity are an instrumental aspect of Nigeria’s history as a society. Ethnic groups are defined as “coalitions which have been formed as a part of rational efforts to secure benefits created by the forces of modernisation.” Ethnicity is commonly referred to as an outlook that distances citizens from each other, undermining collective action for national goals and alienating group members from the greater society. If majority of Nigerians are asked to identify themselves, there is a strong likelihood that the characteristic they would use to describe themselves is their ethnicity, first and foremost, before their nationality. This highlights how strongly norms based on ethnicity are entrenched within the Nigerian society and consciousness. Scholars believe that the main reason why norms of trust based on ethnicity have taken root and flourished is because “the bonds of mistrust between states and individuals...are replaced with bonds of moral sentiments binding individuals who share a common ethnicity.”

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637 Ajayi J.F.A. “Tradition and Change in Africa.” (2000) Trenton, NJ and Asmara: Africa World Press. Ajayi asserts that “neither colonialism nor the post colonial new states have so far succeeded in dissolving ethnicity. The pre-colonial polity, linguistic or cultural group, not the new nation, has remained the basis of solidarity contracts in Africa...The modern state with its precise boundaries, foreign inspired laws and judicial procedures, new basis of election and representation, have so far failed to displace ethnicity in the distinctive loyalties of people...ethnicity or traditional culture has been and remains the instrument of survival from the pressures both of colonial and neo-colonial external factors.”


639 A Nigerian is more likely to identify himself by referring to his ethnicity and stating... “I am Ibo...or I am Yoruba etc.” This differs from a British National or a German National who would identify themselves as British and German respectively.

societies have developed informal institutional norms of trust based on ethnic groups, allocating the responsibility of providing basic security needs and benefits for individual members of the group to these ethnic and kinship groups. A focus on coalitions based on ethnicity limits the collective drive for the common benefit of all individuals. For instance, it limits the focus on better protection of property rights to land applicable to all individuals within the Nigerian society. Alternatively, the focus culminates into what would benefit or be advantageous for members of a specific ethnic group over and above all other ethnic groups. NR norms of trust based on ethnicity segments the Nigerian society into differing ethnic groups limiting the collective consensus, drive and action required to pool together and advocate for the reform of inefficient laws within the Nigerian legal system.

The Afro-Barometer Working Paper was set up to report the results of national sample surveys on the attitudes of citizens towards democracy, markets, civil society and other aspects of legal progression in African countries including Nigeria. It highlights the intrinsic nature of ethnic identification in Nigeria. Nigeria showed the strongest inclination towards ethnicity among fifteen countries surveyed by Afro-Barometer. Further, it revealed that due to the blatant lack of trust of formal institutions by individuals within the Nigerian society, patron-client networks structured along norms of trust based on ethnicity has become

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University Press, p. 22-37. Mistrust between individuals and the state in Africa is a product of history, fostered by the fact that African states have been unable to provide reasonable security for their people for a long time. Ekeh ibid n 641 above at p. 23.


Lewis Peter Identity, Institutions and Democracy in Nigeria (2007) A Comparative Series of National Public Attitude Surveys on Democracy, Markets and Civil Society in Africa, Working Paper No. 68. Nigeria is declared to measure well above other countries in their reliance on socially-defined ethnicity. See Afro-Barometer Working Paper ibid which states that “Nigerians are nearly 3 times more likely than Tanzanians and 5 times more likely than South Africans to identify themselves ethnically. Nigerians also gravitate towards ethnicity to a greater degree than their West African neighbours in Ghana, Mali and Senegal.” Afro-Barometer Working Paper supra n 644 above.
ubiquitous in Nigeria. The Afro-Barometer Working Paper states that “Nigerians who adhere to ethnic group identity to the exclusion of national identity are less trustful of other ethnic groups, more likely to feel economically deprived and politically marginalized, and show less confidence in major political and state institutions.” The question that arises is whether the dividing effects of informal NR norms of trust based on ethnicity adversely affects the creation of a unified purpose to collectively advocate for reform of the laws. It seems clear that NR norms based on ethnicity limit the development of collective goals within the Nigerian society. Where the informal institutional norms of trust entrenched within individual members are based on ethnicity, it restricts the collective drive towards legal policies that target the Nigerian society as a whole and instead, replaces it with a drive towards narrower goals and policies in favour of respective ethnic groups. NR norms of trust based on ethnicity limit and constrain the reform of the laws governing property rights to land in Nigeria because they foster an emphasis on goals, benefits and advantages targeting specific ethnic group interests to the detriment of the entire Nigerian society in general. Where there are different ethnic groups within a society struggling and advocating for benefits and advantages for their respective communal and ethnic groups, the result is a limitation on any progressive development or reform of laws that would offer better

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646 The Afro-Barometer Working Paper indicates that Nigerians are more likely to contact traditional rulers within their ethnic groups or notable influential people within their groups than their elected officials or legislators in relation to individual benefits like property rights to land, jobs, contracts etc.

647 See Afro-Barometer Working Paper No. 68 at p. 25.


649 See Grootaert Christiaan Social Capital, Household Welfare and Poverty in Indonesia (1999) Local Level Institutions Working Paper No. 6, Washington D.C. Grootaert asserts that there are more frequent participation in collective action by members of homogeneous ethnicities than in heterogeneous associations in a survey carried out among Indonesian villagers.

650 Woolcock Michael Social Capital and Economic Development: Towards a Theoretical Synthesis and Policy Framework (1998) Theory and Society 27 at p. 151-208. Woolcock states that “the challenge for development theorists and policy-makers is to identify the mechanisms that will create, nurture and sustain the types of social relationships conducive to building dynamic participatory societies…”
protection of individual property rights for the collective benefit of all Nigerians within society. Informal institutional norms which hinder the creation and the sustainability of social relationships or limit the building of “dynamic participatory societies”\textsuperscript{651} have a negative effect on the development of formal laws governing property rights to land. They contribute to the difficulties faced in achieving a meeting of the minds of all or most members of the society in advocating for a change to present inefficient and inadequate laws.

4.6.2 Religious Affiliations

Culture is defined as the “way of life of people, it is the sum of their learned behaviour patterns, attitudes and material things.”\textsuperscript{652} Culture is also described as “customary beliefs and values that ethnic, religious and social groups transmit fairly unchanged from generation to generation.”\textsuperscript{653} Religion is one of the most significant aspects of culture and is often used as an indicator of the cultural proclivities within a given society.\textsuperscript{654} Religion is therefore credited with tying people together in communities and facilitating the accumulation of trust, conventions and shared norms.\textsuperscript{655} Over decades and centuries, religious values have become an indiscernible part of prevalent culture. In certain countries, the connection between religion and culture is still apparent and tenable, but in other countries, individuals acting according to cultural norms and traditions may not connect or realise the connection between norms and religion anymore. A systematic tracing of the cultural properties back to their

\textsuperscript{651} \textit{Ibid}, see Woolcock n 651 above.
\textsuperscript{652} See Hall E. “The Hidden Dimension.” (1969) New York, Anchor Books. See also the American Psychological Association Guidelines on Multicultural Education Training, research, Practice and Organizational Change for Psychologist (2002) Available at www.apa.org Here, culture is defined as “the belief system and value orientations that influence customs, norms, practices and social institutions…”
\textsuperscript{654} Max Weber in 1905 was the first to identify the significant role that religion plays in social change.
\textsuperscript{655} Tu Qin, Erwin Bulte and Shuhao Tan Religiosity and Economic Performance: Micro-Econometric Evidence from Tibetan Area (2011) China Economic Review Vol. 22, Issue 1. However, mere religious beliefs do not influence legal or economic development until they become institutionalised as norms, values and codes of conduct within a society.
origin would reveal that religion is determinedly the starting point of a considerably large number of norms.\textsuperscript{656} This means that the origin of most values and norms within societies can be traced back to religion and is therefore dependent on which religion has been, either in the past, or is still dominant within a particular region.\textsuperscript{657} Where different types of religions exist within a society, it becomes likely that each religious group within the society will differ in terms of their norms, conventions and trust values.\textsuperscript{658} Dobler\textsuperscript{659} asserts that the reason why we generally use religious terms to describe a group of countries, using terms such as “the Christian West” or “Islamic countries” is because the differences inherent in countries’ cultures, norms and values trace back to religion, otherwise we would not use religious terms to describe relevant countries. As we classify countries according to their religious affiliations, this presupposes that we associate a prevalent religion with certain obvious features that exist within countries. The inference is that certain characteristics “like values, conventions, attitudes, behaviour or societal, political, legal and economic differences”\textsuperscript{660} are indicative of the religious affiliations of particular countries in question. Simply put, religion matters.\textsuperscript{661} Nigeria is one such country were religious beliefs are prevalent and tenable. The two main religious affiliations in existence within the country are Christianity and Islam.\textsuperscript{662}

\textsuperscript{656} Dobler Constanze \textit{The Impact of Institutions, Culture and Religion on Per Capita Income} (2009) No. 28, Stuttgart-Hohenheim ISSN 1618-5358.

\textsuperscript{657} This is so although in certain countries and societies, the norms, values and beliefs and their historical link to religion is not longer visible or obvious. However, if these values, norms and behaviours are traced back in time, they usually have religious orientations.

\textsuperscript{658} Different types of religions emphasize and highlight dissimilar social norms and behaviour by displaying their differing views, values and beliefs. See Blum U. and Dudley L. \textit{Religion and Economic Growth: Was Weber Right?} (2001) Journal of Evolutionary Economics 11 (2) at p. 207–230. Blum and Dudley discuss the fact that values, norms and conduct differ among different religious affiliations; a Christian way of thinking about the world differs from the way a Muslim or a Buddhist would think. See also Guiso, Sapienza and Zingales ibid, above who argue that “on average, Christian religions are more positively associated with attitudes that are conducive to economic growth while Islam is negatively associated…”

\textsuperscript{659} Dobler Constanze ibid \textit{The Impact of Institutions, Culture and Religion on Per Capita Income} (2009) No. 28, Stuttgart-Hohenheim ISSN 1618-5358.

\textsuperscript{660} See Dobler \textit{supra} n 657 above.

\textsuperscript{661} \textit{Supra} see Dobler \textit{supra} n 657 above at p. 14.

\textsuperscript{662} Nigeria is a highly religious country; the figures are 50% of the Nigerian population consists of Moslems and 40% consists of Christians. The United States Group, the Pew Foundation on Religion & Public Life published a research survey that states that “Nigeria has the largest Muslim population in Sub-Saharan Africa (78 Million

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Due to the fact that the proportion of Christians and Moslems in Nigeria are practically identical (50 – 50 arguably the same) Nigerians identify and distinguish themselves based on their religious affiliations. A long and well-documented history of conflict between both religions. NR norms of trust in Nigeria are therefore a natural consequence of persistent conflict between both religions. According to Weber beliefs, attitudes and codes of conduct resulting from religious affiliations affect the development of legal policies within a society. Deep rooted distrust of individuals with different religious beliefs to one’s own leads to difficulties in uniting for the achievement of a singular or common purpose or goal. Even where the purpose sought is the reform of laws for the better protection of all individuals’ rights to land. The issue becomes what the effect of the existence of two equal but different religious dispositions based on different values, norms and conduct is within the Nigerian society. As individuals practise NR norms of trust, higher levels of trust would naturally occur within members of the same or similar religious groups as opposed to lower levels of trust which would exist between members of completely different religious groups.

