Privatisation of Pension Scheme in Nigeria: Analysis and Appraisal of the Pension Reform Act, 2004

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Abstract

The enactment of the Pension Reform Act, (PRA) 2004 is evidence of a great change in pension administration and management in Nigeria considering the abysmal failure of the old pension scheme to provide retired public servants pensions and gratuities as and when due. The PRA, 2004 displaces to a large extent the Pay-As-You-Go system of the repealed Pension Act, 1974 and enthrones a new pension regime described as the defined-contribution scheme which entails the transformation of the financial and administrative structure of the pension system. The central feature of the new system is the establishment of individual capitalization fund and the consignment of pension fund assets to private-sector organizations for greater efficiency and maximal return on investment under strict regulation and supervision of the regulatory authorities. This paper focuses on an analysis of the new pension law in Nigeria. It also examines the extent of the privatization of the pension scheme in Nigeria and the economic and social implications of privatization of pension schemes in general. The paper also highlights defects in the law and proffer suitable reform proposals. The paper concludes with a discussion on the level of socio-economic development in the country, especially the level of poverty and argues for the establishment of a social-assistance-based national old-age pension that would provide means-tested benefits to the elderly poor population.

I. Introduction

Over the past three decades, pension reforms have occupied the front burner in social security discourse across the world with many countries instituting major structural reforms in their pension systems to have beneficial effects on the economy and to provide a more secure old age income.[1] In Nigeria, after a life span of about thirty (30) years, the Pension Act, 1974[2] which regulated retirement benefits for civil servants and employees of

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[1] Chile, under General Pinochet's military regime pioneered the structural reform process in 1981, replacing the PAYG system with privately-run individual savings accounts. During the 1990s, Peru (1992-1993), Colombia (1993-1994), Bolivia (1997), and Mexico (1995-1997) implemented comparable reforms. However, the public system was not phased out for those currently in the civil service. Reforms in Argentina (1994) and Uruguay (1995-96) consisted of setting up mixed systems including a reformed PAYG system and private individual savings accounts. See OECD, *Economic Survey of Chile,*, OECD, (2003) and (2005).

[2] Re-enacted as Cap. P4, Laws of the Federation of Nigeria (LFN), 2004.

scheduled statutory bodies and government-owned companies[3] was repealed[4] and a new Act, the Pension Reform Act (PRA), 2004, which is generally believed would provide a more progressive and financially-sustainable pension scheme for the country was enacted. Generally, old age or retirement is one of the nine minimum standards of social security or contingencies listed in the International Labour Organisation's Social Security (Minimum Standards) Convention 1952, No. 102 that is required to be provided by any viable social security scheme. The contingency covered is survival beyond a prescribed age.[5] In Nigeria, pensions and gratuities are a constitutionally recognised right to which a public servant who qualifies for them are entitled on retirement against the government.[6] However, the Pension Act, 1974, operated on the Pay-As-You-Go (PAYG)[7] basis did not actually fulfill its major objective of providing these pensions and gratuities to the target beneficiaries as it was bedeviled by a number of problems ranging from unpredictable and unsteady budgetary allocation,[8] corruption, outright embezzlement of pension funds, bureaucracy and lack of effective management systems to demographic change.[9] Similarly, the Nigeria Social Insurance Trust Fund established under the Nigeria Social Insurance Trust Fund (NSITF) Act, 1993[10] for the private sector to provide like benefits to any contributor to the Fund who had satisfied the applicable prescribed conditions[11] was also faced with the challenge of non-remittance of contributions to the Fund by some establishments[12] coupled with the administrative inefficiency of the management of the Fund to bring the culprits to book. Against this backdrop, the introduction of the contributory pension scheme which the PRA entails is thus generally viewed as the much-needed panacea to effectively tackle the lingering budgetary deficit and to infuse sanity and stability into the pension management and administration in Nigeria. Furthermore, the PRA has also sought to unify pension regimes for public-sector and private-sector workers with a shift from the "defined-benefit" scheme to the "defined-contribution" scheme. Consistent with the global trend in pension reforms, the new pension scheme

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[3] See Second Schedule to the Pension Act, 1974.

[4] See sec. 99 of the Pension Reform Act, 2004.

[5] See Art 26 of the Social Security (Minimum Standards) Convention 1952, No 102 and Art. 15 of the Invalidity, Old Age and Survivors Benefit Convention 1967, No. 128.

[6] See Secs 173 and 210 respectively of the Constitution of the Federal Republic of Nigeria 1999. See also B.O. Nwabueze, *Military Rule and Social Justice in Nigeria,* Spectrum, (1993) at p.177 and the case of *Momodu* v *Nigerian Union of Local Government Employees & Ors* (1994) 8 NWLR (Part 362) 336 at p.350 S.C..

[7] The PAYG system is one in which annual revenues dedicated to the system approximately equal annual expenditures. The Pension Scheme under the Pension Act, 1974 was operated on the PAYG system and funded from the Consolidated Revenue Fund of the Government – See section 2 thereof.

[8] The yearly budgetary allocation for pension was one of the most vulnerable items in budget implementation with the result that the pensions liability of the government as at Year 2004 when the Pension Reform Act was enacted was estimated at about ₦2 trillion. See *The Guardian* (Nigeria) , 28 Sept. 2004, 7.

[9] It was revealed sometime that in some of the government agencies, the pensioners had outnumbered active workers thereby putting excessive pressure on government's revenue. See *The Guardian,* (Nigeria), 28 Sept 2004, 7.

[10] Re-enacted as Cap N 88, LFN, 2004.

[11] See section 16 of the NSITF Act, 1993 and regulation 30 of the NSITF (General) Regulations, 1994.

[12] For example, as at 2004 when the new Pension Reform Act came into effect, a total of ₦917, 277,841.05 comprising deductions made from workers' salaries as well as the employers' contributions was yet to be remitted by employers across the country into the NSIT Fund. See *The Guardian* (Nigeria), 2 August 2004, 1.

under the PRA, 2004 is a public-private partnership Scheme in the sense that it is a privately-managed and market-driven pre-funded Scheme with government providing regulatory and supervisory roles to ensure compliance by relevant stakeholders as well as the ultimate success of the Scheme. It is expected that apart from ensuring the financial viability and sustainability of the pension system, the PRA would hopefully *inter alia* provide a simple, transparent, cost effective system that would guarantee payment of retirement benefits as and when due to claimants to enable them live out their senior years with dignity and security. Moreover, the Scheme is expected to impact positively on the broader economy through its generation of long-term national savings which will in turn facilitate capital accumulation that could deepen and strengthen the capital markets, enhance strategic investments in social infrastructure as well as facilitate economic growth for poverty reduction and wealth generation.[13]

This paper is therefore concerned with an analysis and appraisal of the Pension Reform Act, 2004. To do this meaningfully, we shall discuss the pith of the Act with a view to highlighting the lacunae in the law and proffering appropriate remedial measures. The paper will also focus attention on the allied socio-economic implications of privatisation of pension schemes in general on some of the basic principles of social security. The peculiar nature of the reform has made a comparative excursion inevitable in order to know the approaches taken by some other countries that have similarly implemented a structural reform of their pension system. An attempt will also be made to present the need to have a social-assistance-based national old-age pension for deserving elderly poor. A consideration of the provisions of the Act will be our first focus to which we now turn.

II. The Pension Reform Act: An Overview.

The Pension Reform Act, 2004 is divided into fourteen (14) parts of one hundred and three (103) sections. Our review of the Act would be focused on the salient provisions thereof as enunciated hereinafter.

A. The Declared Objectives of the Pension Scheme

The objectives of the pension scheme as listed in section 2 of the PRA include ensuring that every person who has worked in either the Public Service of the Federation, Federal Capital Territory or Private Sector receives his retirement benefits as and when due; assisting improvident individuals by ensuring that they save in order to cater for their livelihood during old age and establishing a uniform set of rules, regulations and standards for the administration and payments of retirement benefits for the Public Service of the Federation, Federal Capital Territory and the Private Sector.

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[13] See World Bank, *Averting Old Age Crisis: Policies to Protect the Old and Promote Growth,* World Bank and Oxford University Press, (1994). See also National Pension Commission, *The Pension Reform*, being text of a paper presented by the National Pension Commission at the BPSR/CAPAM IN-COUNTRY CUSTOMIZED STAKEHOLDERS SEMINAR at le'Meridien Hotel, Abuja between 8 and 10August 2006, 1 at 3.

