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## AN ANALYSIS OF PENSIONS LAWS IN NIGERIA\*

### Abstract

This paper examines the contiguous nature of pension legislation in Nigeria. Tracing the origin of pensions from inception to the present 2014 regime, this paper contends that legislative vehicles for pension administration is a veritable example of the law as a tool for social engineering. The paper argues that a law must first be applied in order for its efficacy and suitability to local circumstances to be tested and that the pension regime stands out as a dynamic mode through which the law makers have regulated a sensitive area of labour legislation. This work examines the various pension regimes which have passed through the Nigerian legislative contrivances, their strengths and weakness. While attempting to show how successive pension legislations have improved upon their predecessors, it is argued herein that there is still room for development, adaptation and reform with particular reference to the constraints of peculiarly Nigerian circumstances.

### 1.1 Introduction

The human problems of individual citizens are a proper and important concern of our government. One such problem that faces every individual is the provision of economic security for his old age and economic security for his family in the event of his death. To help individuals provide for that security – to reduce both the fear of and incidence of destitution to the minimum – to promote the confidence of the individual in the future – these are the proper aims of all levels of government, including the Federal Government<sup>1</sup>.

Pension has been defined in the Oxford Advanced Learners' Dictionary<sup>2</sup> as an amount of money paid regularly by a government or a company to an individual who is considered too old or too ill to work. According to Dr J. E. O. Abugu pension can be conceptualized as the right of an employee to some financial or other benefit for subsistence upon retirement if certain conditions such as minimum years of service or minimum age have been met and denotes a scheme which guarantees the employee some form of annuity usually spanning his post retirement life span funded either by the former employer or based on some form of proceeds from contributions made by the employee.<sup>3</sup>

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<sup>1</sup>Excerpt from President Eisenhower's speech to the United States Congress on January 14<sup>th</sup> 1954 quoted in "Public Assistance and Social Insurance-A Normative Evaluation" Vol. 1 No. 3 (April 1954, U.C.L.A Law Review, Page 237).

<sup>2</sup>A. S. Hornby: 'Oxford Advanced Learners' Dictionary', (6<sup>th</sup> edn. Oxford University Press, Oxford 2004) 1129

<sup>3</sup>J.E.O. Abugu: 'Nigeria's Evolving Legal Framework For Pensions and Pension Fund Administration; (2006) 17 ICCLR 345

Pension has been judicially defined as 'an accrued right of an employee be the right in money or other consideration on the employee's retirement from the services of his employers and satisfying the conditions for the payment of the said pension'<sup>4</sup>.

Pensions has also been defined in the Securities and Exchange Commission Regulations on the Administration of Pensions as 'a fund, society, contract or scheme the assets of which are held under irrevocable trusts and any scheme established by law in Nigeria or elsewhere, the main objects of which are the provision of non-assignable and non commutable retirement pensions or annuities for an individual or his dependants after his death or any group of individuals or dependants'.

By virtue of the provisions of the Pensions Reform Act (2014)<sup>5</sup>, Nigeria operates a contributory pension scheme which has eclipsed the existing pension structures of the previous pension regime<sup>6</sup> by which pensions (particularly in the public service) were largely funded by the Federal Government of Nigeria and was non contributory in nature. Workers outside the public service largely fell back on the National Insurance Trust Fund Scheme or the private pension arrangements made by employer companies for the benefit of their employees.

According to Hoskings<sup>7</sup>, in justifying the need for contributory pension schemes in most world economies; if the gainfully employed of today are to have financial independence when they are no longer able to make their contribution to current production they must be prepared to forego their present right to spend on current consumption.

The present regime however is an attempt at consolidation of all the hitherto existing schemes into a composite system with regulated investment of funds arising from the contributions being invested by the pension fund custodians and administrators under the regulatory oversight of the National Pensions Commission.

The need for statutory as well as institutional regulation of pension schemes and investments made therefrom is the perhaps obvious fact that without checks being put in place, the workers would be left with reliance only on the future promise to pay of the investors who manage these funds on their behalf<sup>8</sup>.

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<sup>4</sup> *Momodu V National Union of Local Government Employees* (1994) 8 NWLR (Pt 362)

<sup>5</sup> Section 1 of the Act

<sup>6</sup> The Pensions Act No. 102 of 1979 which later transmuted into Cap 346 Laws of the Federation of Nigeria 1990. This Act was based on the recommendations of the Udoji Public Service Review Commission Report which was drawn up sequel to a comprehensive study of the Nigerian civil service.

<sup>7</sup> G.A. Hoskings: *Pension Schemes and Retirement Benefits* (Sweet and Maxwell, London 1960)1094

<sup>8</sup> G.A. Hoskings (n.7) 3

It goes without saying that in every representative system as envisaged by the investment of huge funds on behalf of the employees by pension fund administrators and pension fund custodians, these managers of funds will attempt to exact economic

rents from the system and this will translate into high agency costs<sup>9</sup> accruing to the employers and employees who are the contributors to the scheme.

The National Pension Commission has the essential role of attenuating the escalation of these rent seeking interests by effectively monitoring the corporate investors who custody the pension funds of Nigerian workers. It goes without saying that institutional interventions of the type contemplated by the National Pension Commission should have the three pronged aim of helping employees provide for financial security in the event of old age; reduce the fear and incidence of destitution to the minimum, and to promote individual confidence in the future<sup>10</sup>.

## 1.2 Overview of the Historical Evolution of Pensions Laws

The initial evolution of pensions as a pillar of social security is traceable to Germany under the rule of Bismarck. Health insurance was put in place in 1883, workmen's compensation in 1884, and old age and invalidity pension in 1889<sup>11</sup>. In the United Kingdom, the concept of pensions didn't arise until the early 20<sup>th</sup> Century<sup>12</sup>. Prior to this period, most employers were content to employ staff for as long as they were useful and replace them with younger staff after they had outlived their usefulness. Former employees therefore had to make private plans for their retirement or alternatively rely on younger relatives to care for them in the event of incapacity or inevitable old age.<sup>13</sup> The legal mechanism for the protection of the aged and infirm fell under the Poor Laws<sup>14</sup>.

However, even during that period, there still existed some employers who made provision for their workers though this practice was not widespread. Extant legislation for pensions and pension schemes in the United Kingdom started evolving in 1908 from the Poor Laws.

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<sup>9</sup> I.O. Bolodeoku: 'Corporate Governance: The Laws Response to Agency Costs in Nigeria' (2007) (32) 2 *Brooklyn Journal of International Law* 115

<sup>10</sup> See n2 above

<sup>11</sup> J.E. Abugu (n.3) 346

<sup>12</sup> Hosking (n.8) 1

<sup>13</sup> *Ibid*

<sup>14</sup> The Poor Laws were the primary social security legislation in the United Kingdom as early as 1908. It catered primarily for the destitute and the aged.



These laws were designed to assist improvident individuals in the society to make provision for his livelihood by ensuring that basic allowances were paid to assist his day to day subsistence. According to Townsend in his dissertation on the Poor Laws, this system of social welfare was based on an 'interdependent system of assumptions, policies, and programs which was based on the classical free enterprise model which has disintegrated under the influence of modern conditions'<sup>15</sup>.

Be that as it may, the Poor Laws were the starting point of social security legislation in the United Kingdom and the harbinger of other social security initiatives in that jurisdiction which now encompasses legislation covering old age, invalidity, death, etc. Presently, workers in the United Kingdom are protected by a plethora of benefits which spans unemployment, sickness, disablement, pensions and widows allowance<sup>16</sup>. It is Agomo's view that the legislative thrust envisioned by the Poor Laws changed with successive legislations from public assistance to national assistance and has now become so all embracing that hardly any facet of human existence or need has been left untouched<sup>17</sup>.