Another factor that contributes to NR norms of trust in both religious groups is that before the LUA, the North and Southern parts of Nigeria had different laws governing their property rights to land. The Moslem Northern Nigeria had a nationalised system of land

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663 Nigerians usually identify themselves by their ethnicity and religion. For example “My name is Olu, I am a Yoruba, Christian male…”
664 Sam Lazaro F. Nigeria: Killing of Christians by Islamic Extremists Continues (2011) at www.pbsnewshour.com In Nigeria, both Christian and Moslems are always fighting and killing each other. An Extract from Lazarro’s article reads: “Violence weary Christians in Borno State have been further upset to learn of the murder of a Nigerian evangelist by Boko Haram less than three months after the Islamic extremist group killed a Maiduguri pastor…”
tenure as far back as 1916\textsuperscript{667} while the Christian South had their choice of customary ownership rights.\textsuperscript{668} This means that individuals from both religious affiliations had historically different laws in relation to their property rights to land. It is unsurprising that based on the differing legal history and the persistent conflict between both religions in Nigeria, NR norms of trust are prevalent and divisive. The differences in the histories, norms, values, conventions, viewpoints and beliefs of the different religious affiliations create divisions between members of the Nigerian society. These divisions make it more difficult to achieve one collective purpose and generate the collective drive needed to advocate and agitate for legal reform or a change to the laws governing property rights to land.\textsuperscript{669} Informal NR norms of trust based on religious affiliations limit and constrain the reform of laws governing property rights to land due to the tendency for trust to be more prevalent among members of the same or similar religions to the detriment of members of different religions within the Nigerian society. The result is that NR norms of trust based on religious affiliation have inadvertently created limitations to the legal reform of private property rights to land in Nigeria.\textsuperscript{670} The informal institutional norms discussed above have dampened agitations for legal change and served to undermine, limit and restrict the collective drive and purpose needed by Nigerian citizens to advocate for essential and necessary legal reform required to offer better protection of individual property rights to land in Nigeria.

\textsuperscript{667} Native Lands Protection Act 1916.
\textsuperscript{668} Under customary law, ownership of land was vested in communities, families and individuals.
\textsuperscript{669} See Patteau J.P. Religion, Politics and Development: Lessons from the Lands of Islam (2008) Economic Behaviour & Organization Growth Centre Yale University 68 at p. 329-351 where Plateau ascribes to the existence of hierarchical societies in which high levels of trust and cooperation is prevalent in groups like families, tribes or ethnic groups and religious groups. However, beyond these groups, mistrust is dominant and people have less respect for members of other families or groups. Resultantly, a hierarchical structure with distinct familial, tribal or religious affiliations is less supportive of economic growth.
\textsuperscript{670} See Nasrabadi M.A. Influential Factors in the Trust Relationships Existing between Financial Analysts and Corporate Managers in Iran (2006) University of Wollongong. Nasrabadi discusses the differences between the different informal norms, attitudes and values that exist between Islamic investors in Iran and Western investors. Nigeria differs in that it has an almost equal number of Christians and Moslems, therefore the different values, norms, attitudes and behaviour patterns is inherent within the Nigerian society between Moslem and Christian members of the society.
4.7 Limitations of Informal Institutional Norms to Legal Reform

The role of informal institutional norms of authoritarian leadership manifested through patronage and kinship structures, NR norms of trust based on ethnicity and religious affiliations, and corruption are that they serve to make the reform of laws significantly more difficult within Nigerian formal institutions. Simply put, informal institutional norms act as further constraints to reform within Nigerian formal institutional structures. As already discussed, the legislature is charged with making new laws under the Nigerian Constitution. In relation to private property rights to land, the requisite majority needed to amend, revoke or change the laws governing property rights to land is clear - two-thirds majority of the National Assembly and two thirds majority of all the States in Nigeria. The National Assembly and the States Houses of Assembly are made up of members of different ethnicities, kinship structures, patronage relationships and religious affiliations. Within the National Assembly and States Houses of Assembly, members are often divided along ethnic, religious, patronage and kinship structural lines. This means that members would deliberately not vote for the amendment or revocation of a certain proposed law simply because the person(s) proposing the amendment or revocation is from a different ethnic group or has a different religious affiliation. Further, members from the same kinship or patronage structures would support one another in voting or opposing a proposed amendment (whether or not it is beneficial) simply to score points against members from different kinship or patronage structures. This highlights the fact that individuals from the same ethnicity, religion, kinship and patronage structures have higher levels of trust for one another than for individuals from differing ethnic or religious structures in Nigeria. Thus, members within the National Assembly and States Houses of Assembly place higher levels of trust in other members of the same ethnic, kinship, patronage or religious structures and have lower levels of trust for members of different dispositions. Individual members would trust and support an
amendment or revocation proposed by a member(s) of a similar cultural background over other members of a different ethnic, religious, patronage or kinship structural background. These divisions along the lines of ethnicity, religion, kinship, and patronage structures worsen already existing limitations which exist within Nigeria’s formal institutions. The existence of these NR norms of trust delineated on cultural grounds of ethnicity, religion, etc, compound the already existing formal institutional limitations of executive dominance which is inherent in the LUA thereby making legal reform of the property rights to land in Nigeria more difficult to achieve.

The prevalent existence of the informal norm of corruption also exacerbates existing formal institutional constraints, and ultimately limits legal reform. Members within the National Assembly and States Houses of Assembly become used to subverting their legislative office, connections and networks to do “favours” for their families, friends, kinship or patronage groups, their ethnic groups, or individuals that share the same religious affiliations. This results in a diversion of focus from the satisfaction of the general interest of the Nigerian society; namely, better property rights to land protection, refocusing it on private interests, benefits or gain – thereby hindering legal reform. Hence, the Nigerian legislature is divided by these informal institutional norms which exist within Nigeria’s formal institutions and members are unable to unify and vote to change or reform the laws in order to provide better protection of individuals’ property rights to land.

4.8 Conclusion
In this chapter, analyses of informal institutions and their role in relation to existing formal institutions have been carried out. The effects that informal institutions have within the Nigerian society and their relationship to the present formal institutions have been examined to understand the limitations and constraints to progressive legal reform and whether informal
institutions contribute to limiting the reform of present laws. The issue of the role of informal institutions vis-à-vis formal institutions and the reinforcement and support offered by existing informal institutions to formal institutions within the Nigerian legal system have been addressed. Further, the types of informal institutional structures prevalent within the Nigerian society have been analysed to understand how informal institutions are encouraging maintenance of the present laws. For there to be successful legal reform of existing formal property rights laws in Nigeria, there needs to be a collective drive and demand for change to the laws to provide better protection of private property rights to land. It has been established that informal institutional norms which exist within the Nigerian society limit or constrain the reform and development of better, more suitable and effective laws for the protection of private property rights. This is because they dampen agitations and demands for changes to the law and restrict the collective drive, common purpose and unified focus required to progressively advocate for much needed changes to the laws governing. Conclusively, informal institutional norms of corruption, norms of authoritarian leadership and NR norms of trust based on ethnicity and religious affiliations hinder and limit legal reform of the private property rights of individuals to land in Nigeria. The next chapter addresses what needs to be done to successfully reform the laws governing property rights to land in Nigeria. This will be carried out by identifying different strategies to enable legal reform and making reformatory proposals and suggestions to support and promote legal reform within formal and informal institutions in Nigeria.
Chapter Five:

A Normative Approach to Legal Reform

5.1 Introduction

The aim of this chapter is to normatively explore and proffer reform proposals and suggestions to achieve successful reform of the laws governing property rights to land in Nigeria. The fundamental goal of achieving successful reform is to guarantee better protection of the private property rights of all Nigerian citizens. The issue of why there has been no reform of the present laws governing property rights to land in Nigeria is the main focus of this thesis. Chapter Three has addressed the laws governing property rights on land and the formal institutional constraints that limit any reform, modifications or amendments to the laws. Chapter Four has examined informal institutional constraints which adversely affect and limit reform of existing property rights laws on land in Nigeria. It was submitted that the reason there has been no legal reform since the LUA inception is because of the limitations and constraints within both the formal and informal institutional structures in Nigeria. In this chapter, a normative consideration of the mechanisms for reform and amendment within both institutional structures will be carried out. Firstly, an analysis of suggested strategies to enable legal reform within the formal institutions will be explored. This will be carried out by identifying the start-up point of any successful reform of laws and examining two proposed strategies to achieve reform of the LUA - amendment and excision (5.2). Secondly, substantive reformatory proposals to existing laws will be suggested and analysed to enhance and facilitate better protection of individual private property rights to land. Further, basic underlying principles which need to be in place to promote the efficacy of any successful legal reform will be discussed. (5.3). Thirdly, an analysis of the strategies to assist and enable reform within the informal institutional structures of the Nigerian society will be undertaken by considering two relevant issues – education and poverty. By identifying and addressing
basic needs and interests of society, suggestions will be proffered to assist legal reform and tackle limitations to reform within the informal institutional structures in Nigeria (5.4). Finally, the last section concludes the chapter (5.5).