B. Coverage

Section 1 of the Act establishes for any employment in Nigeria, a Contributory Pension Scheme (hereinafter referred to as "the Scheme") for payment of retirement benefits of employees to whom the Scheme applies. The categories of persons to whom the Act particularly applies are employees in the Public Service of the Federation, Federal Capital Territory and any Private Sector Organisation that has five (5) or more employees in its employment. However, by section 8 of the Act, exemption from the Scheme has been made for any employee who at the commencement of the Act is entitled to retirement benefits under any pension scheme existing before the commencement of the Act but has three (3) or less years to retire in accordance with the term of his or her employment; judicial officers such as justices of the Supreme Court and the Court of Appeal covered by section 291 of the Constitution of the Federal Republic of Nigeria, 1999 and existing pensioners. These categories of workers are to derive retirement benefits under the existing pension schemes hitherto applicable to them. Section 9(4) of the Act however allows any person ordinarily exempted by it to make voluntary contributions under the Scheme.

C. Financing

In line with the global trend in the privatisation of pension schemes, the Scheme is designed as an individual, fully-funded retirement accounts managed by private sector organisations. As such, the Scheme is required to be financed jointly by both the employee and the employer. Thus, at the end of every month, every employer and employee to whom the Scheme applies is required by section 9 of the Act to contribute a minimum of seven and half per cent each of the employee's monthly emoluments. In the case of the military, to make up the 15 per cent contribution required by the Act, the employer is required to contribute a minimum of twelve and one - half per cent while the employee contributes two and half percent. In order to ensure simplicity and transparency, section 11 of the Act requires every employee to maintain a Retirement Savings Account (RSA) in his name with any Pensions Fund Administrator (PFA) of his choice with Personal Identification Number peculiar to each employee. Such RSA is expected to be an individual capitalisation fund which establishes a connection between the employee's personal effort and the reward. The employer, after making the necessary statutory deductions is required under section 11(5) of the Act, to remit the total sum of contributions payable under the Act to the Pension Fund Custodian (PFC) specified by the PFA of the employee to the exclusive order of such PFA. To ensure prompt remittance of such contributions by the employer, section 11(7) of the Act has provided for appropriate penalty for any employer who fails to remit the contributions within seven (7) working days from the day the employee is paid his salary. Such employer is, in addition to making the remittance already due, liable to a penalty of not less than 2 per cent of the total contribution that remains unpaid for each month or part of each month the default continues and such amount of the penalty is recoverable as a debt owing to the employee's RSA as the case may be. In addition to the actual contributions made into the RSA by employers and employees, all income earned from investment of pension funds under the Act are by section 70(1) of the Act required to be placed to the credit of individual RSA holder save

for clearly defined and reasonable fees, charges, costs and expenses of transactions made by the PFAs. Government's contribution to the Fund in its capacity as an employer is to be a charge on the Consolidated Revenue Fund of the Federation under section 11(8) of the Act. In case of any delay in remitting the statutory amounts, the Director-General of the National Pension Commission is mandated by section 11(9) of the Act to request the Accountant-General of the Federation to remit the amounts immediately before incurring any other expenditure. This is to guard against the unfortunate situation of the repealed Pension Act, where huge pension liabilities were acquired from unstable budgetary allocations for pension purposes.

The Act is however flexible in its provisions regarding the percentage to be contributed and by whom such is to be paid. Under section 9(2) of the Act, allowance is made for any employer who wishes to bear the full burden of contributing the required minimum of 15 per cent to do so. Also, under section 9(5) thereof, an employee may in addition to the prescribed total contributions required of him and his employer make voluntary contributions to his RSA. Moreover, under section 9(6) of the Act, an opportunity is further given to both the employer and employee on agreement between themselves to revise upwards, from time to time, the prescribed rate of contribution. The foregoing provisions of section 9(5) and (6) of the Act are salutary as they would further enthrone and promote the culture of long-term private savings among the employers and employees especially improvident workers since whatever fund credited to their RSA is personal to them and enures for their benefit only. This will further guarantee a relatively comfortable living standard at old age because the more money the worker contributes to the account, the more money he is expected to get on his retirement. Also, unlike the PAYG system, those who retire early bear the cost of their early retirement in the form of lower accumulations and benefits rather than passing on the costs to others and undermining the financial viability of the Scheme, as it occurs in most defined-benefit plans. It is also noteworthy that by section 13 of the Act, the RSA opened by an employee pursuant to section 11 of the Act, being a personal account, is portable as the employee transfers his service or employment from one employer or organisation to another. Thus, the account remains fully funded at all times just like a personal savings account and employee's pension rights are conserved even when the employer changes. This will no doubt engender labour mobility, as employees do not need to worry about any adverse implications of changing jobs on their pensions. Furthermore, in order to engender healthy competition and greater efficiency among PFAs, a RSA holder is at liberty under section 11(2) of the Act to transfer his account from one PFA to another taking with him the entire accumulated funds. However, to check unbridled campaigns by PFAs to woo contributors, such transfer has been limited to only once in a year as of right. It would appear from the provisions of section 11(2) of the Act that any subsequent request for transfer within a given year may be granted only upon giving convincing reason for such transfer. Unless the worker opts to buy an annuity on his retirement, RSA on the death of the owner is passed on as part of the deceased's estate to be shared among his survivors.

In addition to the contributions specified in section 9(1), section 9(3) of the Act has also mandated every employer to maintain life insurance policy in favour of every employee for a minimum of three times the annual total emolument of the employee.

D. The Benefit Structure of the Pension Scheme

Generally, retirement benefits under the Scheme depend on the contributions made over a person's working career and the investment income on accumulated balances. As a general rule, by section 3(1) of the Act, a worker is not entitled to make any withdrawal from his RSA before attaining the age of 50 years or retirement. This provision is expected to curtail unnecessary withdrawals that may defeat the objective of maintaining a reasonable standard of living for the worker after retirement. However, upon attaining the age of 50 years or upon retirement, whichever is later, section 4 of the Act permits the holder of RSA to make such withdrawals from the balance standing to the credit of his RSA, which can either be a programmed monthly or quarterly withdrawals calculated on the basis of an expected life span or a lump sum withdrawal. Where it is a lump sum however, the amount left in the account after the withdrawal must be sufficient to procure an annuity or fund programmed withdrawals that will produce an amount not less than 50 per cent of his annual remuneration as at the date of his/her retirement. The account holder also has the option of purchasing annuity for life from a life insurance company licensed by the National Insurance Commission with monthly or quarterly payments. However, in such exceptional cases as those contained in section 3 (2) of the Act, where any employee is retired on the advice of a suitably qualified physician or a properly constituted medical board certifying that the employee is no longer mentally or physically capable of carrying out the functions of his office; or is retired due to his total or permanent disability either of mind or body; or retires before the age of 50 years in accordance with the terms and conditions of his employment, the holder of a RSA may be allowed to make withdrawals from his RSA. Nevertheless, any employee retired on health grounds on the advice of a physician or a medical board may re-enter the Scheme upon securing another employment if he can show that his fitness has been reviewed and that he is currently mentally and physically capable of carrying out the functions of his office. Also, in the case of retirement of an employee before the age of 50 years pursuant to the terms and conditions of his employment, the worker is entitled to withdraw a lump sum of money not more than 25 per cent of the credit standing in his RSA if he/she is unable to secure another employment six months after the previous one.

Survivors' benefits under the Act are derivable from the total sums in the RSA of the holder at the time of death and from the life insurance policy maintained by the employer. Thus, on the death of an employee, section 5 of the Act requires that the deceased's entitlements under the life insurance policy be paid into his/her RSA. The PFA is thereafter required to apply the total amount in such RSA in accordance with the aforementioned provisions of section 4 of the Act in favour of the beneficiary under a will; or the spouse and children of the deceased or in the absence of a wife and child, to the recorded next-of –kin or any person designated by him during his life time or in the absence of such designation, to any person appointed by the Probate Registry as the administrator of the estate of the deceased. Where an employee is missing and is not found within a period of one year from the date he was declared missing, and a Board of inquiry set up by the Commission concludes that it is reasonable to presume that he has died, the above provisions of section 5 shall also apply to his RSA.

Moreover, in line with what obtains in privatised schemes in other countries such as in Chile and Argentina,[14] and as part of government's intrinsic responsibility for social protection to ensure that retirees will not fall into poverty, the Act in section 71thereof provides for a minimum pension guarantee to all RSA holders who have contributed for a number of years to a licensed PFA.