According to Jessup<sup>18</sup>, increased lifespan of workers, the change from an agrarian population to an industrialised one, growth in population, higher tax rates and the rapid development of private pension plans have all contributed to the growing interest in the area of pensions and pension schemes in the United States of America. He traces pension plans as an economic device for retirement, to the last quarter of the 1800s when in 1875, the American Express Company set up the first pension plan. Adjudging the impetus for pension plans to be the 1<sup>st</sup> and 2<sup>nd</sup> World Wars when the government prohibited wage increases without the approval of government and the high rate of corporate taxes encouraged employers to take advantage of pension schemes which were largely tax deductible<sup>19</sup>. This trend was followed in America over the decades with laws enacted to grant tax exemptions to funds which were targeted at employee pension schemes<sup>20</sup>.

In Africa, there arose no institutionalized system for pension and pension management until the evolution of pension schemes which were innovation of the colonial governments of the different African nations<sup>21</sup>. This was due to the fact that the extended

<sup>15</sup> Jessup L.F.: "Law of Retirement" (Oceana Publications Inc, New York, 1959) p.33

<sup>16</sup> Agomo C. K.: 'Social Security in Nigeria, A Critical Appraisal' (University of Lagos Press, Lagos 2004) p. 183

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid* p. 33

<sup>19</sup> *Ibid*, 83

<sup>20</sup> For instance, in 1972 the United States Internal Revenue Service declared by 401 (a) of the Federal Internal Revenue Code that a public employee pension trust fund and the benefits derivable thereunder are entitled to special tax treatment for qualified pension trusts and their beneficiaries.

<sup>21</sup> Odulana F. O.: *Pension Reforms in Nigeria; a Guide to the Implementation and Operation of the Pension Reform Act 2004* (The Chartered Institute of Bankers of Nigeria Publication, Lagos 2004) 2

the extended family system was so deeply entrenched in the African value system that the able bodied younger generation shouldered the responsibility of taking care of the less able, infirm and old members of the extended family. Prior to the attainment of independence by the African nations from their colonial governments, these governments had set up social security mechanisms with pension schemes modelled after the pension schemes of their home governments. Unfortunately, these schemes were restricted to the public sector of each of the countries.

According to Odulana, the former North African colonies of Tunisia, Algeria, Morocco and Egypt due to their close proximity with Europe, had employment based pension schemes in place as early as the 1950s. These countries expanded their schemes to include unemployment benefits and amplified the coverage in pension schemes to include coverage for the self employed.<sup>22</sup>

However, in the former British colonies like Ghana, Swaziland, Nigeria and Kenya the emphasis was on the provision of financial succour in the event of work related injuries and from this slant arose the workmen's compensation system. It is therefore not surprising that the initial work related legislations in these countries were the workmen's compensation legislations notable of which for the purpose of this study is the Nigerian Workmen's Compensation Act of 1942 which covered both the public and private sectors<sup>23</sup>.

In Nigeria, pension schemes whether in the public or private sector had their origins in the English colonial laws and practices. According to Abugu, pension schemes were actively promoted as the primary benefit of the civil service by the colonial and post colonial governments<sup>24</sup>. It is his view that this was one of the factors that made employment in the civil service an attractive option for the emerging educated class of Nigerians as an employment option. This was due to the fact that while early pension schemes in Nigeria were initially established for the benefit of the colonial officers who served in Nigeria, indigenous officers later benefited from these schemes subject to the pleasure of the governor-general<sup>25</sup>. In the Nigerian private sector, pension schemes did not start until 1954, when the Nigerian Breweries Limited established the first pension and gratuity scheme.

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<sup>22</sup> *Ibid*

<sup>23</sup> *Ibid*, 5

<sup>24</sup> (n.3), 346

<sup>25</sup> (*Ibid*) The rise of indigenous employees was also responsible for the gradual codification of laws relating to pensions and pension schemes. Even with the vagaries of European enactments to cover access to income by members of the society who due to age could no longer be gainfully employed, which transmuted early into professional income management, Nigerian legislation in this area of the law was piecemeal and ensued between 1963 and 1979. These include The Pensions Act 1958, Pensions (Special Applications) Act 1960, Pensions (Special Applications) Act 1961, Pensions Act 1964, Police Pensions Act 1966, Pensions (Federal Fire Service) Act 1966, Pensions and Gratuities (War Service) Act 1969, etc. These Acts were consolidated and re-enacted in the Pensions Act of 1979.



Nigerian Breweries Limited established the first pension and gratuity scheme. The United Africa Company (UAC) followed with a similar scheme in 1957<sup>26</sup>.

### 1.3 Jurisprudential Analysis of the Need for Pensions and Pensions Regulatory Laws

An attempt to examine the jurisprudential predicates of pensions and pension regulatory laws would necessitate the examination of the philosophy behind the laws and constitutional provisions. The rise of pensions' regulations in the general framework of labour laws appears to have to a large extent been influenced by the concept of the law as a tool for social engineering.<sup>27</sup>

Roscoe Pound in his early work expatiated on the concept of social engineering in law<sup>28</sup>. According to him, the law is made to meet a social purpose or objective and the test for how well the law conforms to societal needs is predicated on the extent to which it solves social problems. However Zinskind points out that though this is a direct and pragmatic way of evaluating all labour legislation, it only serves as a guide whenever the purpose of the law is undisputed<sup>29</sup>.

According to Oputa, the law, through the legal system creates, imposes, regulates and enforces various rights and duties in order to promote social welfare. He goes further to state that law as a vibrant social necessity aims at protecting individuals from oppressive actions by powerful forces, be those forces the government, powerful conglomerates or powerful individuals<sup>30</sup>. In order therefore for the law to keep pace with the dynamism of society as it develops, it is necessary for provision to be made for evolving areas of the law including imposing duties on employers to cater for the members of their workforce who by reason of age or infirmity are unable to continue in active service.

In his realist school of thought, Llewellyn developed the view that the purpose of any law in the society is to find a life changing situation and accommodating the law to fashion a solution to that life changing situation<sup>31</sup>. It is Zinskind's opinion that evaluating the basis for all labour laws necessitates an examination of special objectives and the social

<sup>26</sup> Odulana (n.21) p.5

<sup>27</sup> D. Ziskind: "Standards For Evaluating Labor Legislation" (1966) 51 (3) *Cornell Quarterly Law Review*, Spring

<sup>28</sup> Pound: 'Jurisprudence' ch. 6 Pages 291- 358 quoted in Elegido, J.M. : " *Jurisprudence* " 'Spectrum Law Series' A. Aguda (Ed) (Spectrum Books Limited, Ibadan 1994) 360

<sup>29</sup> Ibid p.507

<sup>30</sup> Oputa C : "Law and Social Justice in Africa" in ' *In the Eye of the Law; Selected Essays and Speeches of the Honourable Justice C. Oputa* ' (Friends Law Publishers, Orlu 1992) 41

<sup>31</sup> Llewellyn: 'The Common Law' quoted in Elegido (n.28) 356

social objectives and the social welfare principle primarily governs protective labour legislation<sup>32</sup>.

According to Wilgus, this social welfare thrust of regulatory laws has exerted a powerful influence in ensuring that employers assume a level of responsibility for the welfare of the people they employ<sup>33</sup>. He posits that this is done firstly by encouraging competent and faithful employees to remain in the service and not embark on other vocations by providing incentives in the form of benefits from which the employees obtain pecuniary and other advantages. Secondly, by retiring those in active service who; by reason of their devoting their best energies for a long period of years to the performance of duties may not perform so well or with equal physical or mental vigour as younger employees<sup>34</sup>. The pension aspect of labour legislation therefore makes provision for at least the partial support of such workers when their retirement with pay would have been deemed inequitable and for who without such legislation, payment of post retirement emoluments would not be enforced<sup>35</sup>.