5.2 Strategies to Enable Legal Reform

As we have established, legal reform of the laws of property rights to land in Nigeria has not yet been achieved. This chapter normatively considers the issue of what ought to be done to bring about the reform and amendment of laws to procure better private property rights protection. This it undertakes by evaluating suggestions aimed at the promotion of legal reform and analysing how these alternative solutions or suggestions would function to improve law and policy making and create improvements within existing institutions. To institute legal mechanisms for the reform of the laws governing property rights to land in Nigeria, certain strategies need to be considered. It is essential to consider the question of “where to begin” in any proposed reform of laws. Therefore, the first strategy in achieving legal reform is the identification of the beginning point of the proposed reform of the laws. The second strategy is an analysis of the most efficient way to successfully achieve legal reform. This is achieved by considering whether an amendment of the LUA would resolve the constraints imposed by the dominance of the executive institution and allow for the interests of individual members rights to landed property to be better protected. Alternatively, a consideration of whether an excision of the LUA from the Nigerian Constitution would be a better option to achieve similar results, namely, the curbing of executive dominance and the promoting of a better protection of individual property rights to land. The strategy is important because it considers two key ways of achieving reform of the LUA; through amendment or excision.
5.2.1 Identification of the Status Quo

Status quo is used to connote the “state of play” within a state or society at a particularly designated moment in time. Buchanan explores a potential start-up point for improving the likelihood of successful reforms by asserting that reform cannot begin from any conceivable point within a society or from the reformer’s preferred start-up position. Reform must begin from “some structure, any structure of well-defined rights” and this necessary starting point is essentially the status quo; forming the basis for reform. To ensure progressive legal reform, Beaulier and Subrick believe that reformers must take a bottom-to-top approach. This simply means that reformers should devote resources to encouraging and facilitating discussions between interest groups starting at the grass root of the relevant society. Reforms are deemed to be more likely to succeed where the reformers define the status quo of the relevant society and apply bottom-to-top reforms. In our case, the first important issue is if reformers clearly understand the present status quo of the laws governing property rights to land in Nigeria. Secondly, if they also understand the local concerns and interests of the members of society in relation to the protection of individual property rights, and their preference for easily alienable rights to land. Reformers would then be able to proffer and adopt suitable legal reforms within the Nigerian state based on their

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674 Supra see Buchanan J. (1972), n 673 above. Buchanan argues that one cannot “alter the distribution of property rights to start from anywhere… the status quo provides the natural place to begin for the simple reason that it exists.” See also Beaulier Scott A. and Subrick Robert J. Reform in the Legal-Economic Nexus: Lessons from the Buchanan-Samuel Exchange (2007) American Review of Political Economy.
675 Ibid, see Beaulier and Subrick Reform in the Legal-Economics Nexus: Lessons from the Buchanan-Samuels Exchange n 675 above.
knowledge.\textsuperscript{677} It is important to identify the status quo or limitations imposed on formal and informal institutions by the present laws governing property rights to land in Nigeria. Further, it is crucial to identify the needs and collective interests of the members of the Nigerian society. Namely, a strong property rights system and better protection of individual property rights to land.\textsuperscript{678} In light of this, the status quo of formal private property rights in Nigeria is that the conversion of the Land Use Decree to Act has imposed a military-style dictatorship of the executive institution on the Nigerian Constitution. Further, the dominance\textsuperscript{679} and centralisation of powers in the executive institution has been exacerbated by the constitutional entrenchment of the LUA. As a result, the roles of the legislature and the judiciary have been significantly and unapologetically limited by the LUA.\textsuperscript{680} These constraints have created an unbalanced concentration of powers in the executive institution to the detriment of the legislative and judiciary institutions.\textsuperscript{681} Progressive legal reform requires that the status quo be changed to a preferred position. This emphasizes the need to reform, amend, modify or alter the laws to curtail the wide discretionary powers vested in the executive institution and stop the encroachment of these powers on the private property rights of individuals to land in Nigeria. With this knowledge, it is possible to make adequate reformatory proposals and suggestions which will take into consideration the needs and collective interests of the members of the Nigerian society and tackle existing limitations.

\textsuperscript{677} Beaulier and Subrick illustrate their view by using China and her decision under the leadership of Deng Xiaoping to successfully adopt reformatory policies to promote economic development. They state that “by clearly understanding the “here” (status quo) in the reform process, and by making sure most parties were on board with the “there” (post-reform outcome), reformers were able to promote positive social and economic change.”

\textsuperscript{678} As mentioned in an earlier chapter, a well-defined and strongly protected property rights system has been lauded by legal and economic policy makers as essential to the economic development of a state.

\textsuperscript{679} Executive dominance within the LUA is manifested in the consent, revocation and compensation powers granted to the executive institution.

\textsuperscript{680} The LUA purports to limit the legislative institution in sections 1 and 47 by asserting that the LUA shall have effect “notwithstanding…any law or rule of law including the Constitution of the Federation or any State…” In the same light, the LUA attempts in section 47 to oust the jurisdiction of the court to “inquire into any question concerning or pertaining to the vesting of all land…in accordance with the provisions of the Act…”

\textsuperscript{681} The set up structure of the LUA is directly responsible for these draconian provisions of the LUA.
The next section will consider the first part of our two-pronged strategy which is whether an amendment of the LUA will achieve a successful reform of the laws.

5.2.2 Amendment

The current procedure for amendment of the LUA is notably stringent. As stated in an earlier chapter, any proposal for amendment must be supported by two-thirds majority of all the members of the National Assembly and approved by a resolution of the Houses of Assembly of two-thirds of all the States in Nigeria. The first step to consider is whether amending the provisions of the LUA would adequately address the limitations or constraints imposed on formal institutional structures. This issue is thoroughly analysed by examining the unsuccessful Amendment Bill 2009 proposed by the former President of Nigeria referred to as the Land Use Amendment Bill. The aim of the proposed Amendment Bill was to enhance private property rights and make land more accessible for security transactions and capital accumulation. The Bill set out to review the exclusive powers of the executive institution by examining the alienation of private property rights such as mortgage interests and certain transfer of possession of property transactions. In doing this, the Bill acknowledged the existing difficulties attached to the transfer of property through mortgages and other secured property transactions. Further, it recognised the arbitrary abuse of executive power which had become part of the application of private property rights due to...

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683 Thirty-one years after the inception of the LUA 1978, an Amendment Bill was proposed as part of a seven-point agenda instituted by President Umaru Musa Yar’Adua who was sworn into office on the 26th of July 2007.
685 See Rasheedat Ola President Yar’Adua’s Seven-point Agenda, (specifically on Land Reform) (2009) Vanguard Newspapers. The Senate President Taslim Folarin declared the aim of the Bill to be: “For Nigeria to develop as a country, we need to awaken the potential of land as a veritable resource for...security, poverty reduction, capital accumulation, economic growth and national development. We must embark on the amendment of the Land Use Act in order to bring it into conformity with current economic trends and realities.”
the consent provisions of the LUA. It also recognized the significant and unreasonable time delay which was a recurrent part of obtaining Executive Governor’s consent and the resultant delay that this added to the completion of any transfer of private property rights to land transactions. In addressing these issues, the Bill proposed for the amendment of section 21 of the LUA. The effect of the proposed amendment would be that holders of a customary right of occupancy would be empowered to alienate their rights by way of a mortgage, transfer of possession, or sub-lease without requiring the consent or approval of the Governor. Secondly, the Bill recommended the amendment of sections 22 (1) and (2) of the LUA and the creation of a new sub-section (3) stating that “the consent of the Governor shall not be required for the creation of a mortgage or sub-lease under this section.” The reason for the proposed amendments of these two sections was to grant holders of statutory or customary rights of occupancy the power to alienate their rights by way of mortgage, transfer of possession, or sub-lease without requiring the consent of the Executive Governor. Notably, the Amendment Bill did not propose any amendments regarding the Executive Governor’s power of consent for alienations of rights by way of sale or assignment.

This means that any alienation by way of an assignment or sale under the proposed Bill would still require Governor’s consent in order for the sale or assignment to be valid. It is submitted that the proposed removal of the applicability of the consent provisions to all

686 For example, it acknowledged that the process of obtaining the Governor’s consent was a costly venture. In Lagos State, the process of obtaining Governor’s consent cost about 15% of the deemed value of the property.
688 This it achieved with the deletion of all the words in the section after “assignment” and the inclusion of a sub-section stating that “the right of a holder of a customary right of occupancy to alienate such right by mortgage is hereby recognized.” See the full provision of section 21 of the Land Use Act which is contained in the earlier part of the chapter.
689 See section 5 of the proposed Amendment Bill 2009.
690 This it achieved with the deletion of the words “mortgage, transfer of possession, sub-lease, or otherwise” immediately after the word “assignment.” It also recommended the deletion of the entire proviso after subsection (1). Again, see the full text provision of section 22 of the LUA which is contained in Chapter three of the thesis.
691 See section 6 of the proposed Amendment Bill 2009.
692 Ultimately, the proposed Bill sought to restrict the requirement of the Governor’s consent solely to alienation of property by way of assignment or sale.
transfer of property rights to land except through sale or assignment is not sufficient to eliminate or diffuse the dominant powers of the executive institution over the legislature and judiciary. Further, the proposed amendments are inadequate in guaranteeing better protection of individual property rights and rendering land a more easily convertible asset for individuals to raise capital. This is because the proposed Bill does not address the other dominant executive powers of revocation and compensation. It does not address the LUA’s ouster provision\(^{693}\) which purports to oust the jurisdiction of the legislature and the judiciary to legislate or decide on matters relating to the private property rights of individuals to land. Also, by excluding transfers of landed property by sale or assignment from any amendment, the executive consent powers remain applicable to individual members of the Nigerian society who wish to sell or assign their property. As a result, their right to sell or assign their property is still limited and subject to the executive’s whims. In light of these deficiencies, the 2009 proposed Amendment Bill seems inadequate and insufficient as the answer to a successful reform of the LUA.

It is crucial to note that the proposed Amendment Bill never went further than the early stages of deliberations by the National Assembly and was never implemented. This is because the rigorous amendment process of the LUA made it almost impossible to get the required majority of members of the National Assembly and State Houses of Assembly required to amend it. It is therefore submitted that the amendment of the LUA may not be the ideal strategy to achieve successful legal reform. It seems undisputable that the LUA’s constitutional entrenchment and the resultant special procedure for its amendment continue to limit and constrain legal reform.\(^{694}\) This major deterrent to the legal reform of the LUA can

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\(^{693}\) Section 47 of the LUA.

\(^{694}\) The proposed Amendment Bill 2009 was the closest to legal reform achieved in Nigeria in thirty-three years and it did not get further than early deliberations at the National Assembly. Clearly, the rigorous process of amendment of the LUA has made it almost impossible to amend.
be further analysed by considering the second part of the strategy - the excision of the LUA from the Nigerian Constitution.