The Act has also provided some measure of tax incentives in respect of contributions and retirement benefits to ensure that retirees under the Act take the full benefit of their hard-earned savings. First, in order to reduce the impact of making the required contributions to the Scheme on their expenditure, section 10 of the Act has made such contributions by an employee to the Scheme part of tax deductible expenses in the computation of tax payable by an employer or employee under the relevant income tax law. Similarly, section 7 of the Act has exempted from taxation any amount payable as retirement benefit under the Scheme. The justification for this has been premised on the fact that necessary tax under the Pay-As-You-Earn Income tax would have been paid when the monthly salaries are paid out to workers. To deduct tax from such retirement benefits therefore would amount to double taxation. However, in order to discourage indiscriminate withdrawals in respect of additional voluntary contributions made by an employee to his RSA, any withdrawal made before the end of 5 years from the date such voluntary contribution is made is subject to tax at the point of withdrawal under the provisions of section 7(2*)* of the Act.

E. Accrued Retirement Benefits and Transitional Arrangements

Accrued retirement benefits of any employee (such as gratuity and pension) under any existing pension scheme and who has over three (3) years to retire before the commencement of the new Scheme have been adequately addressed by the Act through the creation of a vested pension from the employment relationships that had existed before the commencement of the PRA. In effect, the pension right and gratuity accrued from the employment contract up to the commencement of the Act would be calculated as if the employment contract had ended then in accordance with existing contract of service. Thus, in respect of employees in the Public Service of the Federation and Federal Capital Territory where the pension scheme was unfunded, the retirement benefits in respect of accrued or past service earned by an employee is required under section 12 of the Act, to be computed by the Government in accordance with the terms of contract of service existing before the commencement of the Act. Each employee is thereafter to be issued with a Federal Government Retirement Bond, redeemable only upon retirement of such

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[14] In Chile for instance, workers are eligible for Chile's minimum pension guarantee which is about twenty five per cent of the average wage, after twenty years of contributions, meaning that the government tops up the benefits of these workers to the guaranteed point if their own accumulation does not suffice. In contrast, Argentina pays all workers with at least thirty years of contributions a flat benefit of about twenty five per cent of the average wages plus an additional one per cent for every year above thirty up to forty five years. See U.S.Social Security Administration, *Social Security Programs Throughout the World: the Americas, 2003,* Office of Research, Evaluation and Statistics*,* (2003) 1 at 29 & 61.

employee, which is equivalent to the total retirement benefit that was due to him/ her as at the commencement of the Act. The proceeds of the bond so redeemed shall then be transferred to the credit of the RSA of the employee and applied in accordance with the provisions of section 4 of the Act. The issuance of the Federal Government Retirement Bonds would hopefully solve to a large extent the issue of Transition Cost which has been a major challenge to pension reform in most countries as Government would not have to furnish immediately the entire accrued pension funds necessary to change to the new system. And as a means of ensuring that the Federal Government is able to redeem such retirement bonds as and when due, section 29 of the Act has mandated the Central bank of Nigeria to establish, invest and manage funds to be known as the "Retirement Benefit Bond Redemption Funds" in respect of the Federal Public Service and Federal Capital Territory. The Redemption Funds are required to be credited with 5 per cent of the total monthly wage bill payable to employees in the Public Service of the Federation and Federal Capital Territory. Payments into the Redemption Fund shall however cease after all the retirement bonds issued have been redeemed.[15]

For private sector employees, the employer is also required to compute the retirement benefits in respect of accrued or past service earned by each employee in accordance with the existing contract of service and credit the RSA of each employee with any funds to which the employee is entitled. For contributors under the NSITF Act, the NSITF is required by section 42 of the Act to compute for each contributor or beneficiary the contributions made and attributable income thereto within the context of NSITF Act, 1993 before the commencement of the PRA. Such amount is then required to be deposited in the RSA to be opened by the NSITF for each contributor or beneficiary. The funds credited to such RSA of a contributor are to remain with the PFA of the NSITF for not less than 5 years from the commencement of the Act. Thereafter, each beneficiary is free to determine which PFA will manage these funds on his or her behalf. In the event of an insufficiency of funds to meet the accrued liability of any employee by an employer, the shortfall shall immediately become a debt of the relevant employer and be treated with same priority as salaries owed. A written acknowledgement to that effect as well as the terms of repayment of such obligation to be agreed with the employee is required to be issued to the concerned employee. Notice to that effect is also required to be given to the National Pension Commission by virtue of section 12(2) of the Act.

Section 30 of the Act has also established Pension Transitional Arrangement Department for the Public Service of the Federation and the Federal Capital Territory, comprising the existing pension boards, or offices in the public service of the Federation and the Federal Capital Territory.[16] The Pension Transitional Arrangement Department which consists of the Civil Service Pension Department; the Military Pension Department;

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[15] In order to meet its obligations to retirees under the Act, the Federal Government has floated a ₦1.68 trillion bond covering a 30 – year period from 2007 to the year 2037. The bonds are to have a fixed coupon rate, non-tradeable, exempted from taxes, certificated and are only redeemable upon retirement. The Debt Management Office is to act as the issuer on behalf of the Federal Government while the Central Bank of Nigeria and the Ministry of Justice are to act as Registrar and Solicitors to the issue respectively. See The *Guardian (*Nigeria), 26 June 2007, 1 at 17. As at September 2007, the Federal Government has paid ₦47.24 billion to the Redemption Fund Account. See *This Day* (Nigeria), 8 December 2007, 1 at 3.

[16] See Section 31 of the PRA, 2004.

the Police Pension Department; the Customs, Immigration and Prisons Pension Department and the Security Agencies Pension Department are to ensure that existing pensioners and category of officers exempted by the Act in section 8 thereof are paid their gratuity and pension as and when due.[17] These Pension Transitional Arrangement Departments, which are also to be regulated and supervised by the Commission, are to cease to exist after the death of the last pensioner or category of employees entitled to retire with pension before the commencement of the Act.[18]

F. Regulatory and Managing Authorities of the Pension Scheme

Consistent with the global trend in privatization of pension schemes, the regulation and supervision of the Scheme are vested in the government while the custody, investment and general management of the pension funds generated under the Scheme have been vested in private companies licensed for such under the Act. Thus, the regulatory and supervisory authority of the Scheme comprises the National Pension Commission (NPC), an agency of the Federal Government, while the managing institutions are designated as the Pension Fund Administrators (PFAs) and the Pension Fund Custodians (PFCs).

(1) National Pension Commission

The apex body saddled with the responsibility for regulating, supervising and ensuring the effective administration of the Scheme is the National Pension Commission (hereinafter referred to as "the Commission") established under section 14 of the Act, membership of which is drawn from all relevant stakeholders in the industry. In order to underscore the importance of the success of the Scheme to the Government, the President of the Federal Republic of Nigeria is empowered under section 16(3) of the Act to appoint one person each from the six geo-political zones of Nigeria subject to the confirmation of the Senate,[19] to serve as the Chairman, the Director-General and members of the Commission other than ex-officio members. In the pursuit of its regulatory and supervisory functions under the Act, the Commission is required under section 20 of the Act to *inter alia* issue guidelines for the investment of pension funds; approve, license, regulate and supervise pension fund administrators, pension fund custodians and other institutions relating to pension matters as the Commission may, from time to time, determine; establish standards, rules and guidelines for the management of the pension funds and perform such other duties which, in the opinion of the Commission, are necessary or expedient for the discharge of its functions under the Act. In addition, the Commission has also been generally empowered to *inter alia* formulate, direct and oversee the overall policy on pension matters in the country and to establish standards, rules and regulations for the management of the pension funds under the Act. The whole tenor of the mandate and activities of the Commission under the Act is generally to provide the necessary ethical and oversight functions that would ensure not only the safety of pension funds but also provide the necessary stability in the new pension regime.

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[17] See Section 33 of the PRA, 2004

[18] See Section 38 of the PRA, 2004.

[19] See generally section 16 of the PRA, 2004.

(2) Pension Fund Administrators

The Commission, in pursuance of its regulatory functions is required under section 44 of the Act to license Pension Fund Administrators (PFAs) who shall be responsible generally for the management of the pension funds in the RSA of employees opened pursuant to section 11 of the Act. Section 44 of the Act specifically charges the PFAs with the responsibility of opening RSA for every employee with a Personal Identity Number attached;[20] investing and managing pension funds and assets; maintaining books of account on all transactions relating to pension funds managed by it; providing regular information on investment strategy, market returns and other performance indicators to the Commission and employees or beneficiaries of the RSA; providing customer service support to employees, including access to employees account balances and statements on demand; causing to be paid retirement benefits to employees in accordance with the provisions of the Act and carrying out other functions as may be directed, from time to time, by the Commission. The PFAs as institutional investors would hopefully facilitate increased market integrity, transparency, corporate governance and overall growth of the capital market.