Giving regard to constitutional provisions, the social welfare object of State fiscal directive policy ensures that the economic power of people within the state is protected by entrenching same into the constitutions of the different nations. For instance, Section 17(3) (e) and (f) of the Constitution of the Federal Republic of Nigeria (1999)(as amended) adjures the State to direct its policy towards ensuring that children, young persons and the aged are protected from any kind of exploitation whatsoever and against moral and material neglect. Also that provision made for public assistance in deserving cases or other conditions of need.

While these subsections make no direct reference to labour laws and post employment legislation, it can be inferred that the whole emphasis of these subsections are primarily geared towards the social engineering functions of law and to that extent the sections can be said to ground the enactment of legislations promoting the payment of post employment emoluments to retired workers.

Oputa posits that the essential ingredients of social justice brought about by the social engineering functions of the law include freedom from want and dependence among other basic freedoms<sup>36</sup>. Laws regarding pensions therefore make provisions for this freedom by ensuring that old age does not necessarily connote financial dependence as elderly ex-employees are guaranteed a means of basic subsistence not necessarily arising from welfare objectives posited by the social sciences but arising from the contractual and trust duties impose on their former employers by the instrumentality of the law<sup>36</sup>.

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<sup>32</sup> Zinskind (n.27) 509

<sup>33</sup> H. L. Wilgus: 'The Constitutionality of Teachers' Pension Legislation' in (1913-14) 12 *Michigan Law Review* p.29

<sup>34</sup> *Ibid*, 48

<sup>35</sup> *Ibid*.

<sup>36</sup> Oputa (n.30) 48

<sup>36</sup> J. Tenbroek and R. B. Wilson: 'Public Assistance and Social Insurance – A Normative Evaluation' (1953-54), 1 (3) *U.C.L.A. Law Review* 289



The United Nations Charter enjoins the United Nations to work towards the solution of the problems of an 'economic, social, cultural and humanitarian character' and to 'promote social progress and better standards of life in larger freedom'<sup>37</sup>.

In American jurisprudence, the legal foundations of social welfare permutations of labour and social welfare laws are predicated on natural rights as perceived by the framers of the American Constitution and the amendments thereto<sup>38</sup>.

According to TenBroek and Wilson, pension programs as an aspect of social security must among other things '....Protect the essential dignity of the individual: by recognising the worth of the human personality and by treating it as a community asset rather than a community liability: by providing aid without humiliation.... Legislative and administrative standards must be established which are uniformly applied...'<sup>39</sup>. The free enterprise structure of this jurisdiction allows for individual structuring of the vagaries of pension schemes operated by employers with due emphasis on the contractual slant of these schemes premised on the continued existence of individual contracts of employment<sup>40</sup>.

#### 1.4 Contractual and Trust Foundations of Pensions

Though pension is primarily a creature of statute, it combines features of contract as well as elements of the law of trust. The essential aspects of contract inherent in the existence of pensions are that of privity of contract and consideration<sup>41</sup>. As between the employee/contributor and the pension fund administrator, there exists the pension fund the subsistence of which is premised on the continued validity of the former's contract of employment, the creation, subsistence and termination of which is governed by the general law of contract<sup>42</sup>. The trust interplay in this relationship comes into focus arising from the personal relationships created by virtue of these relationships.

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<sup>37</sup> United Nations Charter (Preamble)

<sup>38</sup> For instance the rights to property and contract have been regarded as fundamental to the American system. Property in this sense is given a broad definition to encapsulate labor where the worker shall be employed in a manner which is most beneficial to him and of others to employ such labor are constitutionally safeguarded. These are shown in Amendments V and XIV of the United States Constitution.

<sup>39</sup> (n.37) 265

<sup>40</sup> Jessup (n.18) 35.

<sup>41</sup> Adekoyejo D.A.: "Pension Law in Nigeria", (Crescent Law Consulting, Lagos, 2006) 25

<sup>42</sup> *Ejitağa v P.H.M.B* (1995) 2 NWLR (Pt 376) at page 189

This is essentially due to the fact that the relationship is created for the employees benefit and the party in whose custody the pension funds are has dominating right over the funds until the events happens whereby such funds can now be transferred to the custody of the employee/beneficiary. With the growing acceptance of the rights of workers to some basic income for subsistence upon the end of active working life, it became essential to establish legal foundation for the payment of pensions and not leaving it to welfare justifications which while commendable would not justify the continuous payment of income to persons who were no longer wage earners in the strict sense of that word<sup>43</sup>.

According to Wilgus, these annuities, after the expiration of active service, are not gratuitous but are by their nature compensation for services previously rendered for which full and adequate compensation was not received at the time when the services were rendered. He categorises pensions as pay withheld to induce long, continued and faithful service<sup>44</sup>. Pension became a creature of statute and subject to statutory regulation<sup>45</sup>. Approaches to justifying the legal basis for the establishment of pensions as a right in law vested in a worker upon the completion of requisite years of service led to the emergence of two legal rationales. The first is the contractual approach while the other is the property based approach.

The contractual approach is basically premised on the fact that the right to pension is a right inherent in the contract of employment because an employee has continued in the service to which the pension rights have attached as part of the compensation agreed to be paid in consideration of the whole term of service rendered until the end of retirement. Pension when so granted cannot be divested<sup>46</sup>.

Also the contractual based approach argues that the element of continuous payments to a pension plan or pension scheme is due to the promise of the initiators of the pension plan or scheme initiators to provide 'definitely determinable' benefits after retirement. As a result of this, the employer thus assumes a definite contractual obligation to set aside a certain percentage of present earnings to provide future income in order to fulfil this promise<sup>47</sup>. The property based approach is predicated on the premise that pensioners have a property interest in funds which would constitute a buffer for them in post retirement years. Due to this

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<sup>43</sup> T. Mullen: Legislation; The Social Fund- Cash Limiting Social Security (1989) 52 *Michigan Law Review* 53

<sup>44</sup> Wilgus (n.33) 48

<sup>45</sup> *Nigerian Security Printing and Minting Company v Adekoye* (2003) 16 NWLR (Pt 845) at page 12

<sup>46</sup> A.D Lurie: 'Plastic Contributions for Pensions and Profit' (1957-58) 67 *Yale Law Journal* 1003

<sup>47</sup> R. Nobles: 'Pensions: The New Framework' (1986) 49 *Michigan Law Review* 43



reasonable expectation of pension benefits and the hardship it would create if this reasonable expectation is defeated, pensioners have a property interest in pension funds<sup>48</sup>. This property approach is designed to protect the employee's core expectation of a level of retirement benefits assuring a certain standard of living and a minimum of financial security in later life.

The property based approach best explains the setting up of pension plans and scheme with those administering such plans and schemes assuming trustee status over the yet to be accessed pension funds which now transmutes into trust property. The employees are the beneficiaries to the trust and towards them the trustees stand in fiduciary relationship<sup>49</sup>. The purpose of placing the pension funds in the hands of competent trustees is to protect the funds from intermeddling by employer contributors and also protect the even employee from the consequences of his own extravagance<sup>50</sup>.

In general, a beneficiary can challenge an investment decision made by the employee only where the claim is based on the fact that the trustee has acted beyond his area of discretion. This rule captures the common law principle of deference to the decisions of the trustees made in good faith and the objective of mooting frequent interference with the good faith decisions of the trustees<sup>51</sup>.