**5.2.3 Excision**

In considering the excision of the LUA from the Nigerian Constitution, it is important to draw attention to the promulgators of the LUA. As earlier discussed, the military regime originally enacted the Land Use Decree of 1978 which was subsequently changed to the LUA. The intention of the military government in entrenching the LUA into the Nigerian Constitution was to ensure that the executive institution maintained power over the legislative and judiciary institutions. Further, the then military government wanted to ensure that provisions of the LUA guaranteeing executive dominance could not be easily reviewed, amended or revoked. The fundamental advantage of excising the LUA from the Nigerian Constitution is that the LUA would become amenable to amendment by the legislative institution through the normal legislative process. The excision of the LUA from the Nigerian Constitution highlights another relevant issue. In the event of an excision of the LUA from the Constitution, it becomes important to understand the extent of the powers granted to the legislative institution with respect to land and all issues relating to land by the provisions of the Nigerian Constitution. Land is not specifically and elaborately mentioned as a legislative item under the Nigerian Constitution. The Second Schedule of the Constitution categorises the legislative powers vested in the legislature to include the acquisition and tenure of land. The categorization ensures that the lawmaking powers of the legislature on

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695 Presently, the LUA 1978 still has all the provisions referring to the office of “the Military Governor” which has been adapted by the courts to the office of “the Civilian Governor.”
696 Contrary to the separationist concept of the Nigerian federal state.
698 The normal legislative process of the National Assembly is a simple majority to pass a bill into law.
land and land matters are clear and easily inferred from numerous provisions of the Constitution.\textsuperscript{699} If excision occurs, the LUA would become an ordinary Act or Bill. This would allow the legislative institution to fulfil the law making powers granted to them by the separationist features of the Nigerian federal state.\textsuperscript{700}

In addressing the political feasibility of an excision of the LUA from the Nigerian Constitution, it is obvious that there would be considerable difficulties in achieving this. Any changes to or alterations of the laws of the Constitution (including all entrenched laws) would require the above-mentioned rigorous procedure of two-thirds majority votes of the National Assembly and two-thirds of all the States Houses of Assembly. It is acknowledged that similar to the earlier discussed amendment strategy, it would also be difficult to secure the required majority for excision. However, it is submitted that application of the strategy of excision would ensure better protection of individuals’ property rights to land in Nigeria. Further, unlike the amendment process where the special procedure and requisite majority\textsuperscript{701} is required each time the LUA needs to be amended. In the event of an excision of the LUA from the Constitution, the requisite special majority votes would only be required once. Subsequently the LUA becomes an ordinary Act or bill amenable to change by a simple majority. An excision of a dictatorial legislative Act from the Constitution is reasonable and desirable. Once the special status afforded by its entrenchment is removed, the conflict between the LUA and the Constitution as to whether the LUA can oust the authority of the judiciary to determine matters relating to land in Nigeria would be finally resolved. Thereafter, the laws of the democratic Constitution would supercede the LUA allowing the judicial institution to determine all issues of private property rights to land and transfer of property transactions in accordance with the powers vested in the judiciary by the Nigerian

\textsuperscript{699} Part III of the Second Schedule to the 1999 Constitution categorises the incidental and supplementary legislative powers of the legislature to include the acquisition and tenure of land.
\textsuperscript{700} See section 4 of the 1999 Constitution confers the power to make laws on the legislative institution.
\textsuperscript{701} Section 9 (2) of the 1999 Constitution.
Constitution. Having looked at various strategies which may be applied to promote reform of the laws governing property rights to land in Nigeria, the next step to consider are proposals and suggestions which may be implemented to achieve better laws.

5.3 Reform Proposals

The LUA’s intention of administering land for the common benefit of all Nigerians has not been achieved. In light of this, the core reformatory proposal proffered is that provision be made under the law for the option of legally recognised private ownership rights to land to be vested in individuals to eliminate the limitations imposed by existing Nigerian property and land laws. This would automatically dissolve the blanket ownership and trusteeship status vested in the executive institution. Before the LUA, existing property rights to land in Nigeria were privately and communally owned. English statutes of general application, statutory laws enacted by local legislatures and customary laws were applicable in all Nigerian States with the exception of the Northern States. While the Northern States already had a nationalised system of land tenure prior to the LUA, the Southern States of Nigeria had a choice as to the form of land tenure, statutory or customary to adhere to. Ownership of land rights were vested in three categories of “persons,” the community, the family and the

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702 See section 6 of the 1999 Constitution which vests all judicial powers to determine all matters in the judiciary.
703 The LUA, in vesting all land comprised in each state to the Executive Governor of each state declared the reason for this vesture to be “that land be administered for the use and common benefit of all Nigerians…” See section 1 of the LUA. See also Chapter Three of the thesis.
705 See the English Conveyancing Act 1881.
706 See the Property and Conveyancing Law Cap 100, Laws of Western Nigeria 1959. See also the Land Tenure Laws applicable in the Northern States.
707 In the ten Northern States of Nigeria, a nationalised system of land tenure was already in application from 1916. See the Native Lands Protection Act 1916, the Property and Conveyancing Law 1957 and the Land Tenure Law 1962 which were all applicable in the Northern States.
708 See the case of *Shelle v Asajon* (1957) 2 F.S.C. where it was held that the family is legally recognised as a juristic person for the purposes of landholding and transactions.
individual.\textsuperscript{709} The LUA changed all this by nationalising all land in Nigeria,\textsuperscript{710} extinguishing all prior rights to land of all Nigerian citizens and substituting previous ownership rights with lease-hold like “rights of occupancy.”\textsuperscript{711} The reason for the nationalisation of all land in Nigeria, as extolled by the promulgators, was to “assert and preserve the rights of all Nigerians to use and enjoy land and to enable them provide for sustenance for themselves and their families…”\textsuperscript{712} Despite eloquently written honourable intentions, the bringing of all land under national control and management and the vesture of ownership rights to all land in the executive institution created fundamental limitations to legal reform. To implement the proposed amendment of removing ownership rights to all land from the state and effectively providing for the vesture of private ownership rights in individuals, certain steps need to be taken. First, the legislature would have to revoke the provision (section 1) of the LUA vesting all ownership rights to land in the Executive Governor of each state. The process for achieving a revocation of section 1 of the LUA differs depending on whether the LUA has been excised from the Constitution or whether it still remains constitutionally entrenched. If the LUA is still entrenched in the Constitution, the revocation of section 1 will be onerous invoking the special amendment process (two-thirds majority of all members of the National Assembly and two-thirds resolution from the Houses of Assembly of all states in Nigeria). However, if the LUA is already excised from the Constitution, it would only require a simple majority of the members of the National Assembly to achieve this.\textsuperscript{713} The main advantage of an excision of the LUA from the Constitution is that it creates a significant new right for

\textsuperscript{709} In practice, the issue of ownership rights to land being held or owned by the individual occurred but was always debatable. Usually, at the death of an individual owner or holder of an interest in land, the land reverted back to being family property. See \textit{Ogunmefun v Ogunmefun} (1931) 10 NLR. See also \textit{Miller Bros v Ayeni} (1924) 5 NLR 42.

\textsuperscript{710} See section 1 of the LUA 1978.

\textsuperscript{711} The prior system of private ownership of land which allowed individuals, families and communities to have freehold ownership rights which they had acquired through inheritance, gift, conquest, first settlement etc was extinguished.

\textsuperscript{712} See the full quotation in the preamble to the LUA 1978.

\textsuperscript{713} The requirement for the passing of an Act or Bill under the Nigerian Constitution is only a majority of the members of the National Assembly. See section 56 of the Constitution.
Nigerian property rights laws. This new right allows for any law or provision that is ineffective, inadequate or inadvertently encroaches on individual rights to landed property to be easily amended through an ordinary procedure for amendment like all other pieces of legislation not entrenched in the Constitution. Following the excision of the LUA and the revocation of section 1, it becomes possible to grant new legally recognised private ownership rights on land to individuals.

Private ownership rights would give individuals the power to buy, sell or otherwise acquire land without needing or requiring executive consent. As land is no longer held on trust and vested in the office of the Governor of a state, the requirement for consent becomes inapplicable. Another new right created by the proposed reform is that individuals would have the power to mortgage property without requiring executive consent. In addition, private ownership rights would grant individuals the power to lease property without requiring the requisite executive consent. The suggested processes would automatically remove the bottleneck caused by the requirement for executive consent before any transactions on land can be carried out and ensure that Nigerian citizens would easily be able to acquire landed property. Another benefit is that any executive power to revoke land where ownership rights are vested in the individual would require adequate or commensurate compensation. This simply means that if the land or property is required for “public purposes” the state would have to pay adequate or commensurate compensation to the owner of the land in order to revoke the ownership rights of the individual, as ownership rights would no longer be vested in the executive as it presently stands under the laws of the LUA. See below for a detailed illustration of the above suggested/proposed reforms. The first diagram illustrates the present laws as it stands today. The second diagram shows proposed reforms.

714 See the restriction imposed by the powers of revocation vested in the executive under section 28 of the LUA.

715 The rationale for the compensation provision in the LUA is that since all land is owned by the State under section 1 of the LUA, there is no basis for the State to compensate the landowner for bare land.
Figure 3: Present Laws

- Special procedure for amendment
- Ownership rights vested in the executive
- Executive consent required to buy, sell, mortgage, lease or otherwise transfer property rights to land
- Power to revoke rights or interests in land vested in the executive without adequate or commensurate compensation
5.3.1 Functionality of the Proposed Reform

It is essential to assess the benefits such a change would provide. The change from ownership rights held on trust and vested in the executive to private ownership allowing the vesture of ownership rights and interests in land to individual members of the Nigerian society is distinctly progressive. It is accepted that private property rights is a core tenet of a functioning legal system.\textsuperscript{716} A strong legal framework which provides clearly defined laws allowing individuals to have ownership rights and free-hold interests in land would therefore

\textsuperscript{716} See Elegant S. \textit{China Gets a Property Rights Law} (2007) The Times Newspaper dated Friday March 16 2007. In reforming their property rights laws, China has sought to enact a law to provide for private property rights, stepping away from Communist collective ownership towards a market economy.
be beneficial.\textsuperscript{717} In this scenario, the Nigerian state would relinquish the absolute and blanket control over ownership rights to all land in Nigeria and generate finances through the taxation of landed property.\textsuperscript{718} This strategy would guarantee that any Nigerian citizen can acquire ownership rights to land and landed property provided they adhere to certain requirements. Firstly, anyone seeking to acquire land or landed property must carry out the necessary searches in the land registry for prior existing interests on the property. Subsequently, they must duly register the land or property and enter their names in the land registry office of each state. The registry office would serve as the official record for all ownership and interests in property rights to land of the state. This provides individuals with a platform to declare their interests or rights to land serving to put all other parties on notice. It also provides a forum for the state to generate revenue from the registration costs paid by individuals who wish to acquire land or landed property.\textsuperscript{719} It is important that the state be able to generate income through taxation of land in order to use the resources to provide for amenities and services for the development of the state. It is suggested that the process of registering the land or landed property in Nigeria should entail a registration fee which could be from 5 - 10\% of the cost of the property or land depending on the cost of the property or land.\textsuperscript{720} An example of a legal system that similarly charges tax for prospective buyers of property is the UK. Under UK property law, the rate of stamp duty land tax varies depending on the cost of the relevant property and whether the buyer is a first-time buyer or not. Another way that the state may generate revenue is through the imposition of building fees

\textsuperscript{717} Karl Marx clearly identifies the features of private property rights in this quote “the right of man to property is the right to enjoy and dispose of his property at will and pleasure without regard for others and independently of society...”


\textsuperscript{719} This could be 5\% - 10\% tax of the cost of the property.