To be licensed as a PFA, section 50 of the Act requires that an applicant must be a limited liability company incorporated under the Companies and Allied Matters Act, 1990 with the object of managing pension fund; must have a paid up share capital of ₦150, 000,000.00 (One hundred and fifty million naira) or such sum as may be prescribed, from time to time, by the Commission; must satisfy the Commission that it has the professional capacity to manage pension funds and administer retirement benefits; must not have been a manager or administrator of any fund which was mismanaged or has been in distress due to any fault, either fully or partially, of the PFA or any of its subscribers, directors or officers and must undertake to the satisfaction of the Commission that it shall not be engaged in any business other than the management of pension funds.

(3) Pension Fund Custodians

Although PFAs are generally charged with the management and investment of pension funds, responsibility for the custody of such pension funds and assets is however given to other bodies called Pension Funds Custodians (PFCs) who are also required to be licensed by the Commission.[21] The functions of the PFC as listed under section 47 of the Act are to receive the total contributions remitted by the employer on behalf of the PFA within 24 hours of the receipt of contributions from any employer; notify the PFA within 24 hours of the receipt of contributions from any employer; hold pension funds and assets in safe custody on trust for the employee and beneficiaries of the RSA; on behalf of the

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[20] The Commission has revealed that as at the third quarter of year 2007, the total number of registered employees for the pension scheme stood at 2.68 million with employees from both the Federal and State Governments making up 47.39 per cent and 24.63 per cent respectively of the total number of registered contributors while the private sector accounted for only 27.98 per cent of the total contributors. It has also revealed that during the period, the value of the Fund under the management of licensed PFAs had risen to ₦666.84 billion - see *This Day* (Nigeria) 8 December 2007, 1 at 2.

[21] See Section 51 of the PRA, 2004.

PFA, settle transactions and undertake activities relating to the administration of pension fund investments including the collection of dividends and related activities; report to the Commission on matters relating to the assets being held by it on behalf of any PFA at such intervals as may be determined, from time to time, by the Commission; undertake statistical analysis on the investments and returns on investments with respect to pension funds in its custody and provide data and information to the PFA and the Commission; and execute in favour of the PFA relevant proxy for the purpose of voting in relation to the investments.

To be licensed as a PFC, section 52 of the Act requires that an applicant must be a licensed financial institution registered under the Companies and Allied Matters Act; must have a minimum net worth of ₦5,000,000,000.00 (Five billion naira) unimpaired by losses or is wholly owned by a company with a minimum net worth of such amount unimpaired by losses or any such sum as may be prescribed, from time to time, by the Commission and must have a total balance sheet of at least ₦125,000,000,000.00 (one hundred and twenty five billion naira) and or is wholly owned by a licensed financial institution with a total balance sheet of at least such amount. Furthermore, the Custodian Company is required to issue a guarantee to the full sum and value of pension funds and assets held by it or to be held by it. It is also required to undertake to hold the pension fund assets to the exclusive order of the PFA on trust for the respective employees as may be instructed by the PFA appointed by each employee and must not have been a Custodian of any fund which was mismanaged or has been in distress due to any default, either fully or partially of the Custodian. In addition, an applicant must also be ready to satisfy such additional requirements as may be prescribed, from time to time, by the Commission.

(4) Closed Pension Fund Administrators

In addition to licensed PFAs, who are generally new entrants into the business of managing pension funds, the PRA under sections 39 and 40 has also given opportunity to private organisations who had their own pension schemes before the commencement of the Act to apply to the Commission to be licensed as Closed Pension Fund Administrators (CPFA) to manage the pension funds either directly or through a wholly owned subsidiary of such employer dedicated exclusively to the management of such funds. Once registered as such, all the applicable provisions of the Act on regulation and supervision of PFAs by the Commission is applicable to them. The closed pension scheme is required *inter alia* to be fully funded at all times and any shortfall is to be made up within ninety (90) days; pension funds and assets are to be fully segregated from the funds and assets of the employer and are to be held by a licensed PFC. Moreover, every employee in such existing scheme is given the freedom under section 39(1)(d) of the Act to exercise the option of either staying under such existing scheme or coming under the Scheme established under the PRA. Where the employee chooses to come under the new Scheme of the PRA, the employer is required to compute and credit to the account of such employee the contributions and distributable income earned as at the date the employee exercises such an option subject to further rules and guidelines issued by the Commission. Such amount is then required to be transferred to the RSA of the employee maintained with a PFA of his choice.

To be licensed as a CPFA under section 40 of the Act however, the applicant must *inter-alia* hold a minimum pension funds and assets of ₦500, 000,000.00 (Five Hundred Million Naira) and above; must also be a limited liability company incorporated under the Companies and Allied Matter Act, 1990; must not have been a manager or administrator of any fund which was mismanaged or has been in distress due to any fault, either fully or partially, of the organisation or any of its subscribers, directors or officers and must undertake to the satisfaction of the Commission that it shall not be engaged in any business other than the management of pension funds. Also, the employer must demonstrate that it possesses managerial capacity for the management of pension fund and assets for a period not less than 5 years before the commencement of the Act.

The establishment of the PFAs and PFCs with separate functions respectively by the Act as highlighted above gives an assurance of accountability and transparency with respect to dealings with the RSAs of employees. It is generally geared against mismanagement and misappropriation of pension funds and ensures the solvency of the system. Thus, in the extreme case that a PFA goes bankrupt or is wound up, individual funds would remain unaffected. The RSA holder would only have to transfer his/her account to another PFA.[22] Furthermore, the condition precedent in terms of financial base required of an applicant before being licensed as either a PFA or a PFC is a precautionary measure by the Act to ensure and guarantee the safety of workers' fund as well as remove any likelihood of loss of workers funds as a result of a weak financial base of these major operators. The choice of private control of the Pension funds by the PRA, 2004 is also salutary not only because it has followed the trend in the countries that have adopted structural reforms of their pension schemes but also because private control maximises the likelihood that the investment strategy of these PFAs is more likely to be driven by economic considerations and the need to give the highest return on savings rather than being governed by political considerations. It is common knowledge in Nigeria that most government-controlled enterprises such as the Power Holding Company Nigeria Plc and the Nigeria Telecommunications Plc neither provide quality service delivery nor make as much profits as their counterparts in the private sector.

G. Imminent Safeguards for the Pension Scheme

The PRA has in its several provisions provided adequate safeguard measures to ensure the overall safety of pension funds and to aid the quick detection of any act capable of undermining the integrity of the Scheme. The first of such safeguard measures is the official design and objective to nip in the bud sharp practices and unconscionable conduct which could bring the Scheme into disrepute which has been eloquently projected in several sections of the Act. These include the maintenance of proper books of account and financial record; the appointment of qualified external auditors not later than four months from the end of the year and publication of audited accounts by every PFA and PFC under section 56 of the Act as well as the submission of such audited accounts and

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[22] See e.g. section 54(6) of the PRA which mandates the Commission to transfer RSAs being managed by either a PFA whose licence is revoked or pension fund assets being held by a PFC whose licence is revoked to another PFA or PFC respectively.

annual report on pension funds to the Commission under section 57 of the Act. Appropriate disclosure of relevant information is expected to be made by the external auditors to the Commission under section 58 of the Act on any extreme situation such as evidence of imminent financial collapse of the PFA or PFC or where they believe that a fraud or other misappropriation has been committed by the directors or the management of the PFA or PFC or have evidence of an attempt by the directors or senior management to commit such fraud or misappropriation.