### 1.5 Legal Framework for Pensions Prior to the Pensions Reform Act, 2004

The legislation guiding social security and by extension the pensions regime prior to 1979 were the piecemeal pensions laws mentioned above<sup>52</sup>, the National Provident Fund Act (NPF Act) 1961 as amended<sup>53</sup> and the Workmen's Compensation Act<sup>54</sup>. While the pension laws dealt with the post retirement emoluments of public sector employees, the Workmen's Compensation Act is primarily concerned with compensation payable to a worker upon injury during the course of his employment. In order to establish liability under this Act, it must be shown that the claimant is a workman within the meaning ascribed to it by the Act and that the accident giving rise to the injury must have arisen out of and in the course of employment<sup>55</sup>.

<sup>48</sup> *Spina v Consolidated Police and Firemen's Pension Fund Commission* (1964) 41 New Jersey Reports, 391, *City of El Paso v Simmons* 379 U.S. 497 (1965) all cited in A.D. Lurie (op cit) at page 1016

<sup>49</sup> Mayys Abla: *Law of Trust* (Sweet and Maxwell Publishers, London, 2001) 14

<sup>50</sup> R. Nobles (n.48) 46

<sup>51</sup> 'Public Employee Pensions in Times of Fiscal Distress'; A Report of the Pension Task Force of the Sub-Committee on Labour Standards, House Committee on Education and Labour, 29<sup>th</sup> Congress, 2d Session, Interim Report on Activities I (hereinafter cited as TASK FORCE REPORT) in (1976) 90 *Harvard Law Review* 993.

<sup>52</sup> See note 23 above

<sup>53</sup> Amended by the National Provident Fund Act No.17 of 1984, The National Provident Fund (Management Board) Act No. 39 of 1974, the National Provident Fund (Amendment) Act No. 35 of 1976

<sup>54</sup> Cap W6 Laws of the Federation of Nigeria 2010

<sup>55</sup> G.G. Otuturu: 'Employer's Liability for Personal Injuries Under the Workmen's Compensation Act' in "Labour Law Review; *Nigerian Journal of Labour Law and Industrial Relations*" B. Atilola (Ed) Vol.1 No.4 (Hybrid Consult, Lagos 2007) 1

The National Provident Fund Act on the other hand established the National Provident Fund as a compulsory savings scheme for workers who constitute the members of the fund. This type of social security arrangement is common to most developing countries and was a feature of post independent Africa<sup>56</sup>. A provident fund is a type of social security scheme that encourages regular savings through compulsory employee contributions or salary reductions. The contributions from an employee's account are usually invested in a single publicly managed fund for future benefit payments in the event of any of the covered contingencies arising<sup>57</sup>.

Financing for the fund in Nigeria arose from contributions in equal proportions by employers and workers. The Fund was designed to cater for workers primarily in the private and public sector workers who were not beneficiaries of the extant pension schemes. As a result of this, the scheme provided for private sector employers with not less than ten workers, as well as missionary societies who desired to join the scheme. Casual workers were expressly excluded<sup>58</sup>.

The NPF Act essentially provided for three benefits, these are old age benefit, survivor's benefit and invalidity benefit<sup>59</sup>. It required equal employee and employer contributions of four naira per month<sup>60</sup>.

In spite of its laudable objectives, the NPF didn't quite attain the envisioned success which resulted in its replacement in 1993 by the Nigerian Social Insurance Trust Fund which was established by decree No. 73 of 1993.

### 1.5.1 The Pensions Act (1979)

This Act was significant in the sense that it provided a unitary pension scheme for members of the public service and government parastatals<sup>61</sup>. The Act covered the civil service at the federal, state and local government levels, the armed forces, police and public enterprises. It made extensive provisions for gratuities and pensions to these public servants on a pay as you go (PAYG) basis<sup>62</sup>.

<sup>56</sup> Odulana (op cit) According to him, Ghana the provident fund scheme was set up in 1965 but replaced it with social insurance programs in 1991.

<sup>57</sup> L. Gibbs: 'The Big Retirement Headache' (Money Magazine, April 27 2005) 12

<sup>58</sup> C. K. Agomo (n.16) 186

<sup>59</sup> Section 20 (1) (a)

<sup>60</sup> C. K. Agomo (n.16) 187

<sup>61</sup> J. E. O. Abugu (n.3) 346

<sup>62</sup> The scale of gratuity ranged from 100% to 300% of terminal emoluments for retirees who had spent between 10 to 35 years of pensionable service except for certain groups such as judges, members of the armed forces, university professors, heads of service and permanent secretaries.



For the purpose of this study, it is significant to note that the scheme was non contributory and payments made there under were borne by the Federal government alone and expressly charged to the Consolidated Revenue Accounts of the Federation. The state governments were also responsible for the funding retirement benefits of their retired civil servants from their Consolidated Revenue Fund<sup>63</sup>.

For the purpose of the employees of the parastatals, the Government attempted to fund their pensions and emoluments by means of a policy directive instructing the heads of these parastatals to set aside 25% of the total emoluments of their staff to pension funds to offset the entitlements of retiring staff. Interestingly, the Federal Government still paid the entitlements of state civil servants up to March 31<sup>st</sup> 1976<sup>64</sup>. Section 3 of the 1976 Act explicitly states when a public officer is entitled to enjoy gratuity and pension<sup>65</sup>.

On funding of public sector pensions, the Federal government found itself facing the dilemma previously faced by advanced countries in the sense that it had bitten off more than it could chew. This was because the financial burdens imposed by funding the pensions of public servants proved to be overwhelming for the fledgling Nigeria in the same way it had been overwhelming for the more seasoned United States of America and the United Kingdom<sup>66</sup>. Due to the fact that in these advanced nations, public sector pension systems had swallowed up increasingly large shares of state and local revenues, financially troubled governments sought private sector intervention in the holding, management and investment of pension funds<sup>67</sup>.

In Nigeria, it became apparent as the decades passed and the pension bills were never really paid off that the government needed to take the initiative of inviting private sector participation in the management and investment of pension funds and restrict itself to oversight functions in an independent supervisory

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<sup>63</sup>In accordance with Section 15 (10) of the Act, the benefits of state government employees who retired by March 31 1976 were fully paid by the Federal Government.

<sup>64</sup>J.E.O Abugu (n.3) 347

<sup>65</sup> Upon voluntary retirement after putting in 15 years of service from April 1<sup>st</sup> 1976, on compulsory retirement after attaining the age of 60 years after arch 31 1977 or being required by the Minister of Labour to retire, having attained the age of 45, on compulsory retirement for the purpose of facilitating improvements in the organization of the officer's department or ministry so that greater efficiency or economy may be effected, on the advice of properly consulted medical board certifying that the officer is no longer mentally or physically able to carry out the functions of this office, on total or permanent disablement while in the services, on his retirement from the Federal Civil Service Commission arising from the abolition of his office, if he is required by the Federal Government to retire on the ground that his retirement is in the public interest, on his taking up an appointment in a local government as the head thereof with the prior consent of the Minister for Labour.

<sup>66</sup>(n.52) 1025

<sup>67</sup>(*Ibid*).

capacity<sup>68</sup>. This assertion shall be examined in greater detail in a subsequent part of this study.

The next part of this study shall examine private sector pension framework which existed in Nigeria prior to the 2004 Act.

### 1.5.2 Pre- 2004 Private Sector Pension Structures in Nigeria

#### *The National Social Insurance Trust Fund (NSITF) Scheme*

This was the first concerted attempt to regulate private sector pensions in Nigeria. The fund was instituted by the National Social Insurance Trust Fund Act<sup>69</sup> as a pension institution and fund manager to operate a pension scheme for workers in the private sector. Abugu contends that while the government had been the sole custodian of public sector pension schemes, the private sector had been left largely unregulated; the private sector was left largely unregulated apart from individual pension initiatives by employers in the organised private sector<sup>70</sup>. He goes on to state that these private sector initiatives took the form of insurance or trust schemes<sup>71</sup>.