\textsuperscript{720} In the UK, stamp duty land tax is charged on land and property transactions. There are different rates charged – for residential properties being purchased for £250,000 by buyers who are not first-time buyers, the rate is 1\%. For properties worth over £250,000, the rate is 3\%. For properties worth over £1 million, the rate is 5\%.
for individuals who wish to build on purchased land. This means that if an owner of rights to land wishes to build on such land, he/she must pay a building fee. The rate should be fixed (for example, 5000 naira for bungalows, 10,000 naira for one-storey buildings etc). The rationale for this is to once again make the property tax commensurate to the cost of the building as one or two storey buildings usually cost more than bungalows. The proposed system of easy alienability of land and landed property therefore creates a win-win situation for both individuals and the state. The state is able to generate finances to use for the fulfilment of its functions and in addition, better protection of individual property rights to land is also achieved. The proposed reform allowing private individuals to have ownership interests in land ensures the maximisation of Nigeria’s natural resources and better private property rights protection. Under existing laws governing property rights on land, the executive owns and controls all ownership rights to land. As established, consistent abuse of these executive powers occur regularly in Nigeria. Governors of states and other elected officials authorised by the Governors allocate or compulsorily acquire land under the pretext that it is for public purposes. In reality, the Governors allocate the land or property to themselves, to other government officials or to family and friends as gifts. The state is not generating any revenue from these transactions because executive officials are corruptly keeping expensive properties for themselves or other government officials. Further, the consent requirement makes it difficult for individual members of the Nigerian society to buy, mortgage or lease their interests in land due to the exorbitant costs and long time periods it takes to get the relevant executive consent. Acquiring land is tedious and individuals find the

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721 The building fee could be fixed and depend on the size of the structure as mentioned earlier.
722 Naira is the currency used in Nigeria.
724 Section 1 of the LUA.
725 Due to corruption and arbitrary abuses of power, the executive retains ideal pieces of land and properties and gives them to their officials and friends for free.
administrative red tape surrounding the required consent onerous and overwhelming. The end result is that the cost of buying, mortgaging, leasing or otherwise acquiring land or landed property remains extremely high as demand for landed property outweighs supply.\textsuperscript{726} The removal of state control by allowing individuals to have ownership rights to land in Nigeria would eliminate the consent requirement. Individuals would be able to acquire ownership rights to land once they have duly fulfilled the registration requirement. The availability of land and landed property to individuals would encourage and promote competition. Once property is easily available to buy, mortgage, lease or otherwise acquire, the present high prices of land and landed property in Nigeria will fall.\textsuperscript{727} If a seller is selling land at inflated prices, individual buyers would have the choice to go to another seller as land would be more readily available under the proposed reformatory system.\textsuperscript{728}

There is a great need for a review of the laws governing property rights to land in Nigeria to be carried out by the National Assembly/legislature. It is suggested that the LUA be completely revoked or at the very least, thoroughly reviewed and amended. An Act that still uses the terms “Military Governor” and “Federal Military Council” on the basis that these terms should be automatically substituted with the terms “Executive Governor” and “Executive Government” should not remain part of the present democratic 1999 Nigerian Constitution.\textsuperscript{729} The trusteeship status and ownership rights vested in the executive institution by the LUA should be removed. Ownership rights and interests to land should be allowed for individual members of the Nigerian society subject to the necessary registration and relevant


\textsuperscript{727} The economic laws of demand and supply.

\textsuperscript{728} Private ownership rights vested in individuals without recourse to consent raises efficiency and profitability and increases access to private property.

\textsuperscript{729} See the cases of \textit{Umar Ali & Co. Nigeria Ltd v Commissioner for Land and Survey} (1982) No. ID/115/81 Ikeja High Court. See also \textit{J.M. Aina & Co Ltd v Commissioner for Lands and Survey} (1982) Suit No. 1/439/81 Ibadan High Court where the issue considered was whether the democratic civilian Governors were lawful successors to the powers of the military Governor by virtue of the succession clause of section 276 of the Constitution.
fees. Once the ownership and control powers of the executive institution over all land are removed, the legislative institution would then be able to carry out its main function and make new laws. The National legislature needs to immediately set up a land use and property rights reform commission. Ideally, the Commission should consist of approximately six to ten members. This is to ensure that members are chosen to reflect the different sectors of the Nigerian society. It is recommended that the Chairman of the Commission should be a former Chief Justice of the Supreme Court. This is because the in-depth knowledge and expertise accrued by the former Chief Justice in determining all matters including land issues would be crucial in overseeing the review and proposal of new policies and property laws. Other members of the Commission should include former Court of Appeal Justices, former Federal High Court Judges and academics and senior lecturers of land law who have extensive knowledge of property laws and land matters. Politicians should not be included as members of the Review Commission as they owe allegiance to their political parties and it is therefore likely that they would propose policies based on these allegiances rather than for the benefit of the masses. The Commission should also devote resources to encouraging and facilitating discussions between interest groups starting from the grass root of the Nigerian society. This should be carried out by employing individuals to distribute fliers and conducting person-to-person surveys where the views and interests of the members of society in relation to property rights are carefully gathered and documented. By adopting this bottom-to-top approach, the reformers would be able to meet the needs of society and proffer suitable reforms aimed at facilitating better protection of individual property rights to land.
5.3.2 Underlying Principles of Policy-Making Redesign

For the reform of existing laws to be effective,\textsuperscript{730} efficient and easily adaptable to suit the changing needs of a globally dynamic society, certain factors need to be present and adhered to. These factors are:

5.3.2.1 Clarity of Laws

The issue of clarity of laws is an important aspect of any proposed legal reform. The LUA currently suffers from badly drafted laws\textsuperscript{731} and laws inconsistent with the Constitution.\textsuperscript{732} The effect of this lack of clarity in the present laws has been long drawn out court proceedings to interpret or determine what exactly the provisions of the LUA mean. Court proceedings instituted to establish clarity and the true intentions of the law add to the already cumbersome provisions of the LUA. This results in further delays for individuals who wish to buy, mortgage, lease or otherwise acquire private property rights to land in Nigeria. A key requirement for the success of any proposed legal reform is the provision of clear laws which detail the rules of engagement of the relevant actors – the state and the individual members of the society.\textsuperscript{733} When the proposed reform is clear on the rights and interests of all parties to the transaction and the consequences of any failure or defaults in the fulfilment of obligations, the law becomes much easier to understand, implement and abide by.

\textsuperscript{730}Gray C.W. \textit{Evolving Legal Framework for Private Sector Development in Central and Eastern Europe} (1993) World Bank, Washington. Many countries are taking steps to encourage and protect private property rights. The prevalent stance is that the interventionist state of the past is being replaced by the less intrusive or obtrusive state.

\textsuperscript{731}See Bello A.O. \textit{Constitutional Entrenchment of the Land Use Act – An Argument for Excision} in “The Land Use Act: Twenty Five Years After.” Edited by Smith I.O. (2003) Folar Prints. Bello reiterates a statement as follows “it must be admitted that if there be any award for bad drafting, the draftsman of the Land Use Act will easily win…I cannot think of any statutes which has produced so much ambiguity, contradictions, absurdities, invalidities and confusion as the Act has done…”

\textsuperscript{732}These inconsistencies between the LUA and the Constitution have also led to problems of interpretation and ambiguity.

5.3.2.2 Accountability

The term “accountability” has been defined as a “broad spectrum of public expectations dealing with (institutional) performance, responsiveness and even morality of government…These expectations often include implicit performance criteria related to obligations and responsibilities…” Accountability connotes that the objectives, responsibilities and duties carried out by institutions reflect the intentions of the promulgators and the expectations of the public. Accountability incorporates financial accountability, accountability for fairness, accountability for performance and accountability for the incorporation of citizens’ interests. Under the present laws of the LUA, the executive institution is not accountable to any other institution or the public. The dominant power of the executive over all institutions and the general public ensures that executive powers continue to go unchecked. The result is that corruption and other arbitrary abuses of executive powers continue to thrive and escalate in Nigeria. An important aspect of legal reform is to propose laws that will ensure that all institutions are accountable to each other. In order to ensure accountability, considerable effort should be made to find out what members of the society want from their institutions. This requires engaging with citizens through the adoption of better uses of surveys, advisory committees and community forums in order to guarantee participation from society. Institutions should then be prepared to meet the expectations and demands for higher standards of accountability and accessibility after participating members of society have expressed their views, needs and expectations. Institutions that feel accountable for their actions, and understand that they may have to explain their policies,

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734 Kearns K.P. “Managing for Accountability: Preserving the Public Trust in Public and Non-Profit Organizations.” (1996) San Francisco, Jossey Bass Inc. Kearns asserts that “accountability requires a shared framework for the interpretation of basic values, ones that must be developed jointly by the bureaucrats and citizens in real world situations rather than assumed…”


their implementation process or their judicial decisions are less likely to abuse their institutional powers. By keeping institutions accountable to each other, it is also possible to ensure that Nigerian institutions act as checks and balances on each other’s institutional powers – a key principle of the separationist concept of a federal state.

5.3.2.3 Transparency

The principle of transparency within the law indicates that information relating to all laws, decisions and enforcement processes are freely available and directly accessible to anyone who chooses to access them. The effect of transparent laws is that laws are carried out in such a way that it is easy for others to see what actions are being performed. Transparency exposes problems in the law, allowing these problems to be easily addressed and solved. This is the opposite effect of the present laws of property rights to land in Nigeria. The LUA is definitely not transparent. Rather, it contains numerous ambiguous and contradictory laws which make it difficult for individuals and even judges to interpret or understand. The LUA would greatly benefit from the introduction of more transparent laws as it would help to prevent and curb corruption and abuses of executive power while making the institutions more efficient. The result is that it will become easier and cheaper for individuals to acquire property rights to land in Nigeria. To that effect, a fundamental aim of legal reform is to ensure that any proposed laws be based on the principles of transparency. An effective legal framework governing property rights to land would therefore greatly benefit from transparent laws.

5.3.2.4 Review Clauses

Another factor which should be considered in the proposal for reform of the laws governing property rights to land in Nigeria are review clauses. Review clauses refer to special provisions which are included in legislative Acts or legal documents to authorise the periodic review of the objectives, standards and efficacy of the relevant Act. Review clauses are very specific. They are used to specify the body that will review the laws, the objectives for which the review is carried out and the timeframe for the review. The usual practice is that review clauses will state the period of time when the review should occur, for example every 5 years or every 10 years. Other types of review clauses contained in different legislations or regulations specify a particular date whereby the laws contained in the Act must be reviewed.\(^{738}\) Review clauses provide an opportunity to raise any concerns about inefficiencies and propose solutions for issues or inadequacies discovered in the laws. The inclusion of review clauses allows certain questions and considerations to be analysed in the assessment of the continued efficiency or efficacy of existing laws. One of such considerations is whether the original policy objectives that existed at the time the laws were initially enacted are still relevant. Another consideration is whether the laws have had a significant beneficial impact in line with its original policy objectives. It also creates a forum for discussion of whether there is a better way of achieving the policy objectives than the present laws being practised.

Review clauses have become common practice in certain jurisdictions especially within EU laws and legislations.\(^{739}\) A Government Guide to EU Rules\(^{740}\) states that

\(^{738}\) See EU Regulation No 1995/2006 of the Corrigendum to Council Regulation amending Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities. Article 20 is a review clause that specifically provides a date for the review of the legislation – 31 December 2013.