The second category of the safeguard measures concerns provisions geared towards preserving the integrity of the pension funds as would be found for example under section 60 of the Act, which makes it mandatory for the PFC to at all times maintain all pension funds and assets in its custody to the exclusive order of the relevant PFA and must not utilise any pension fund or assets in its custody to meet its own financial obligation to any person whatsoever; the maintenance of a statutory reserve fund to be credited annually with 12.5 per cent of the net profit after tax or such other percentage of the net profit as the Commission may from time to time stipulate as contingency fund by every PFA under section 69 of the Ac*t* and the regular risk rating of investment instruments by Risk Management Committee and Investment Strategy Committee to be set up by every PFA under section 66 of the Act. Furthermore, section 65 of the Act has forbidding every PFA from keeping pension funds or assets with a PFC in which the PFA has any business interest, shares or any link whosoever. Also, no employee of the PFA is to engage in any business transaction or trade in any manner whatsoever with the PFA as a counterpart or with the subsidiary in relation to pension fund or assets. Also, in order to ensure the integrity of transactions relating to investments, section 75 of the Act, has prohibited a PFA from investing pension fund assets in the shares or any other securities issued by the PFA or PFC or a shareholder of the PFA or PFC. Also, a PFA has been prohibited under section 76 of the Act from selling pension fund assets to itself; any employee, shareholder, director or affiliate of the PFA or any of their spouses or those related to them; affiliates of any shareholder of the PFA; the custodian holding pension fund assets to the order of the PFA or purchase any pension fund assets or apply such assets under its management by way of loans or credits or as collateral for any loan taken by any person. The Commission has also been empowered under section 77 of the Act to impose additional restrictions on investments where such restrictions are made with the objects of protecting the interest of the beneficiaries of the RSAs.

The third category of the safeguard measures concerns the express disqualification and exclusion of certain individuals from the management of pension funds. Thus, the ethical leverage in the PRA has been considerably strengthened by the combined provisions of sections 50 and 52 which has on the one hand denied individuals of questionable background the opportunity to participate in the management of pension funds and sections 62 and 63 which have on the other hand denied employment to any person that has had his employment terminated on the ground of fraud. Furthermore, the Commission is empowered under section 88 of the Act to cause to be removed from office any director or officer of a PFA or PFC found guilty of financial misconduct or dishonesty. Thus, the Act has sought to ensure that only credible, trustworthy, qualified professionals and persons of high integrity are entrusted with the pension funds.

The fourth category of the safeguard measures concerns the general power of supervision and examination given to the Commission. Thus, as a means of pursuing the goal of disclosure of relevant information by licensed PFAs and PFCs, section 79 through section 84 of the Act has generally empowered the Commission to inspect, examine or investigate any of the activities of licensed PFAs and PFCs through periodic examination of relevant documents of these bodies. Under section 97 of the Act, the Commission has also been empowered to make regulations generally for the carrying into effect the provisions of the Act. Such regulations, which in law, have equal force as if they themselves are statutes on their own in their inherent legal capacity, are to serve as a source of making supplementary provisions to the Act thereby making it a virile and living law.

The fifth category of the safeguard measures concerns the strict regulation to provide for risk control strategies to curtail losses in the investment drive of PFAs. Thus, restrictions have been placed on the portfolios in which pension funds may be invested in order to rule out highly volatile and concentrated portfolios and to ensure that investments provide real rates of return during both up and down financial markets. The Act in section 73 thereof, has laid down clear-cut guidelines for investment of pension funds and has largely restricted such investments 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 a stock Exchange registered under Investments and Securities Act, 1999; ordinary shares of public limited companies listed on a Stock Exchange with good track records of having declared and paid dividends in the preceding five years; bank deposits and bank securities; investment certificates of closed-end investment fund or hybrid investment funds listed on a Stock Exchange with a good track records of earning; units sold by open-end investment funds or specialist open-end investment funds listed on the Stock Exchange recognised 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. These portfolios are presumably safe and will hopefully give high returns on investment. By section 77 of the Act, the Commission is generally empowered to impose additional restrictions on investments by PFAs where expedient to protect the interest of the beneficiaries of the RSAs. The restrictions placed on the investment drive of the PFAs as highlighted above may however curtail ingenuity on the part of the PFA to make foray into areas, which in their independent judgement, may yield appreciable returns than those listed in the Act. Subject to the subsisting Central Bank of Nigeria foreign exchange rules, investment of pension fund assets outside the territory of the Federal Republic of Nigeria is permissible under section 74(2) of the Act upon approval by the President on the recommendation of the Commission. One hopes that the Commission and the operators of the Scheme would seize this opportunity to invest in a broad range of securities not only within the country but also in international markets to minimize country-specific risk. The recent depreciation of stocks in the Nigerian market ought to serve as a warning signal to PFAs of the danger of restricting their investment portfolio drive to the country.[23]

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[23] For example, between March and July 2008, investors lost a whopping sum of N2.03 trillion to stock market crash in Nigeria. See *The Guardian,*(Nigeria) 5 July 2008, 1 at 48.

Moreover, as a means of ensuring safe and sound investment strategies, the Act in its section 66 has mandated every PFA to establish standing committees such as Risk Management Committee and the Investment Strategy Committee. The Risk Management Committee is generally charged *inter alia* with the responsibility of determining the risk profile of the investment portfolios of the PFA and determining the level of reserves to cover the risks of the investment portfolios while The Investment Strategy Committee on the other hand is saddled *inter alia* with the responsibility of formulating strategies for complying with investment guidelines issued by the Commission; determining an optimal investment mix consistent with risk profile agreed by the board of the PFA; evaluating the value of the daily marked-to-marked portfolios and making proposals to the board of the PFA; on periodic basis, reviewing the performance of the major securities of the investment portfolios of the PFA and carrying out such other functions relating to investment strategy as the board of the PFA may from time to time, determine.

The sixth category of the safeguard measures concerns the general powers given to the Commission in its supervisory capacity to impose appropriate sanctions on erring licensed PFA or PFC. As such, in deserving situations, the Commission has the power to impose penalties ranging from a fine of between N250, 000.00 (Two hundred and fifty thousand naira) to N5, 000,000.00 (Five million naira). In addition, the directors and officers of such PFA or PFC may be liable on conviction to a term of imprisonment ranging from three to ten years. As a sanction of last resort, the Commission has the power under section 54 of the Act to revoke the licence of obdurate or unyielding PFA or PFC. The law however requires that the affected PFA or PFC be granted a fair hearing before revocation of its licence.

Lastly, under section 98 of the Act, the safety of pension funds and assets in the custody of any licensed PFC in the event of its being wound up, liquidated or where it otherwise ceases to carry on the business for which it was licensed, has been further guaranteed by prohibiting the use of such pension funds and assets in the custody of such PFC to meet the claims of any of the Custodian's creditors. In addition, such pension funds and assets cannot be seized or be subject of execution of a judgement debt or stopped from transfer to another Custodian.

H. Legal Proceedings

Under section 91 of the Act, the Federal High Court has been vested with the jurisdiction to try any offence committed under the Act while a dispute resolution network is also available under section 92 through section 94 of the Act to minimise litigations in Court. The effect of giving exclusive jurisdiction to the Federal High Court is to render trial of such offences by any other court a nullity and to avoid unnecessary delays that may arise if such offences were to be tried by other regular courts. By the combined provisions of sections 95 and 96 of the Act, any person who intends to commence any suit against the Commission is required to first serve a written notice of such intention upon the Commission 30days before instituting such action stating *inter alia* the relief which he claims. It would appear that service of such notice is a condition precedent to competently maintaining any suit against the Commission in a law court.

By and large, the Pension Reform Act, 2004 has by its far-reaching provisions laid a solid foundation not only for a transparent, fully-funded and self-sustaining pension scheme but also for an efficient management of pension funds and assets which hopefully would fulfill the yearnings and aspirations of the average Nigerian worker to live a stress-free and dignified life in old-age. However, like in all privatised pension systems such as we have in Chile, Singapore and Argentina, the privatisation of the pension scheme in Nigeria has altered some of the basic principles of social security such as income redistribution and solidarity. A discussion on this should be our next focus.

III. Socio-Economic Implications of Privatisation

Notwithstanding the possible positive indirect effects of privatisation, such as fostering economic growth and the development of the capital market, it has been suggested that more attention needs also to be given to possible negative indirect effects, such as increased exposure to market risks, decreased coverage for low-income groups and adverse distributional effects for certain vulnerable groups such as the low-income earners and women.[24] One of the basic objectives of social security is income re-distribution with a view to reducing social inequalities and inequity, which has helped to reduce poverty in several countries.[25] The PAYG system benefit formular is generally progressive and redistributes income within and across generations based on lifetime earnings rather than current income, although, such schemes sometimes do include vertical redistribution as well, providing a better return on contributions for low – wage workers. Thus, within the category of persons covered by these schemes, re-distribution of income does take place between the healthy and the sick; the economically active and inactive persons, that is, the elderly or invalid workers; persons with a job and those who are unemployed, single persons or married couples without children and persons who have family responsibilities (horizontal redistribution) and, as the case may be, between the rich and the poor (vertical redistribution) and to some extent between persons earning a high or moderate wage and lower paid workers as a result of the methods used for calculating charges and benefits..[26] Such income redistribution tends to increase the nation's average propensity to consume and stimulate global demand and employment. Viewed from this perspective, benefits produce an anti–cyclical effect that is particularly useful in periods of economic recession and high unemployment.[27] For instance, in the United States of America, there is considerable evidence that reliance by the elderly on their children has declined since the advent of social security and this has also contributed to the economic gains of the aged as measured by the decline in the proportion of the poor.[28] To the extent

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24 See J. B. Williamson and F.C. Pampel, "Does the Privatization of Social Security Make Sense for Developing Nations?" in 51 *International Social Security Review*, (1998), 3-31 at 28.