Oversight of the affairs of the fund was vested in a management board which constituted a chairman, two persons; each representing the Nigerian Employers Consultative Association and the Nigerian Labour Congress, one representative each from the Federal Ministry of Labour and the Central Bank of Nigeria, three executive directors and a managing director<sup>72</sup>.

The Act applied to every person employed by all incorporated companies and partnerships including sole proprietorships with staff strength of no less than 5. All employers to which the Act applied were required to register with the fund, the operation of the fund expressly excluded members of the public service of the federal, state and local governments<sup>73</sup>.

Contributions under the Act were payable on a monthly basis and were computed by reference to the employees wages. The rate of contribution was 6.5% and 3.5% of the total salary for the employer and the employee respectively. Attempts at dodging contributions by means of presenting false or misleading information or deceptive documentation was made an offence under the Act and punishable upon conviction by a term of imprisonment for one year or a fine of ₦ 10,000 (Ten thousand Naira).

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<sup>68</sup> Bernard Casey: 'Pension Reform in Nigeria; How not to Learn from Others', 5<sup>th</sup> International Research Conference on Social Security, Warsaw, 5-7 March 2007- [www.issa.int/pdf/Warsaw07/2](http://www.issa.int/pdf/Warsaw07/2). Last viewed on May 12<sup>th</sup> 20015 (hereinafter cited as PENSION REFORM IN NIGERIA.....)

<sup>69</sup> No. 73 of 1993

<sup>70</sup> J.E.O Abugu (n.3) 347

<sup>71</sup> *Ibid*

<sup>72</sup> Section 4(1) Act No. 73 of 1993

<sup>73</sup> Sections 10 and 11

Under the Act, the an employee, upon fulfilment of all the pre-requisites, was entitled to retirement pension, retirement grant, survivor's benefit, death grant, invalidity benefit and all other benefits as may from time to time approved which benefits were tax free and not liable to claim or attachment for debt in any manner<sup>74</sup>.

According to Adekoyejo<sup>75</sup>, different private sector organisations operated private pension schemes and gratuity schemes for the benefit of their employees. These arrangements were usually under the custody of independent pension fund institutions<sup>76</sup>. It therefore goes without saying that prior to the year 2004, pension fund managers and administrators existed to service the organised private sector which constituents designed private devices to check the excesses of these managers and administrators.

According to Abugu, these private sector arrangements were contractual in nature and required individuals to make regular payments which were usually monthly, over a number of years therefore providing the fund managers with a steady stream of income from which investments could be made. He identifies the principal feature of these institutions as being the long term nature of their liabilities which enabled them to make long term investments in areas of project finance and investment in long term securities<sup>77</sup>.

The income from these investments and resulting rise in capital base provided regular funds by which pension and gratuity obligations were met. In addition to this, there existed pension contracts put in place by individuals to ensure a comfortable retirement upon cesser of their working life. These were available to the self employed and those in non pensionable employment and served as supplementary income for these classes of people. These services were primarily offered by life assurance companies<sup>78</sup>.

In Nigeria, the gradual evolution of pension schemes under the pre-2004 regimes did not give rise to the private management of public and private sector pension funds by independent professionals operating outside government regulation save for statutory and institutional supervision as is the case in the present pension regime. This is a far cry from the situation obtainable in Europe and other developed countries where in the United Kingdom for instance, pooled pension funds operate through two types of legal entity to wit; exempt unit trusts and managed pension funds<sup>79</sup>.

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<sup>79</sup> Odulana (n.21) 5

<sup>74</sup> Section 16 of Act No. 73 of 1993.

<sup>75</sup> (n.42), 7

<sup>76</sup> *Ibid.*

<sup>77</sup> (n.3), 348

<sup>78</sup> *Ibid.*



### 1.6 Challenges Posed by the Pre- 2004 Pensions Administration Regimes

The regulation of pensions prior to the implementation of the Pension Reform Act 2004 was fraught with challenges and limitations. According to Modibo.<sup>80</sup>

1. “....Typically, the world over, the Pay as You Go Defined benefit Scheme that operated in Nigeria prior to 2004 is burdened with a lot of problems and had increasingly become unsustainable. For example, the Nigerian Railway Corporation (NRC) generates only N30 million as revenue monthly but pays N200 million monthly as salary. Furthermore, the military exhibits the most graphic example of the collapse of the pension system in the public service in Nigeria. Soldiers retire and wait for upward of one year before they are paid their gratuity and have pension arrears of one year.
2. Against the backdrop of an estimated N2 Trillion national pension deficit, and 216,000 retirees from the Federal public service being owed a whopping N56 billion in retirement benefits, arbitral increase in salaries and pensions as well as poor administrative structures, the need for pension reform was glaring.”

In the first instance the administration of pension was done on an ad-hoc basis without a central regulating body. In the public sector, each ministry and parastatal had a pensions department or unit which handled disbursements of incomes to retired staff when such monies were remitted to the units. In the private sector, the regime imposed by the NSTIF had no way of enforcing contributions from employers and such contributions made became liable to misappropriation by the administrative bodies concerned<sup>81</sup>.

Due to poor administration, escalating cost of living and the non contributory nature of the pension structures, failure to invest the pension funds to ensure increase in capital base to meet up with the arbitral increase in pension entitlements which of course were a reflection of the arbitral increases in salaries, there was system failure when the funds existing for

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<sup>80</sup> A.M Modibo : “Contributory Pension Scheme and the Pension Reform Act 2004” in *Labour Law Review*, Vol. 1 No. 1, Atilola B (Ed) (Hybrid Consult, Lagos 2007) p.45

<sup>81</sup> Obioma B: “Federal Government Spends 50bn on Pensions Contributions” *Daily Independent*, Wednesday, April 5<sup>th</sup> 2006 p.6

the payment of pension entitlements were inadequate when compared with the sheer financial weight of the entitlements to be paid to the workers<sup>82</sup>.

Abugu ascribes this failure to lack of opportunity for investment as there existed no cache of investible funds due to the fact that the Federal, state and local governments took upon themselves the paternalistic role of payment of pension from their coffers as it were. He goes further to contend that in the light of this paternalistic approach, there was great propensity on the part of government to defer pensions in favour of other more pressing commitments like wage bill, capital infrastructural development projects. He states further that the government also contributed to the problems of pensioners by the inadequate and late release of pension funds as well as arbitral increase in salaries without the full assessment of the short and long term implications of these increments<sup>83</sup>.

In the private sector, the retirees were affected by the poor pension structure available in Nigeria due the fact that their 'right' to pension upon cesser of their employment life arose *ex-contractu*. This means that the employee's pension is dependent on the contract of employment. In the event of the contract of employment being terminated<sup>84</sup>, the pension entitlements of the worker abate also.

In this situation, the position of the worker in the Nigerian organised private sector is very shaky indeed due to the fact that the worker had no recourse in the event of untimely termination of employment except where he had the foresight to secure his future by means of private investments<sup>85</sup>.

The non contributory nature of the scheme also posed a lot of problems due the fact that it exacerbated the problems of the already riddled pension administration system. In the public sector, the retirement emoluments of workers were paid directly of as a Pay as You Go premise from the Consolidated Revenue Fund and this was provided for in the budget annually. The late release of funds inherent in the Nigerian fiscal system deadlocked this initiative.

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<sup>82</sup> Benard Corsy (n.69) 8

<sup>83</sup> J.E.O Abugu (n.3), 348

<sup>84</sup> One needs to be guided by the fact that except for the employments having 'statutory flavour', in Nigeria, a contract of employment can be terminated for a good reason, a bad reason or no reason at all (*Daodu v UBA Plc*, [2004] 9 NWLR {Pt 878} page 276). In the event of this situation arising as it so often does in Nigeria, the employee is left stranded as retirement benefits were payable only upon reaching the requisite age or circumstances as stated in the contract of employment arise. The only obligation of the employer to the employee being to pay one month's salary in lieu of notice.