\(^{739}\) For example, see Case C-217/04 \textit{United Kingdom v European Parliament and Council} (2006) ECR I – 03771; EU Regulation No 1095/2010 of the European Parliament and the Council of 24 November 2010. Article 81 inserts a review clause allowing the Commission to “every 3 years thereafter...evaluate the progress
“reviewing the impact of legislation implementing every five years provides an essential check on whether the original policy objectives are being achieved and whether any changes or improvements could be made.”741 At present, review clauses do not exist within the LUA. One would suggest that if review clauses were contained in the LUA, it would have been possible to amend the LUA sooner. Review clauses would have provided an opportunity for constant review of the provisions of the LUA and created a window whereby ineffective laws would be amended, modified or revoked easily. The inclusion of review clauses in the new reformed laws would guarantee a periodical review of the laws to determine whether the fundamental objectives that the reform sets out to address are being achieved. This would allow the reformers to address any changes or improvements to the laws which need to be dealt with allowing them to modify the laws accordingly to suit an ever-evolving society. An inclusion of (for example) a 5 or 10 year review clause in the reform of laws of property rights to land in Nigeria would be beneficial to the progressive development of better laws. The National legislature would be able to review and monitor the application of the laws and revise or remove sections or provisions that are not working in practice every 5 - 10 years. Further, they would be able to add or modify sections or provisions to deal with situations which may have changed since the laws were initially adopted.

The above discussion has focused on important suggestions and proposals to be considered in addressing the important issue of legal reform of private property rights to land within the formal institutions of Nigeria. Further, it has analysed basic principles which are essential in achieving successful legal reform. It is suggested that consideration and adoption

740 Dated 25 May 2011.
741 See the Government Guide to Implementing EU Rules 2011 where it was proposed that “all EU laws should have a five-year review date… (and) policy makers should write a duty for ministers to review into any EU derived law.” Another example of review clauses is used in the New York Insurance Department. Section 207 of the State Administrative Procedure Act (SAPA) states that there must be a “review after five years and at five-year intervals thereafter, rules adopted on or after… The purpose of the review is to determine whether the rules should be continued as adopted, or else modified.”
of these relevant proposals would ensure that an effective and efficient legal framework is set up to govern private property rights to land in Nigeria. The remaining part of the chapter analyses suggested reforms to tackle existing limitations and enable reform within informal institutional structures in Nigeria.

5.4 Strategies to Assist Informal Institutional Reform

The status quo or beginning point of any informal institutional reform has to be an acknowledgement of what currently exists within informal institutions. Informal institutional structures in the Nigerian society are based on corrupt, patronage and kinship-style authoritarian leadership norms. The prevalence and widespread acceptance of the norms of corruption, authoritarian dictatorship and the general lack of trust within the Nigerian society enable and perpetuate existing laws governing private property rights guaranteeing their continued existence. It is clear that for a successful reform of the laws of private property rights to occur, informal institutional limitations that exist within the Nigerian society need to be addressed. If these informal institutional constraints hindering legal reform are not addressed, it would be impossible to set up clear, efficient and effective laws based on principles of transparency and accountability. In considering different strategies to assist and enable the reform of informal institutional norms within the Nigerian society, there are two relevant issues to consider. The first issue is education – which essentially means educating members of the Nigerian society on the crucial need for reform. This can be achieved by educating individuals against the detrimental and limiting effects of corruption, adverse effects of authoritarian dictatorship relationships and the limiting effects of large-scale distrust between ethnic and religious groups. The present acceptance of these as normal

742 The informal institutional norms of corruption, authoritarian leadership and narrow-radius trust have been thoroughly analysed in Chapter four of the thesis.
practice severely constrains the development of better laws governing property rights to land. The second issue to consider is poverty within the Nigerian society. It is accepted that societies with bad or inadequate private property rights protection for individuals, more often than not, have higher levels of poverty.\textsuperscript{743} Poverty is known to be exacerbated by the existence of endemic corruption in countries struggling with economic growth and democratic transition.\textsuperscript{744} Countries where poverty exists are considered “natural breeding grounds for systematic corruption due to social and income inequalities and perverse economic incentives.”\textsuperscript{745} Nigeria is representative of this phenomenon due to the corrupt practices and abuses of power rampant in both its formal and informal institutions. In addition, prevailing existence of patronage/kinship relationships perpetuate the social inequality and poverty of the masses.\textsuperscript{746} Therefore, the issue of poverty becomes relevant because poverty aggravates issues of corruption, bribery, patronage and kinship style relationships.\textsuperscript{747} To competently assist reform within the Nigerian state, basic needs of survival and sustenance within society need to be addressed. Once these issues are dealt with and members of the society are educated about their relevant basic legal rights, they begin to understand and focus on the importance of reform and ways to improve their basic individual rights including their rights to land. Issues of education and poverty are therefore crucial in reducing or limiting the adverse effects of constraining institutional norms. Further, they are essential to enable members of the Nigerian society to fully understand the need to protect individual property rights to land and appreciate the benefits of legal reform for the Nigerian state.


\textsuperscript{745} Ibid, see Chetwynd et al above.


\textsuperscript{747} Resultantly, individuals within the society become desperate to benefit at others’ expenses.
5.4.1 Education

The important role education plays as the primary reformatory tool to be used in addressing existing informal institutional constraints within Nigeria’s formal institutions is undeniable. Informal institutional constraints which exist between members of the legislative institution (made up of the National Assembly and the States Houses of Assembly), which is responsible for the reform of the laws of property rights to land, needs to be thoroughly and effectively addressed through education. Simply put, education is the main reformatory tool to be used to address informal institutional norms and adequately promote the reform of the dictatorial laws of the LUA. This is achieved by educating members of the legislative institution on the limitations in their cultural beliefs, values and norms based on ethnicity, patronage and kinship structures, religious affiliations, as well as corrupt behavioural practices. This also entails educating members of the National Assembly and the States Houses of Assembly on the adverse effects that the informal norms of ethnicity, religious affiliations, corruption, patronage and kinship-based structural relationships have on the unison needed by the legislature to effectively come together and agree to reform the laws of the LUA. Members of the legislature need to be educated on the consequences that the formal institutional constraints have for all Nigerians, and the necessity to disregard cultural and geographical divides to reform the laws to achieve better protection of all individuals’ property rights to land. To promote reform of the laws of the LUA, members of the legislature also need to realise that the present laws, which perpetuate executive institutional dominance over the weaker legislative and judiciary institutions, are responsible for the inadequate protection afforded to individuals’ property rights to land. Further, the existence of informal institutional norms of corruption, patronage, kinship structures and NI norms of trust based on ethnicity and religious affiliations within members of the legislature make progressive reform significantly more difficult to achieve. Therefore, members need to be educated on the
limiting effects of these informal norms to private property rights protection in Nigeria and taught to come together and actively participate in order to achieve the requisite special majority needed to create better laws to protect private property rights to land.

Education is fundamentally important to any reform of laws. Unfortunately, the standard of education in Nigeria is insufficient. Nigeria is one of the nine members of the Educationally Disadvantaged (referred to as E-9) countries in the world.\textsuperscript{748} Within the Nigerian society, Nigeria’s literacy rate has been put at 57\% with significantly lower rates in certain parts of the country and also lower rates of literacy in females than males.\textsuperscript{749} According to the National Population Commission (NPC) which presented the key findings of the National Education Data Survey (NEDS)\textsuperscript{750} States in the northern part of Nigeria have the lowest rate of basic school attendance. The levels of literacy differ within the Northern States with findings of literacy in the North-western states declared as low as 23.2\% of the adult population.\textsuperscript{751} Where a considerable proportion of the Nigerian society have no basic/primary education, it is impossible for them to comprehend the need for reform\textsuperscript{752} or have a thorough understanding of existing institutional norms and their constraining effects on legal reform. Individuals with low levels of literacy cannot fully understand the adverse

\textsuperscript{748} The United Nations has listed Nigeria as one of the nine most illiterate countries in the world. Other countries on the list are Bangladesh, Indonesia, India, Egypt, Brazil, China, Mexico and Pakistan. See UNESCO Education Sector \textit{The Plurality of Literacy and its Implications for Policies and Programs} (2004) United National Educational, Scientific and Cultural Organization Paper; the Paper defines literacy as the “ability to identify, understand, interpret, create, communicate, compute and use printed and written materials associated with varying contexts. Literacy involves a continuum of learning to enable an individual to achieve his or her goals, to develop his or her knowledge and potential and to partake fully in the wider society.”

\textsuperscript{749} See the National Empowerment Development Strategy and National Bureau of Statistics. 46.7\% of Nigerians are purely illiterate while 53.3\% are literate in the use of the English language. A further breakdown of the statistics indicates that of the literate population, 61.3\% are male and 45.3\% are female.

\textsuperscript{750} Mr Samalia declared the NEDS findings in 2010.

\textsuperscript{751} The National Bureau of Statistics reveals that 72\% of children aged between 6 and 16 years in Borno State (a Northern State) have never been in school. Another survey carried out by UNICEF highlights that over 10 million Nigerian children of school age are not in school, most of them either selling goods on the streets or doing manual labour or odd jobs to earn some money.

\textsuperscript{752} They cannot understand why there is a need to change the status quo. See Weinberger S. \textit{Illiteracy Breeds Corruption, Slows Training Among Afghan Recruits} (2010) at \url{www.rawa.org} The article asserts that illiteracy breeds corruption due to the fact that illiterates do not know any better so they continue with what they are used to.
effects of long standing norms and practices. To pre-empt change of existing informal institutional norms within the Nigerian society, there needs to be a focus on education for all members of the Nigerian society. Fortunately, the Universal Basic Education Programme Act (herein referred to as UBE)\textsuperscript{753} has been established to ensure a basic standard of education for every child of school-going age.\textsuperscript{754} However, the sad reality is that the objective of UBE has still not been achieved. One reason for its failure is the high levels of poverty\textsuperscript{755} in Nigeria. In societies where people are very poor, individuals tend to focus more on sustenance than education.\textsuperscript{756} Another reason is that the importance of education has not been adequately explained especially within the educationally disadvantaged rural parts of Nigeria.\textsuperscript{757} Scribner\textsuperscript{758} who categorises literacy and the need for literacy in society states that “literacy for adaptation or the need for literacy to survive in an environment is one of the three essential reasons for obtaining literacy.” In rural parts of Nigeria, there is a generally held belief that literacy or education is not essential or needed to “survive” within the local villages and towns.\textsuperscript{759} This belief is proof that the importance of literacy and the crucial need for education has not been adequately or properly conveyed to Nigerians in all parts of the country. Another significant factor is the provision of adult based education for illiterate adult