25 A.W.Clausen, Poverty *in the Developing Countries*,, The World Bank, (1985) 6.

26 H. J. Aaron, *Economic Effects of Social Security,* The Brookings Institution., (1982), 82

27 Alain and C. Euzeby, "Social security financing methods: Labour costs and employment in industrialized market economy countries", in ILO, *Financing Social Security: The Options – An International Analysis,* ILO, (1984), 51 - 85 at 52.

28 H. J. Aaron, supra, note 26 at 71.

that social security reduces transfers from others to the elderly, it leaves the consumption possibilities of the elderly unchanged, and the relief for the non – elderly from transfers they would otherwise feel obligated to make represents an immediate offset to the payroll taxes they pay, leaving their consumption unaffected.[29] Furthermore, the combination of income sources available to the elderly in many developed countries suffices to prevent them from having lower incomes on the average than do the non-elderly and to prevent real consumption opportunities from declining at retirement.[30] In pre–funded, privately–managed schemes which are currently being adopted in many countries including Nigeria however, the principle of income redistribution is a non-issue except in those instances where government guarantees payment of minimum pension to workers who have contributed for a specified number of years. By their nature, defined-contribution plans build in less redistribution within and across generations. Privatised retirement account is basically a compulsory individual insurance system with no intentional redistribution in favour of low-income workers. Indeed, some features of privatisation do give rise to regressive redistribution in favour of high-income workers. For example, the structure of commission charged by pension fund administrators especially the flat rate such as we have in Chile do have negative impact on the savings of lower-income groups by crediting them with a much lower rate of return than high-income workers.[31] Variations in returns of pension managers may also adversely affect lower-income groups, although, these are generally limited by the required minimum relative returns on pension funds. In Chile for instance, the authorities impose on Pension Fund Administration Companies Superintendency or AFPs for short, and guarantee in case of AFP failure, a minimum investment return relative to the average for all pension funds while in Nigeria, section 72 of the PRA requires "maintenance of fair returns on amount invested". Generally however, more inequities are being created by privately-funded schemes, since the defined-contribution system guarantees larger pensions to the high-income groups, whereas the low-income groups will receive small pensions, or only the minimum pensions in the countries in which there is provision for such. Some of these new inequities are linked to the performance of the investment and the interest rate at the time of retirement, which will have a direct impact on the size of the annuity. Indeed, workers with identical earnings history may have different retirement incomes based on their individual-specific investment experiences. Other inequities of the defined-contribution system in favour of high earners stem from the way annuities markets and privately managed defined-contribution systems operate. Low-wage earners are likely to have a higher discount rate and suffer a greater utility loss since their income is lower; the required contribution represents a higher proportion of their total income; and they are less able to have other sources of savings.[32] Indeed, it has been aptly stated that:

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29 Ibid at 23.

30 Ibid at 71.

31 See S. Borzutsky, Social security privatization: the lessons from the Chilean experience for other Latin American countries and the USA, 12 *International Journal of Social Welfare,* (2003) 86-96 at 89.

32 Ibid at *93*.

> "The new systems show both promise and evidence of being more efficient than the old. They have also eliminated or greatly reduced some of the pre-existing equity problems stemming from poorly designed defined-benefits formulas and pay-as-you-go finance methods. At the same time, they have introduced new equity problems, stemming from annuity pricing, saving offsets, administrative costs, imperfect information and inequality under choice. Thus, perverse redistributions within cohorts are still possible, although intergenerational redistributions are less likely."[33]

Thus, while privatised pension schemes may be greatly beneficial to high-income earners as aforementioned and those who enter into such schemes early in their job career, the same could not be said of low-income earners as well as late entrants to such schemes. This is necessarily so since the value of pension largely depends on the amount of capital accumulated in the savings account. This amount in turn depends *inter alia* on salary, the years of contribution, retirement age, the life expectancy of the retiree, the vagaries of the commercial market in terms of rate of return on investment and commissions and fees charged by pension fund administrators.[34] Also put at a disadvantage are women who spend less time in the labour market because of child-bearing and child-rearing responsibilities which also creates more equity problems in such schemes.

Another objective of social security is the pivotal role it plays as mechanisms of social solidarity and social cohesion in two major ways, depending on the method of financing.[35] Solidarity has been defined as "a sense of non-calculating co-operation based on identification with a common cause." The individual is viewed as "embedded in social contexts" rather than as an independent agent, and thus solidarity is not a characteristic of particular individuals but instead reflects "a specific type of association among people."[36] Therefore, an individual secured by the State against the risks of life, as by a guaranteed minimum income even during a period of unemployment, would naturally feel that society cares for him and his interests, and may thus be able to identify with it, and to feel a sense of belonging with other members. Where protection is provided, not through direct state funding, but by workers or residents pooling their resources together to cover one another and pay out cash benefit as and when anyone of them is affected by a covered risk, a sense of inter-dependence, of community and of solidarity would thereby have been generated among them.[37] The value of the insurance lies partly in the sense of security, in knowing, as an individual, that one is adequately insured if one's income ceases. In privatised pension schemes however, the principle of solidarity has been eliminated since the system is basically a compulsory individual insurance

33 E. James, Pension Reform: An efficiency - Equity Trade Off?, in N. Birsdall N, C. Graham, R. Sabot , (eds). *Beyond Trade Off: Market Reforms and Equitable Growth in Latin America*, Interamerican Development Bank, (1998), at 270.

34 See e.g. sec 70 of the PRA.

35 R. Walker, Poverty and Social Exclusion in Europe in A.Walker, and C. Walker, (eds) *Britain Divided: The Growth of Social Exclusion in the 1980s and 1990s.*. CPAG Ltd, (1997) .48-74 at 66.

36 See R. B. Saltman. and H.F.W. Dubois, The Historical and Social Base of Social Health Insurance Systems in R. B. Saltman,. R. Busse, and J. Figueras, (eds) *Social Health Insurance in Western Europe*, England, (2004) 21-31 at 27.

37 B. O. Nwabueze, *Social Security in Nigeria,* Nigerian Institute of Advanced Legal Studies, (1989) at 12

system. Thus, providing for retirement is an individual responsibility. Even in a partial privatisation such as for example, the Argentina pension scheme, there is likely to be a break in the principles of social solidarity and equity that have long been an integral part of the social security system.[38]

In addition to the general negative impacts of privatised pension schemes highlighted above, the Nigerian Pension Reform Act is fraught with some inadequacies which could undermine the overall objectives of the Scheme. It is an examination of these inadequacies that we should now turn.

IV. Perceived Defects in the PRA, 2004

One major gap in the PRA 2004 is its limited coverage. The Act in section 1(2) thereof, has expressly limited its application to all employees in the Public Service of the Federation, Federal Capital Territory as well as employees in the Private Sector who are in employment in an organisation wherein there are five (5) or more employees. By section 102 of the Act, "Public Service of the Federation" is as defined in section 318 of the Constitution of the Federal Republic of Nigeria, 1999 to wit – "the service of the Federation in any capacity in respect of the Government of the Federation" while "Public Service of a State" is defined as "the service of the State in any capacity in respect of the Government of the State". Since these definitions are mutually exclusive, the Act has expressly excluded employees in the Public Service of a State or a Local Government. There is no stated provision in the Act placing any obligation on the State Governments to mandate compliance with the provisions of the Act in order to safeguard the future well being of their employees which currently constitute about seventy (70) per cent of the nation's public sector workforce. The exclusion of State and Local Government employees from the provisions of the PRA is not however without some justification in view of the Constitutional arrangement which has placed pensions, gratuities and other like benefits under the exclusive legislative power of the National Assembly.[39] In this circumstance, the legislative competence of the National Assembly does not extend to officers in the Public Service of a State or Local Government. However, by limiting coverage in the private sector to organisations where there are five or more employees is untenable. Given the nature of the Nigerian economy whereby a larger percentage of the population are in self-employment in the informal sector, it is clear that quite a large number of employments have been excluded. The option of voluntary participation to this category of people in section 9(4) of the Act smacks of insincerity on the part of the policymakers when one considers the socio-economic challenges to which many are exposed. The income of an average Nigerian worker is barely sufficient to sustain him and

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[38] For example, in Chile, the reform transforms the notion of solidarity, both in its role and its content. Solidarity is not a fundamental notion and, as, such, it is not expressed in the entire system but is reserved for those cases in which the principle of individual responsibility cannot be applied, as in the case of the pensions or welfare pensions. In this unique private insurance system, the State intervenes at selected stages, most importantly, it intervenes at the onset by enforcing enrolment into the system and at the final stages by providing minimum and welfare pensions. - S. Borzutsky,. Supra, note 31 at 95.