<sup>85</sup> S. Erugo: "Security of Employment in Nigeria: A Case for Statutory Intervention" in *Labour Law Review; Nigerian Journal of Labour Law and Industrial Relations* Vol. 1 No. 1 Bimbo Atilola (Ed) (Hybrid Consult, Lagos, 2007) 60.

Apart from this, majority of the public enterprises had funded schemes and it was a requirement that they set aside a minimum of 25% of the total entitlements of their workers to pension funds from which these emoluments were paid<sup>86</sup>. Most public enterprises failed to set aside the requisite 25% which gave rise to indebtedness to the retired workers of these enterprises. There was also the erroneous assumption on the part of these enterprises that their contribution should be limited to the said 25% rather than that percentage being a benchmark from which they could go higher and set aside higher sums<sup>87</sup>.

Abugu also states that this contributions were designed to meet the projected and therefore planned for retirement of staff but failed to cater for the unplanned for retirements which imposed greater burden on the funds set aside for retirement emoluments and caused strain on the already insufficient funds where they were even available<sup>88</sup>.

The regime prior to the 2004 Act had no data or statistical analysis to act a guide in government's decision making. There was no accurate information base upon which the government could be guided in actually ascertaining the number of retirees existing in the Nigerian public and private sectors. There was also no centralized database of retirees or prospective retirees and no valuation taken of parastatal pension schemes. Where such valuation was undertaken, there was inadequacy of reporting procedures or machinery for monitoring contribution payments at rates considered satisfactory<sup>89</sup>.

The perhaps obvious effect of this lapse was the rise of ghost workers and ghost pensioners with retirement emoluments being paid to workers who didn't actually exist or who had died with people collecting benefits fraudulently.

In the private sector however, the issue of 'ghosting' was virtually nonexistent but pension schemes were structured in the form of resignation schemes and aimed at ensuring employee loyalty.

The pension administration regime existing in this period also suffered a failure of governance in the sense that the governance structures available were weak and this guaranteed lapses in the system. In the absence of adequate reporting and investigating mechanisms, it was therefore not surprising that there was difficulty in benefit administration.

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<sup>86</sup> This was revised by Establishment Circular PEN.92138/s.28/195 of January 30, 1997. This circular directed also that actuarial valuations should be carried out on all parastatal's' schemes every three years for the observance of the 25% minimum funding percentage

<sup>87</sup> J.E.O Abugu (n.3) 349

<sup>88</sup> (*ibid*)

<sup>89</sup> B. Casey (n.69) 10



The administrators of pensions found it difficult to establish initial claims and difficulty of access to records of retired staff due to the absence of records. The absence too of a central administrative and supervisory body ensured that there was virtually no external monitoring of the administration of pensions and this led to virtual indifference on the part of the administrators in execution of the functions of their offices<sup>90</sup>.

Abugu adds that the pension's regime prior to 2004 gave legal foundation to workers employed in the federal public service and organisations listed in Schedule II of the Pensions Act (1976). He expresses the view that the Act was perhaps enacted with the intent that each state of the federation would subsequently enact its own pensions law. The states followed guidelines of pension regulation which came from the various offices at the federal level without the expected legal codification<sup>91</sup>. As a result of this, there was no legislation governing pension rights in the state and local governments as well as in the private sector.

In concluding this segment of the paper, it would be apt to draw the inference that pension rights prior to the enactment of the pension Reform Act (2004) had little legal relevance for workers in the private sector as the provisions of the NSITF Act were inadequate and the Pensions Act applied to public sector workers.

### 1.6.1 The Pension Reform Act 2004<sup>92</sup>; a critique

The Act bears the burden of regulating the pension structure in Nigeria<sup>93</sup> which has since its commencement been left largely in the hands of private sector custodians and administrators with a government body in the form of the National Pension Commission providing supervisory and regulatory oversight of these private sector operators. There have however been reservations regarding the suitability of the Act to provide a statutory framework for this purpose given the limitations imposed by its sections.

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<sup>90</sup> G. Ajuyah: 'Strengthening the Legal Framework for Social Security in Nigeria- A Perspective on the Pensions Reform Act 2004' (Unpublished Seminar paper presented to the Faculty of Law, University of Lagos LLM Labour Law Class on 20<sup>th</sup> May 2008) 11

<sup>91</sup> J.E.O Abugu: (n.3) 350

<sup>92</sup> This Act has been repealed by the Pension Reform Act (2014) which will be studied in the next segment of this study.

<sup>93</sup> In *Nigeria Security Printing and Minting Company v Adekoye & 20 Others* (2003) 16 NWLR (Pt 845) the Court stated that the object of the Pension Act was to 'ensure that payment due to retired public servants are made secure by law rather than subjecting the same to the vagaries of contractual agreements between employers and employees. It is an arrangement to ensure stability in the payment of pension; it also makes provisions as regards the class of persons eligible for payment of pensions.....' This dictum is also applicable to the provisions of the Pension Reform Act (2004)

In the first instance, Section 1 of the Act states the persons to which its provisions can pertain to<sup>94</sup>. While it is clear that the Act is rightly applicable to workers in the public service of the Federation and the Federal Capital Territory due to the provisions of Section 4 and item 44 of Part 1 in the 2<sup>nd</sup> Schedule of the Constitution of the Federal Republic of Nigeria (1999)(as amended)<sup>95</sup>, the Act does not extend its amplitude to cover workers in the public service of the state governments by reason of the fact that state pensions are not chargeable to the Consolidated Revenue Fund of the Federal Government but are rather charged to the Consolidated Revenue Funds of the State Government. Perhaps for the purpose of argument one may state that Item 34 of Part 1 in the 2<sup>nd</sup> Schedule of the Constitution which gives the National Assembly power to legislate on 'Labour, including trade unions, industrial relations; conditions, safety and welfare of labour; prescribing a national minimum wage for the Federation or any part thereof; and industrial arbitrations', gives the National Assembly power to extend the Act to cover workers in the public service of the states to the extent that provision is made for the '*welfare of labour*' as an item over which the National Assembly has power to legislate.

While the Act is made applicable to the private sector in respect of any organisation with five or more workers, the legislators seemed not to have averted their minds to the fact that private sector funds are not chargeable to the Consolidated Revenue Fund of the Federation. An attempt to smuggle the private sector pension regulation by the Act would be to invoke the '*welfare of labour*' clause espoused in item 34 discussed above.

Even where an attempt is made to do this as regards to the private sector the Act again entraps itself by limiting the private sector participants to those organisations who have not less than five employees<sup>96</sup>, who have registered as closed pension fund administrators with pension funds holdings of N500, 000,000.00 and above and satisfies all other onerous requirements or in the alternative have registered with a pension fund administrator to which the pension funds have been remitted<sup>97</sup>. This provision is clearly discriminatory of those employers who may not be able to scale the hurdles imposed by the Act. A less onerous but equally workable alternative should have been provided for members of the private sector who would wish to participate in this statutorily regulated pensions regime.

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<sup>94</sup> Section 1 makes the Act applicable to only to all employees in the public service of the Federation, the Federal Capital Territory and the private sector.

<sup>95</sup> By these provisions, the Federal Government has exclusive legislative power to make laws only with respect to 'pensions, gratuities and other like benefits payable out of the Consolidated Revenue Fund or any other public fund of the Federation.....'

<sup>96</sup> Section 1 (2)(b)

<sup>97</sup> Section 40 and 41 of the Act

For the purpose of institutional regulation of pension fund administrator and custodians, the Act provides for the establishment of a National Pension Commission<sup>98</sup> which has regulatory oversight over the players in the Nigerian pension arena. The Commission ensures the regulation, supervision and effective administration of pension matters in Nigeria.