\textsuperscript{753} The Universal Basic Education Programme Act was introduced into the 1999 Constitution as a reform programme aimed at providing greater access to and ensuring the quality of basic education throughout Nigeria.
\textsuperscript{754} The main aim of UBE was to ensure “uninterrupted access to a 9 year formal education by providing free and compulsory basic education for every child…”
\textsuperscript{755} Poverty is the second issue which will be addressed in order to tackle informal institutional norms within the Nigerian society.
\textsuperscript{756} See Dike V. E. Educating the Local Child. Published on May 26 2011 at www.nigeriavillagesquare.com where it is estimated that over 10 million children of primary school age are not in school. Rather, than send their children to school, parents send their children to hawk or sell goods so that they can make some money for basic amenities for their families.
\textsuperscript{757} See Wang H. Illiteracy in Nigeria: Does a Solution Exist? (1995) at www.observer.org Wang asserts that Nigerians especially in the rural areas do not place great value on education. She states that “the first and most obvious reason for the general apathy in literacy education is that it is not needed to ‘survive’ in their given environment…for the rural Nigerian people (they believe that) farmers have little use for literacy except for recreational activities…”
\textsuperscript{759} See Wang H. supra at n 759 above.
members of the Nigerian society.\textsuperscript{760} There are existing policies on Adult Learning Education (herein referred to as ALE) programmes in Nigeria to tackle the high levels of illiteracy that exist within the adult population.\textsuperscript{761} However, many illiterate Nigerian adults refuse to take part in these adult education programmes due to a number of factors. Firstly, a significant number of illiterate adults believe that they are too old to learn what is taught in the ALE classes. Secondly, they prioritize education as secondary and feel that they are too busy working and earning a living to go to ALE classes and thirdly, some illiterate adults feel too shy or embarrassed to attend ALE classes.\textsuperscript{762} There needs to be a re-evaluation of the priority accorded to education within the Nigerian society. If members of society are educated about the importance and basic need for education as a tool to survive within their environment, earn a living, and understand their basic individual rights (including their property rights), these factors would override their present beliefs and reservations about education. Further, the focus on education would encourage and stimulate discussions between members of the Nigerian society about relevant basic individual and property rights protection which would be a step towards legal reform. In the next section, a discussion of reform suggestions to improve education within the Nigerian society and stimulate legal reform will be undertaken.

5.4.2 Reform Suggestions

Education is on the concurrent legislative list of the Nigerian Constitution.\textsuperscript{763} This allows the federal, state and local government to address matters relating to literacy and education. Although the UBE stipulates for free and compulsory education to provide basic education opportunities to all children, the number of schools, educational facilities and teachers

\textsuperscript{760} The illiteracy rate for Nigerian adults is higher than the rate for Nigerian children.

\textsuperscript{761} Most States in Nigeria with the exception of Ogun State and Osun State have a legislative and policy framework backing up Adult Learning Education Programmes.

\textsuperscript{762} See Wang H. \textit{supra} n. 759 above.

\textsuperscript{763} This allows all tiers of government, the federal, the state and the local government, as well as private organisations and individuals to legitimately partake in the provision of education in Nigeria.
available for this scheme especially in rural areas remains grossly insufficient compared to the number of children eligible for the programme.\textsuperscript{764} The first and most important issue is the provision of funds. The federal and state governments need to allocate more resources towards improving education in Nigeria. Funds should be used to provide for more schools, courses, educational programmes and educational facilities. Teachers should be offered higher salaries and bigger incentives to motivate existing teachers and encourage new teachers to undergo the relevant training process required to become school teachers.\textsuperscript{765} Going beyond this, there is a prevalent need for the state to not only stipulate\textsuperscript{766} for free compulsory education and provide educational facilities but also to educate people on why literacy and education is important and why it is relevant and beneficial to them. If individuals are taught about the relevance of education and how it can enhance their lives, they would be more willing to invest their time and effort. In light of this, “open days” and social group events should be organised by the state or local governments within Nigerian towns and villages to educate local members on the importance of education and how it can enable them to get better jobs and provide for their families. A crucial aspect of these organised “open day” and social group events is that they should be tailored to meet the interests of the areas where the events are held. Periodic social group events organised by the state or local government should focus on educating members about their basic human rights. Property rights is clearly important and one of the basic fundamental rights of individuals. Farmers make up a large percentage of the illiterate members who live in the rural parts of

\textsuperscript{764} Alechenu J. \textit{UN Educationally Disadvantaged Countries: Nigeria Makes Moves to be Delisted} Punch Newspaper published on September 17 2011. The current federal and state funding for education is inadequate and this is reflected by the fact that there are insufficient schools, inadequate educational amenities and grossly underpaid teachers.

\textsuperscript{765} The average teacher’s salary is barely above the minimum wage in Nigeria.

\textsuperscript{766} As the Nigerian federal government has already done.
Nigeria. Therefore, organising social groups to educate farmers on their basic rights or interests on land is crucial. Further, educating farmers on how to protect their individual rights or interests in farmland is directly relevant and beneficial to them. If a local government organises an educational forum in a small village in a rural part of Nigeria made up of mostly farmers, the discussion should be tailored to be relevant to the local members of the area. For example, discussions informing farmers about the technical aspects of farming, the best type of farming equipment to use and the best type of agricultural fertilizers would stimulate greater interest in local farmers to attend and participate in educational social events. Also, by organising these events the local government creates a forum where there are exchanges of ideas between the local members of society and the state. As a result, the state would be in a better position to understand how to serve the needs of the Nigerian society. This in turn, would stimulate competent and suitable reformatory proposals directly addressing the needs of the Nigerian society. It is clear that there are tremendous benefits to encouraging and promoting education in Nigeria. Education creates a fundamental basis for all members of the Nigerian society to fully understand the status quo within the state and the need for legal reform.

5.4.3 Poverty

The second constraint to informal institutional reform is poverty. Poverty is characterised by the inability to achieve a certain minimal standard of living. It is reflected in the absence of purchasing power, exposure to risk, malnutrition, high mortality rate, low life expectancy, insufficient access to social and economic services and few opportunities for income

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767 90% of farm holdings in Nigeria are run by small scale illiterate farmers. Further, small scale farmers are the main producers of 98% of the food consumed in Nigeria with the exception of wheat. See Ozowa V.N. *Information Needs of Small Scale Farmers in Africa: The Nigerian Example* (1995) Quarterly Bulletin of the International Association of Agricultural Information Specialists, Volume 4, No 1.

The Global Monitoring Report prepared by UNESCO highlights the fact that 92% of the Nigerian population survive on less than $2 a day while 71% survive on less than $1 a day. Although poverty is more prevalent in the rural areas of Nigeria, people who live in urban areas especially slum parts are also significantly affected. Increases in poverty levels in Nigeria have been attributed to “political instability, bad governance, corruption and the collapse of institutional structures.” Obadan asserts that one of the primary factors that have caused poverty in Nigeria is “inadequate access to physical assets such as land, and minimal access by the poor to credit even on a small scale…” The issue of reform of private property rights laws is therefore pertinent and relevant to the alleviation of poverty within society. Unfortunately, members of the Nigerian society adversely affected by poverty are usually on “survival mode” and are not interested in advocating for or promoting reform or establishment of better laws for the protection of property rights to land. As Nigeria is also a country plagued by corruption, conditions of poverty within the state are immeasurably affected. Chetwynd et al have established two models linking the levels of...
corruption to the levels of poverty within society. The first is the “economic model” which highlights the fact that “increased corruption reduces economic investment, distorts markets, hinders competition, creates inefficiencies by increasing the costs of doing business and increases income inequalities.”  

The second model is the “governance model”. The governance model highlights the fact that corruption adversely affects the institutional capacity of the state to “deliver quality public services… (with the diversion of) public investment away from major public needs into capital projects where bribes can be sought…” The inevitable effect of this diversion of state funds is an increase in poverty levels within the state. See diagram below.

Figure 5

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diverts public resources from infrastructure investments that could benefit poor people, such as health clinics, and tends to increase public spending on capital-intensive investments that offer more opportunities for kickbacks such as defense contracts. It lowers the quality of infrastructures, since kickbacks are more lucrative on equipment purchases. Corruption also undermines public service delivery. See also Chetwynd E. Chetwynd F. and Spector B. Corruption and Poverty: A Review of Recent Literature (2003) Final Report, Management Systems International. Chetwynd et al reiterate that “corruption by itself, does not produce poverty…rather, corruption has direct consequences on economic and governance factors, intermediaries that in turn produce poverty…”

Ibid, see Chetwynd n 779 above.

Supra, Chetwynd et al n 779 above.

Further, they assert that corruption “lowers compliance with safety and health regulations and increases budgetary pressures on government.” supra see Chetwynd et al.

Source: Chetwynd et al Corruption and Poverty: A Review of Recent Literature supra at n 779 above.
In a society plagued with endemic poverty, it becomes difficult to change existing institutional norms of corruption. Individual members of society concerned with issues of “survival” and “sustenance” are considerably more susceptible to taking petty money bribes or abusing “positions of power” for personal gain. Further, authoritarian leadership is prevalent within societies with high rates of poverty because individuals become less reliant on merit based achievements and more willing to form mutually beneficial patron-client relationships for gain. This is characterised by a person(s) in a position of power awarding privileges and benefits to another person(s) in exchange for loyalty and support. Narrow-radius norms of trust are another consequence of poverty ridden societies as individuals facing difficult circumstances find it hard to trust. The status quo becomes a society where norms of corruption, patronage and kinship relationships are regarded with resignation and acceptance. In the next section, we will discuss ways to alleviate prevailing poverty within the Nigerian society. This is important because an analysis of poverty alleviation encourages progressive discussions about the reform of inadequate protection of individual property rights laws (one of the primary causes of poverty within society).