[39] See the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999.

his household. For this reason, many would not readily join the Scheme unless they are compelled to do so. Moreover, the general socio–economic conditions in the country have generally worsened beyond imagination. The rate of unemployment in the country is very high. About 70 per cent of Nigerians or two–thirds of the Nigerian people are said to be living below poverty level, living in absolute poverty with not even the barest essentials to support minimally decent human life[40] Indeed, as at 2004 when the PRA was enacted, the population of Nigeria living below the international poverty benchmark of US $1 a day was 70.2 per cent. At the then level of the country's population of 126.2 million, this translated into about 89 million people living in abject poverty thereby making Nigeria a nation with the highest concentration of people living in extreme poverty.[41] Available statistics also show that Nigeria has continued to fair badly in global development indicators as it was ranked 156th out of 187 countries surveyed by the United Nations Development Programme (UNDP) in 2011..[42] On the other hand however, the inclusion of the military in the PRA is not in tune with global trend whereby such security service personnel have been retained under the PAYG system. For instance, in *Chile* where the privately-managed funded scheme was first introduced in 1981, the Armed Forces and the Police are still under unfunded schemes.[43] Also, in Argentina, the military and the police are exempted from the new scheme.[44]

Secondly, basing the rate of contribution payable by an employee on his "monthly emoluments" which has been defined in section 102 of the Act as "a total sum of basic salary, housing allowance and transport allowance" is inequitable. The allowances for housing and transport payable to an employee serve as some form of incentives to enhance the employee's productive capacity and are targeted towards meeting the specific needs of housing and transport.

Also, while the Act in section 9(5) thereof has permitted, upon agreement between an employer and an employee, an upward revision of the contributions above the recommended minimum of fifteen (15) per cent, there is no where in the Act permitting a downward revision, insofar as such revision does not fall below the recommended minimum percentage.

Generally, the Act would also appear to be limited in its focus. The main objective of the Act as stated *inter alia* in section 2 thereof is mainly to provide retirement benefits to contributors under the Scheme. The Scheme need not be a purely retirement savings scheme. With the total rate of contribution fixed at fifteen (15) per cent of an employee's monthly emoluments coupled with the opportunity provided under section 9(5) to make voluntary contributions, the Scheme ought to be programmed in such a way that it would

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[40] National Planning Commission, *National Economic Empowerment and Development Strategy,*, NPC, (2004), at *xii; .The Guardian* (Nigeria) 15 October 2004, at 2.

[41] *The Guardian,* (Nigeria), 19 September 2004 at 14.See also *Guardian,* (Nigeria), 7 September 2004, at 96

[42] See UNDP Human Development Index Report (HDI), 2011. available at http:// assemblyonline.info/?p=14577. (last accessed April 10, 2012)

[43] S. Borzutsky, supra, note 31 at 91.

[44] See J. B. Williamson, J.B. and F. C. Paupal, supra, note 24 at 17.

allow the use of funds on other merit goods such as housing and education as it is done in Schemes of this nature in some other countries such as Singapore.[45]

Moreover, notwithstanding the seemingly good intention of the provisions of section 7(2) of the Act to discourage indiscriminate withdrawals before the end of five years from the date any voluntary contribution is made into a RSA, the corollary purpose of encouraging more savings is unwittingly being jeopardised by imposing taxation on such savings at the point of withdrawal. Such taxation is tantamount to double taxation on such savings since requisite taxation would have been paid initially by the employee under the relevant income taxation law. The said provision of section 7(2) of the Act is also inconsistent with the provisions of section 10 thereof which has made contributions by an employee or an employer part of tax deductible expenses in the computation of tax payable by such an employee or employer under the relevant income tax law.

Furthermore, the use of annuities in the provisions of section 4(1)(b) of the Act may inadvertently cause unintentional redistribution that may be perverse by penalizing low-income workers. In theory, life annuities should take into account the shorter life expectancy of poorer people. With life expectancy in Nigeria currently put at fifty-four (54) years,[46] deferring the purchase of annuity until retirement as the Act suggests may not give the employee/beneficiary the opportunity of deriving appreciable interest from such annuity when it matures in his lifetime. Also, low-income workers not only do not benefit from lower annuity prices, but may also pay much higher commission charges for their life annuities than high-income workers. Also, section 4(1)(a) of the Act which has given the option of programmed monthly or quarterly withdrawals "calculated on the basis of an expected life span" to the holder of a RSA upon retirement or attaining the age of fifty years has not provided any guideline or criteria upon which to calculate the life expectancy.

Another defect in the Act would be found in section 5(2) thereof which provides that:

> "5(2) – The pension fund administrator shall apply the amount paid under subsection (1) of this section in accordance with section 4 of this Act in favour of the beneficiary under a will or the **spouse** and children of the deceased or **in the absence of a wife** and child, to the recorded next–of-kin **. . . " (**Emphasis supplied).

While the Act in one breath has given recognition to "spouse" of the deceased account holder which in Family Law could be interpreted to mean either the "wife" or the "husband", it has in another breath within the same section, given recognition only to a

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45 The Pension Scheme of Singapore designated as the Central Provident Fund operates four types of individual accounts. Apart from the pure mandatory retirement savings account, the Scheme gives workers additional opportunity for investment in approved securities and for spending on education, health insurance and housing. In addition, workers are required to keep a minimum sum in their account after reaching age 55, which is adequate to purchase on retirement at age 62 a minimum life annuity, equal to 25 per cent of average earnings. To achieve these objectives, contributions under the Central Provident Fund are allocated to three separate accounts and individual savings can be accessed under different specified conditions. See U.S.Social Security Administration, *Social Security Programs Throughout the World:: Asia and the Pacific,, 2004,* Office of Research, Statistics and Evaluation,, (2004), 1 at 166.

46 See WHO, *Country Cooperation Strategy; Federal Republic of Nigeria, 2008 – 2013.,* WHO, (2009), at 4.

"wife" as beneficiary. Thus, in the event that the wife predeceased the husband, it would therefore mean that the husband may not benefit from the deceased wife's RSA going by the provisions of this section as it is presently worded. This certainly could not have been the intendment of the law.

Also, the presumption of death after about one year of declaring an employee missing is rather too short when compared with the provisions of section 144(1) of the Evidence Act which requires a period of seven years before such a person is presumed dead.

Section 71(2) of the PRA which requires the NSITF to provide every contributing citizen Social Security Insurance Services other than pension in accordance with the NSITF Act, 1993 is just a blanket provision which has failed to provide any detailed statutory support for the acknowledged role of the NSITF to provide such other services.

The foregoing identified defects in the Nigerian Pension Law have revealed the need for Nigerian policymakers to take appropriate corrective measures in addressing them. To this end, the following reform proposals are being put forward.

V. Imperatives for Further Reforms

For a complete harmonisation of all laws relating to pension in Nigeria and in view of the fact that the Pension Act 1979 under which all the constituent States in Nigeria derive their respective Pension Laws[47] has been repealed by the provisions of section 99 of the PRA, 2004, it is imperative that every State adopts the new PRA through the enactment of appropriate State (Adoption and Adaptation) Law in order to secure the future well being of officers in the Public Service of the States and their respective Local Governments.[48]

Restriction of coverage to establishments where there are at least five or more employees ought to be removed to give equal opportunity to employees of establishments with fewer number as well as other self-employed people to participate on the same platform as those to whom the Act is currently applicable. Indeed, except for the Armed Forces and the Police who remain under unfunded schemes, the Chilean privatised scheme is mandatory for all employed workers but optional for the self-employed while in Argentina, all workers including both employees and the self-employed, with few exceptions such as for example, the military, the police, and provincial civil servants, must join the new Integrated Pension System called *sistema Integrado de Jubilaciones y Pensiones.*[49] It is gratifying to note in this respect that Jigawa State, which is one of the States in Nigeria that have adopted the Scheme has modified the provisions of the

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[47] See for example, The Pension Act (Adoption and Adaptation) Law, 1990 of Ondo State and the Pension Law of Lagos State, Cap 141, Laws of Lagos State of Nigeria 1994 where the provisions of the Pension Act, 1979 have been adopted and applied with such modifications and adaptations as may be necessary to officers in the Public Service of the respective States.