To facilitate its objectives, the Commission issues guidelines for the licensing, approving, regulating and monitoring the pension funds held by the custodians and managed by the administrators<sup>99</sup>. The Commission is also empowered to receive and investigate any complaint of irregularity levelled against pension fund administrators, pension fund custodians and their staff. The functions and powers of the Commission shall be extensively discussed in the subsequent parts of this study.

Suffice it to say for now that in making provisions for the object and functions of the Commission, the law makers have granted the Commission extensive powers which may have been granted in vain to the extent that the Commission would lack the ability to enforce such powers. An example of such powers would be the authority granted the Commission to suspend the powers of board of directors of erring pension fund administrators and custodians notwithstanding the provisions of the Companies and Allied Matters Act<sup>100</sup> and appoint administrators to manage the affairs of such pension fund administrators and custodians<sup>101</sup>. It is with greatest respect difficult to envision how this provision of the Act can be enforced without recourse being taken in the provisions of the Companies and Allied Matters Act which the Act has expressly excluded<sup>102</sup>. This is with due regard given to the fact that pension fund administrators and pension fund custodians are required to be companies within the meaning of the Companies and Allied Matters Act<sup>103</sup>. A better approach would have been the powers of suspension of the board and appointment of administrators to be vested in the Federal High Court upon the application of the Commission on reasonable suspicion of failure of the custodians or administrators to discharge their functions. Further examples of powers granted to the Commission in vain will be discussed in later parts of this study.

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<sup>98</sup> Section 14

<sup>99</sup> Sections 44, 45 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56

<sup>100</sup> Cap C Laws of the Federation of Nigeria (2010)

<sup>101</sup> Section 54 (5) of the Pension Reform Act

<sup>102</sup> Especially giving regard to the corporate personality principle and instances where it is permissible to lift the veil of incorporation and permissible instances where the powers of the Board may be suspended and external bodies appointed to run the affairs of companies.

<sup>103</sup> Section 50 (1) (a) and Section 52 (1) (a) of the Pension Reform Act



As regards its provisions covering the NSITF<sup>104</sup>, the Act is silent on the fate of those contributors to the NSITF who by virtue of the its stipulations do not fall within the delineations set by it as regards eligibility to participate in the contributory pension scheme which it espouses. It is therefore not clear whether these categories of persons are to continue with the scheme under the NSITF. This is particularly germane in view of the fact that the provisions of the NSITF have been amended to reflect the provisions of the Pension Reform Act<sup>105</sup>. A better position would have been the express amplification of the status of people ineligible to participate in the pension scheme in order to clarify their status under the present regime.

The Act also provides for the rights of existing pensioners and people who had three years or less to retire upon commencement of the new regulatory regime. As stated earlier, existing pensioners prior to the enactment of the Act are catered for under the Pension Transitional Arrangements Departments while who were current participants in pension schemes prior to the commencement of the Act are catered for in the manner prescribed as regards the public and private sector arrangements<sup>106</sup>. The Act does not however make provision for the gradual eclipsing of these ad-hoc arrangements and the main streaming pension bodies into the current legal and organisational structures provided by it. This lacuna gives room for conjecture as to what would be the exact status of the Transitional Arrangement Boards once the purpose for which they were established no longer becomes tenable.

In the area of dispute resolution mechanisms, the Act makes provision for administrative review of the decisions of a pension fund administrator or custodian by the Commission at the written instance of a dissatisfied employee or beneficiary<sup>107</sup>.

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<sup>104</sup> Section 42 of the Act provides that the Nigeria Social Insurance Trust Fund shall establish a company to undertake the business of a pension fund administrator in accordance with the provisions of the Act (1). The section goes further to say that funds in the custody of the NSITF which constitute contributions of participants under the scheme should be remitted into respective retirement savings accounts for the benefit of the participants (2). The section further gives a participant under the NSITF the option of moving his funds to a pension fund administrator of his choice after five years. Funds previously in the custody of the NSITF are mandatorily transferred to a custodian at the commencement of the Act (6), under the direct supervision of the Commission (7).

<sup>105</sup> Section 71 (3)

<sup>106</sup> Section 8 (1) and (4) of the Act

<sup>107</sup> 92(1)

This administrative review is for the purpose of ascertaining the compliance of the offending administrator or custodian with the provisions of the Act or regulations made under it<sup>108</sup>. It is not for purposes of intervention in the decisions made by these custodians or administrators which provoked the dissatisfaction of the complaining employee or beneficiary. The Commission is also enjoined to make its review in a manner that would avoid delay by disposing of any application before it within three months<sup>109</sup>.

The regulatory purpose of the Commission would have been better served if such review was for the purpose of intervention in the unfavourable decisions of erring administrators or custodians.

In the event of dissatisfaction with the decision of the Commission<sup>110</sup>, an aggrieved party is empowered by the Act to seek recourse to arbitration proceedings as laid down by the provisions of the Arbitration and Conciliation Act<sup>111</sup> or to the Investments and Securities Tribunal which was established pursuant to the Investment and Securities Act<sup>112</sup>. Decisions made by these bodies are binding on the parties and enforceable in the Federal High Court<sup>113</sup>.

The efficiency and speed visualised by these provisions of the Act would have been attainable if the Act had made provisions for a quasi-judicial body and vested in it powers to hear disputes and give recommendations enforceable in courts of competent jurisdiction.

Saddling other bodies established under different laws with the powers to hear and resolve disputes arising from the provisions of the Act would not aid the quick and efficient resolution of disputes but would exacerbate inefficiency due to administrative cogs that would inhibit such adjudication or arbitration as the case may be.

An alternative to this transfer of dispute resolution powers would be the establishment of a Pensions Tribunal modelled after the Securities and Exchange Tribunal which was established pursuant to Section 284 the Investment and Securities Act of 2007. This tribunal would rightly adjudicate over pension disputes under the supervisory jurisdiction of the Federal High Court.

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<sup>108</sup> (*ibid*)

<sup>109</sup> Section 92 (3)

<sup>110</sup> Section 93

<sup>111</sup> Cap A2, Laws of the Federation of Nigeria (2010), also Y. A. Dauda: 'Employment of Independent Arbitrators in the Management of Trade Disputes and Industrial Crisis in Nigeria' in *"Labour Law Review; Nigerian Journal of Labour law and Industrial Relations"* B. Atilola (Ed) Vol.1 No.1 January 2007 (Hybrid Consult, Lagos 2007) 35

<sup>112</sup> Act No. 2007

<sup>113</sup> Section 94

Another alternative would have been for the Act to vest the settlement of disputes arising from employer/employee dissatisfaction with the conduct of pension fund administrators or custodians in the National Industrial Court. This is due to the fact that the court is already vested with the power to adjudicate over labour disputes<sup>114</sup> and the matters under consideration in this instance would be the settlement of dispute between administrators and custodians and employers/employees as regards the conduct of the former group. Even though one could counter this position by stating that by virtue of the Constitution of the Federal Republic of Nigeria 1999, the Federal High Court is the proper forum for such adjudication, the labour slant of the matter under consideration would justify the intervention of the National Industrial Court.