5.4.4 Poverty Alleviation

The issue of poverty alleviation is important because of the fact that the high percentage of Nigerians affected by poverty are so concerned with basic “survival” and “sustenance” issues that they are unable to agitate for better protection of their property rights to land. Further, the World Bank has famously described Nigeria as a “paradox”. This is due to the fact that the poverty level in Nigeria contradicts the country’s massive wealth. The main source of

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revenue for the Nigerian economy is oil.\textsuperscript{785} Nigeria’s oil industry was founded at the beginning of the twentieth century. However, it was not until the end of the civil war (1967 – 1970) that the oil industry took on its role as the primary source of revenue in the economic life of Nigeria.\textsuperscript{786} The singular monolithic focus by the Nigerian state on the production and exportation of oil has led to certain detrimental after effects.\textsuperscript{787} It has resulted in the neglect of other potential sources of revenue and the neglect of a previously prominent source of revenue in Nigeria – farming. Before the widespread discovery of oil in the 1970s, Nigeria was the second largest producer of cocoa in the world.\textsuperscript{788} Presently, data shows that Nigeria produces a paltry 5\% share of the world market.\textsuperscript{789} The neglect by the state to invest in land, farming, and farmers has contributed greatly to endemic poverty and the current poverty levels in Nigeria. This is evident in the fact that agricultural food and products previously produced and grown in Nigeria are now being imported from other countries. For example, wheat, a previous Nigerian export now accounts for $925 million of the $1.04 billion total that is imported into Nigeria from the United States.\textsuperscript{790} Morenke Adeonigbagbe-Jones\textsuperscript{791} discusses the prevailing levels of poverty in Nigeria and Nigeria’s failure to pay adequate resource – oil – during the last three decades of the twentieth century but rather than record remarkable progress in national socio-economic development, Nigeria has retrogressed to become one of the 25 poorest countries…whereas she was among the richest 50 in the early 1970s.”\textsuperscript{785} The Nigerian National Petroleum Corporation has declared that Nigeria’s crude oil exports are expected to increase to 2.18 million barrels per day in December 2011 from the present export of 2.05 million barrels per day.\textsuperscript{786} Odularu G. O. \textit{Crude Oil and the Nigerian Economic Performance} (2008) Oil and Gas Business at \url{www.oebus.ru.eng}\textsuperscript{787} Ajakaiye O. \textit{Economic Development in Nigeria: A Review of Recent Experience} (2001) Proceedings of the First Annual Monetary Policy Conference, Central Bank of Nigeria at p. 12-36. Economists refer to the “coexistence of vast natural resources, wealth and extreme personal poverty in developing countries like Nigeria as the resource curse.” The negative effects of the discovery of crude oil in Nigeria has manifested in the environmental degradation of the surrounding communities wherever oil was discovered. This has led to the depletion of farmland resulting in damage to another means of livelihood.\textsuperscript{788} Adeniyi E \textit{Cocoa Exports: Will Nigeria Ever Regain Lost Glory?} Published in Tribune Newspaper dated 7 August 2011. Adeniyi states that “Nigeria destroyed its cocoa production after the oil boom in the 70s and completely left it to suffer an unimaginable degree of under-investment…few years before oil discovery (cocoa) generated about 90\% of Nigeria’s foreign exchange earnings…”\textsuperscript{789} See data statistics for the International Cocoa Organization (ICCO).\textsuperscript{790} Nigeria’s total food and agricultural imports continue to escalate and in 2008, was valued at approximately $4.0 billion. See Flake L. and Nzeka U. \textit{Nigeria – Exporter Guide} (2009) Report No. NI9010.\textsuperscript{791} A Nigerian Economist. See Adeniyi \textit{Cocoa Exports: Will Nigeria Ever Regain Lost Glory? Supra at n 790 above.}
attention to other major non-oil exports in the country by stating that: “(Nigeria is) blessed as a nation with enormous resources but out of many, (has) chosen to neglect some and uphold only one. The realities of modern economy do not operate that way. If you look at the best economies of the world, you will discover that they are highly diversified. No nation thrives on the exportation of one commodity alone. It wouldn’t help and Nigeria cannot be an exception…”  

In order to alleviate poverty within the Nigerian society and move towards successful legal reform to ensure better individual private property rights protection, there needs to be a re-assessment of the monolithic focus on oil to encompass other avenues of resources and revenue for the state.

5.4.5 Reform Suggestions

To alleviate poverty in Nigeria, the federal and state governments should provide considerable and sustained investment in the development of land. Members of the Nigerian society should be informed about their basic rights and interests in land. Firstly, the state should show its support by encouraging and assisting its local farmers to buy or otherwise acquire rights or interests in land. The state can achieve this by enabling the utilization of land through the subsidization of land development in the rural areas of Nigeria. The state should carry out these important duties whilst adhering to the principles of accountability and transparency thereby encouraging agricultural development fairly and equitably among members of society. There should be more investment in intensive mechanized agriculture to develop small scale and medium scale enterprises. The state could achieve this by offering

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792 Supra Adeniyi n 790 above.
793 See Owofemi Dimeji Nigeria: UNESCO on Poverty in Nigeria (2010) at www.tribune.com Owofemi asserts that “(Nigeria) discovered oil and followed up by destroying the structure that was the basis of the nation’s agrarian economy, we now have oil economy which was a shift…we are no longer interested in agriculture…(and there is no more) link between the peasant and commercial farmers and the state…”
794 See previous section on Education.
795 This means that all poverty alleviation programs instituted by the state should be based on the principles of accountability and transparency.
farm inputs, services and credit extensions to local farmers to assist them in acquiring rights to land for farming purposes.\textsuperscript{796} In providing grants and assisting local farmers to acquire land, the state ensures employment for a considerable proportion of society as well as guaranteeing the production of food for consumption and sale.\textsuperscript{797} To further alleviate poverty, the Nigerian state should subsidize agricultural products like fertilizers and seeds for its local farmers. By actively supporting individual members with grants, subsidies and information, the needs of the Nigerian society in relation to private property rights will become more apparent and easier to resolve.\textsuperscript{798} Consequently, individual members of the Nigerian society who are no longer pre-occupied with issues of survival such as poverty would pay more attention to their need for better laws for private property protection. Once the state successfully addresses the basic needs of education and the alleviation of poverty within the Nigerian society, individuals would be better equipped to actively strive towards legal reform to improve their individual property rights to land.

5.5 Conclusion

In this chapter, analyses of the legal mechanisms for reform and amendment within the formal and informal institutional structures in Nigeria have been carried out. A consideration of suggested/proposed strategies to enable legal reform within formal and informal institutions have been analysed to thoroughly address the second research question of what needs to be done to achieve successful legal reform of the laws governing property rights to land.

\textsuperscript{796} Previous agricultural poverty alleviation programmes include the National Agricultural Land Development Authority, the Strategic Grains Reserve Programme, and the Programme for Accelerated Wheat Production. Previous agricultural poverty alleviation programmes in Nigeria have failed to adequately tackle the issue of endemic poverty due to corruption, an absence of transparency and the non-existence of the principles of accountability.

\textsuperscript{797} Considerable revenue can be made from thriving farms. For example, the large farms of the former President of Nigeria Olusegun Obasanjo generate a monthly income of $250,000. See the Nigerian Newspaper Sahara Reporters, September 11 2011.

\textsuperscript{798} Support by the state creates a forum whereby the interests of members of the society become clear to the state. This information is vital in the adoption of suitable reforms.
land. This is to ensure that adequate protection of individuals’ private property rights to land in Nigeria is achieved. Reform suggestions/proposals based on amendment, excision and the vesture of private ownership rights in individuals have been explored to determine whether they are capable of ensuring legal reform and guaranteeing better protection of individual property rights to land. Analyses of issues of education and poverty which limit and constrain reform within informal institutions have also been carried out to competently tackle the issue of what should be done within the Nigerian society to assist reform. Reform suggestions to address issues of education and poverty have been proffered to shift the focus of members of the Nigerian society from “survival” and “sustenance” and re-direct them to another basic legal right – the need for better laws to protect their private property rights. It is submitted that the consideration and adoption of the proposed reforms discussed would inadvertently ensure reform of the laws governing property rights to land and guarantee better protection of individual property rights within the Nigerian state.
Chapter Six

Conclusion

In the last thirty-three years, reform of the laws governing property rights to land has remained unattainable in Nigeria. The LUA’s promulgation in 1978 hallmarked an imposition of private property laws enacted by an undemocratic military regime and entrenched into the Constitution of the Federal Republic of Nigeria. Nigeria, in dire need of a thorough reform of its property rights laws, struggled with land law reform as the present laws offered inadequate protection of individuals’ rights to land. The development of better laws to protect individuals’ property rights was greatly limited by existing laws and the institutions perpetuating them. The limitations imposed by the main legislative Act, the LUA remains all encompassing. The thesis is written to generate meaningful insight as to why there has been no legal reform of the laws in Nigeria. Secondly, it is to suggest reformatory measures and proposals to remedy this deficiency. To do this, the thesis has undertaken an institutional analysis of the formal and informal institutions that limit the development of better property rights laws to land. It highlights path-dependent ideas of the former military dictatorship which are reflected in the present property rights law regime and the institutions created by the LUA. The legal framework created is of dominant power vested in the executive institution to the detriment of weaker legislative and judicial institutions. In addressing the first issue of why there has been no legal reform of private property laws, the thesis proceeds to consider institutional structures within the state exploring theories of institutionalism as a basis for analysing the lack of reform of private property laws. Using several NI institutionalism theories, the thesis considers the role that norms, rules and laws imposed at the inception of institutions have had in influencing and shaping legal policies within the Nigerian legal system. Comparative analyses of the UK/US/Nigeria unitary and federal institutional models are carried out to establish whether inherent constraints have led to lack
of reformatory changes in Nigeria. To understand the Nigerian land law regime, institutional structures which have direct impact on individuals’ property rights are examined. The revelation is that features of Nigeria’s federalism and the separationist concept of her three inter-governmental institutions have created constraints to legal reform. Addressing formal institutions, the set up structure for applicable laws and the draconian provisions of the LUA which significantly affect reform are explored. The consent and revocation powers of the executive institution are representative of the inability of the legislative and judicial institutions to curb the Nigerian executive. The weaker legislature is constrained in its ability to amend or make better laws to protect individual private property rights to land. Further, the Nigerian judiciary is constrained by the provisions of the LUA ousting its jurisdiction to hear matters relating to property rights. To achieve legal reform, the draconian laws of the LUA need to be amended or revoked. Unfortunately, the entrenchment of the LUA in the 1999 Constitution and the rigid process of amendment have prevented any successful legal reform.

Analyses of informal institutions and their role in relation to formal institutions and legal reform are also explored. The reinforcing and supportive features that informal institutional norms proffer to existing formal institutions in Nigeria are revealed to also limit and restrict legal reform. Norms of corruption and authoritarian leadership have resulted in a dampening of agitations and demands for changes to the laws. Furthermore, NR norms of trust have limited the collective drive and common purpose required for individual members of the Nigerian society to advocate for reform of the laws. The combined effect of both formal and informal institutional structures on the development of better laws governing property rights to land is evident. In considering the second issue of what should be done to achieve successful legal reform, reformatory proposals are proffered. The reformatory suggestions are based on strategies of amendment and excision; both strategies of amendment and excision are considered to offer certain benefits for legal reform. The core reform
proposal is established: to allow for vesture of private ownership rights to land in individuals under Nigerian land law. This is achieved by automatically extinguishing the ownership and trusteeship status of all land in Nigeria which is currently vested in the executive institution by the LUA. The implication of private ownership rights vested in individuals is the relinquishment of absolute control and ownership rights of ALL land in the Nigerian territory which is presently vested in the Nigerian executive. The benefit of the proposed reform is that any Nigerian citizen can acquire ownership rights to land without having to adhere to the executive consent criteria. Further, it becomes easier to curtail executive powers of revocation and ensure that adequate compensation is provided in the event of a revocation of individuals’ ownership rights to land. Addressing informal institutional constraints, issues of poverty and education which also constrain legal reform are analysed. Reform suggestions are then offered to address inherent informal institutional limitations. The aim of all suggested reformatory proposals is to instigate a move towards progressive legal reform. Finally, it is submitted that the adoption of the proposed reforms would go a long way to ensuring a successful reform of the laws governing property rights to land in Nigeria.
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