The Act provides strict stipulations on how pension funds shall be invested. Apart from stating that the objectives for investment of pension funds shall be safety and fair returns on the amounts invested<sup>115</sup>, the Act goes further to state that pension funds and assets shall be invested in the areas strictly set out in Section 73 (1) (a)-(i)<sup>116</sup>. While it is true that in other jurisdiction pension funds have become a veritable source of investible funds and have led to the rise of an energetic sector of the economy, it is doubtful that leaving areas of investment to the broad categorisations laid down by the act without enabling rules for monitoring the adherence to these rules would actually ensure compliance to these delineations set down by the Act.<sup>117</sup>

### 1.6.2 The Pension Reform Act (2014); an Overview

The Pension Reform Act (2014) was enacted by the National Assembly of the Federal Republic of Nigeria on July 1, 2014 to repeal the 2004 Pension Reform Act. The objective of the Act is to create a more effective pension administration scheme in Nigeria, to boost the

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<sup>114</sup> F. Agbaje: "The Legal and Constitutional Anatomy of the New Industrial Court Act (2006) in *"Labour Law Review; Nigerian Journal of Labour Law and Industrial Relations"* B. Atilola (Ed) Vol. 1 No. 1 January 2007 (Hybrid Consult, Lagos 2007) 73

<sup>115</sup> Section 72

<sup>116</sup> These items are for the present restricted to bonds, bills and other securities issued or guaranteed by the Federal government and the Central Bank of Nigeria, bonds, debentures redeemable preference shares and other debt instruments issued by corporate entities and listed on the Stock Exchange under the Investments and Securities Act, ordinary shares of public limited companies listed on a Stock Exchange registered under the Investment and Securities Act 1999 with good track records having declared and paid dividend in the preceding five years, bank deposits and bank securities, investment certificates of closed end investment funds or hybrid investment funds listed on a stock exchange registered under the Investments and Securities Act 1999 with good track records of earnings, units sold by open end investment funds or specialist open end investment funds listed on the Stock Exchange recognized by the Commission, bonds and other debt securities issued by listed companies, real estate investment and such other instruments as the Commission may from time to time prescribe.

J.E.O. Abugu (n.3) 357

<sup>117</sup> Section 2



general participation in the Pension reform scheme and to legally enforce worker 'welfarism'.<sup>118</sup>

A major feature of the Act is the creation of a uniform Contributory Pension Scheme that applies to both public and private sectors in Nigeria.<sup>119</sup> The scheme uniformly applies to all employees in the service of the Federation, the Federal Capital Territory and private sectors of the economy and is meant to ensure that workers receive their retirement benefits as at when due. The Act however maintains the policies of earlier pension laws, including the Pension Reform (Amendment) Act (2011)<sup>120</sup>; the Universities (Miscellaneous) Provisions Act (2012)<sup>121</sup>, the Pension Fund Custodians (PFC), the Pension Fund Administrators (PFA), and the National Pension Commission ('the Commission') by the 2004 Act.

Other key ingredients of the Act which differs it from the 2004 Act is the increment in contribution rates<sup>122</sup> from 7.5% under the former dispensation for all employees in both private and public sectors, to 10% and 8% in the public and private sectors respectively under the 2014 pension dispensation. In the event that an employer elects to bear full responsibility of the Scheme, the employer is under obligation to pay a minimum of 20% of the employee's monthly emoluments, which is 5% more than the requirement under the old Act.

Monthly emolument was defined in the 2004 Act as 'a total sum of basic salary, housing allowance and transport allowance'.<sup>123</sup> This position has undergone modification under the 2014 regime which defines monthly emoluments as 'total emolument as may be defined in the employee's contract of employment but shall not be less than a total sum of basic salary, housing allowance and transport allowance'.<sup>124</sup> There is no gainsaying the fact that this new definition favours employee participation in the scheme as it prevents an interpretation of 'total emolument' in a way disadvantageous to the employee.

Apart from the other modes of investment of pension funds open to the PFAs under the 2004 regime, Section 86 of the 2014 Act has included Specialist Investment Funds to the list of options available to PFAs in the area of investment of pension funds. There is however a rider in the same section that all investment portfolios should ensure the protection of pension funds resources.

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<sup>118</sup> Section 1

<sup>119</sup> Section 3

<sup>120</sup> This is an Act to 'exempt personnel of the Military and Security Agencies from the Contributory Pension Scheme' (Source: Preamble of the Act).

<sup>121</sup> This Act reviewed the retirement age and benefits of university professors

<sup>122</sup> Section 4 of the 2014 Act which differentiates it from Section 9 of the 2004 Act

<sup>123</sup> Section 102 of the 2004 Act

<sup>124</sup> Section 120 of the 2014 Act

### 1.7 Conclusion; Towards a Peoples' Pension?

This work has attempted to examine pension laws in Nigeria for the embryo period to contemporary legislative devices. While highlighting the rationale behind each pension enactment and highlighting their shortcomings where applicable, this work has attempted to show where succeeding enactments have improved upon the pitfalls of the previous ones.

The application and effectiveness of pension laws in Nigeria have not been without hitches and drawbacks. They have not also been bereft of unforeseen contingencies. This is to the mind of this writer indicative of the fact that a legislative enactment must first pass the twin test of efficiency in application and relevance to the domestic circumstances where it is applied. It is however gratifying that in the last century, pension legislation in Nigeria has been dynamic and continues to evolve as a response to emerging trends and global standards. While it is hoped that other legislative enactments follow the trend set in the terrain of pension laws, legislative responsiveness in the area of pensions will continue to be keenly anticipated. The current applicable law is yet to be tested *via* judicial decisions and administrative compliance. This is certainly where its efficacy can be ascertained and its shortcomings observed and highlighted.

The 2014 Act has expanded cadres of offences and penalties for the contravention of the stipulations of its provisions under Part XIV. Any attempt to commit an offence under the Act is outlawed and the penalties for attempting to commit a crime and the successful commission of the said crime are the same.<sup>125</sup> PFA or PFC reimbursement of or payment of any fine imposed on a staff, officer, or director under the Act is prohibited and the Act imposes a fine of five million naira on any such PFA or PFC.<sup>126</sup> The penalty for the misappropriation of pension funds has been increased under the 2014 regime and a prison term of ten years as well as a fine of three times the amount misappropriated in addition to the convicted person refunding the misappropriated sum. Another significant feature is the requirement that assets or property acquired with such sums be relinquished to the control of the Federal Government.<sup>127</sup>

By the cumulative effect of Sections 101 and 70, where a PFC to hold the funds in its possession to the exclusive preserve of the concerned PFA and the Commission or where it applies the funds to meet its own financial obligations, a minimum penalty of ten million naira will be imposed upon it on conviction. Where however a director is involved the penalty of five million naira or a five year term of imprisonment or both applies. Other salient features of the 2014 Act include the creation of the Pension Protection Fund ('the Fund') for the benefit of eligible pensioners covered by any pension scheme recognised by the Act,<sup>128</sup> exemption from tax,<sup>129</sup> and a stipulation allowing a person upon disengagement from service before the age of fifty years access to his or her pension funds for the purpose of making withdrawals not exceeding 25% of the total money saved,<sup>130</sup> and the vesting of jurisdiction in the National Industrial Court in the event of employee dissatisfaction with the decision of the Commission with respect to complaints on the conduct an employer, a PFA or a PFC, brought to the former for review.<sup>131</sup> The 2014 Act is therefore an attempt by legislative intervention, to address to a large extent the shortcomings of the 2004 Act with a view to facilitating a more efficient and employee sensitive pension reform initiative in Nigeria. While it may not be a composite legislation, it remains an instance of law reform as a veritable tool for social engineering.

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Section 99(2)

Section 99(4)

Section 100

Section 82 which states also that the fund raised consists of an annual subvention of 1% of the total wage bill payable to employees in the public service towards the funding of the minimum guaranteed pension, an annual pension protection levy paid by the Commission and all licensed pension operators at a rate to be determined by the Commission and investments from the Pension protection Fund.

Section 10 which stipulates that contributions to the Scheme form part of tax deductible expenses and that all interests, dividends, profits, investments and other income accruable to assets from tax, pension funds and benefits are also exempt from tax.

As seen in Section 16(5) which differs from the position under the Section 12 of the 2004 Act which stipulated a waiting period of 6 months.

Section 106.