[48] It is gratifying to note however that the National Council of States had adopted the Scheme for the whole country and has asked the Commission to develop a model for the States to modify based on their peculiarities. The Commission had disclosed that as at December 2007, only about nine States out of the thirty six states in the country are yet to take any significant steps towards implementing the Scheme in their respective States. See *This Day* (Nigeria) 8 December 2007, at 2.

[49] See J. B. Williamson, and F. C. Paupal, supra, note 24 , 12 & 17.

Act in respect of coverage to include participation of people in the informal sector such as commercial motorcycle operators, artisans and craftsmen who are required to make a monthly contribution of ₦1, 000.00 (One thousand naira) into the Fund. Each contributor is only required to pay sixty per cent of this sum while the balance of forty per cent is to be borne by the State and Local Government Councils on behalf of the participants.[50] On the other hand, in line with the global trend in Schemes of this nature highlighted above, the armed forces and allied security services personnel ought to and should be excluded from the contributory pension scheme of the PRA in appreciation of the sensitive nature of their profession and the selfless service they render to the country.

Contributions payable by an employee ought to be based on the employee's basic salary as opposed to the "monthly emoluments" on which it is currently based. This would give more opportunity to the employees to meet the specific needs of housing and transport for which the allowances are paid.

Section 9(5) of the Act ought to be amended to give allowance to the employer and the employee upon agreement, for a downward revision of the contributions of which they have previously adjusted upwards above the recommended minimum percentage insofar as such downward revision does not fall below the recommended minimum of fifteen per cent of the employee's "monthly emoluments".

Apart from the retirement benefits provided by the Act, the Scheme should, with a little increase in the contribution rate, have a wider objective of meeting other social needs of contributors such as housing and education along the line of the pension scheme of Singapore.[51] In this vein, the National Housing Fund Act[52] may be integrated with the PRA. This will hopefully eliminate allegations of corruption and mismanagement of funds that have persistently been leveled against the managing authorities of the National Housing Fund Scheme.

The seemingly inconsistent provisions of section 7(2) and section 10 of the Act which have raised the issue of double taxation ought to be resolved by eliminating any form of taxation on withdrawals from RSA.

The Commission should intervene by way of appropriate regulation to ensure that annuities bought pursuant to the provisions of section 4(1)(b) of the Act are adjusted on actuarially fair terms. The conversion of savings into annuities or programmed withdrawals may indeed be good for the economy if adjusted on actuarially fair terms as it provides an incentive for continued work which increases the nation's labour force and productive capacity since the annual annuity or withdrawal will automatically be larger for those who work longer. Such regulation may make such annuities payable as variable annuities; price-indexed or inflation-indexed as it is the practice in Chile where workers at retirement may use their accumulated funds to either purchase inflation-indexed annuities from a private company or sign up for the periodic withdrawal plan.[53]

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[50] See *The Guardian,* (Nigeria) , 22 February 2005, 1 at 51.
[51] See note 53.
[52] Cap N45, LFN, 2004.
[53] See J. B.Williamson, and F. C. Paupal, supra, note 24 at 12.

Appropriate guidelines or criteria for the determination of the expected life span of retirees under the Act should also be provided by the Commission.

Also, the provisions of section 5(2) of the Act ought to be amended to remove the inherent ambiguity so as to give equal and incontestable recognition to the surviving "husband" as a beneficiary of the RSA of a deceased wife.

The requirement of one (1) year for presumption of death in case of a missing RSA holder ought also to be amended to bring it at par with the requirement of seven (7) years under the provisions of the Evidence Act.

In all, it is hoped that the pool of funds that would be available from long-term savings engendered by the Act would be properly utilised to be of immense benefit to the national economy as it is envisaged.[54] It is also imperative that the National Pension Commission be very alert in its statutory responsibilities to ensure due compliance by all stakeholders to the provisions of the Pension Reform Act and any regulation made pursuant thereto and to swiftly identify and bring to book as quickly as possible any person or establishment found wanting in any manner. This will no doubt build the confidence of the public in the Scheme as well as ensure its continued integrity and sustainability. The co-operation of other regulatory agencies such as the Securities and Exchange Commission, the National Insurance Commission and the Nigerian Stock Exchange is also crucial to the successful implementation of the Scheme on issues such as life insurance cover, annuities and risk- rating of investments.

VI. Conclusion

The Pension Reform Act represents a bold initiative on the part of Nigerian government to address the perennial problems associated with pension administration and payment of pension under the erstwhile P-A-Y-G system. One is hopeful that if the Act is amended along the proposals highlighted above, the whole system would be further strengthened to the abiding benefit of all concerned. However, while acknowledging the fact that one's family ought to and should still be the primary source of support in old age, the poverty level in the country as well as the prevailing socio-economic realities in the country call for a measure of social support for the needy elderly in appropriate cases. In Nigeria and indeed in Africa, one of the consequences of social and economic transformation has been the gradual weakening of traditional forms of social security based on the extended family and kinship ties. As such, the sense of family and charitable responsibility for older members of the society has gradually reduced. An increasing number of the elderly are no longer enjoying any form of support whatever either from their immediate or extended family with many of them taking to the streets to beg for their livelihood. This ought not to be so in view of the provisions of section 16(2)(d) of the 1999 Constitution which have enjoined Government to ensure that suitable and adequate old age care and pension are *inter alia* provided for all citizens. Although these Constitutional provisions are contained in the Fundamental Objectives and Directive

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[54] Pension fund assets in Nigeria was said to have risen to N2.45 trillion by March 2012.- See *The Guardian,* (Nigeria), 22 March 2012, at 20.

Principles of State Policy which provisions are declared non-justiciable by section 6(6)(c) of the said Constitution in the sense that they cannot be secured in a court of law by any person who alleges an infringement of his right in respect of any of them, they however go a long way if pursued as a political programme by any government to further the ends of liberty, equity and justice in the Nigerian society. In this vein, the Nigerian policymakers ought to seize the advantage of the window of opportunity provided by the provisions of section 71(2) of the PRA to institutionalise a social assistance-based old age benefit that would provide means-tested old age benefit to persons aged 65 and over who also meet other eligibility criteria prescribed by law. Indeed, one of the common features of structural social security reforms in most countries is the separate arrangement that is usually made for the poverty-prevention part of the old age system. In Chile for instance, apart from supplementing the individual account when the accumulated private fund, after 20 years of contributions is insufficient to finance a minimum pension, the State also pays welfare pensions to the needy elderly because they are disabled or because they are aged 65 or more.[55] Also, in Singapore, the Government has instituted a public-assistance pension scheme that offers to destitute old people a small pension that is half the size of the minimum pension imposed under the Central Provident Fund and amounts to 12% of average earnings.[56] Similarly, some other African countries including South Africa and Mauritius, though not having privatised pension systems, have successfully implemented non-contributory, old age benefit programme to provide a minimum income for the needy elderly. For instance, in South Africa**,** under the Social Assistance Act, 2004, No. 13*,* entitlement to a basic pension, which is financed from the general taxation, is subject to a means test for every man and woman who has attained the age of 65 years and 60 years respectively.[57] The South Africa's old age pension is said to reach 1.9 million beneficiaries, about 85 per cent of the eligible population. The scheme is also said to have reduced the poverty gap for pensioners by 94 per cent.[58] Also, in Mauritius, the government provides all residents, citizens and non citizens alike, who are aged 60 or older with non-contributory basic pension.[59] The proposed scheme in Nigeria should however be structured in a way that would decidedly stimulate State Governments to buy into it through the provision of necessary financial support towards its implementation. Undoubtedly, a scheme such as this, given the required political will and unwavering commitment on the part of Nigerian policymakers would go a long way in reducing the incidence of poverty and destitution at old age for the less privileged ones.

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[55] See S. Borzutsky supra, note 31 at 91.

[56] See M.G Asher, "The Pension System in Singapore" Social Protection Discussion Paper No. 9919, World Bank, (1999).

[57] See Sections 5 and 10 of the Social Assistance Act, 2004, No. 13 (South Africa).

[58] See ILO, *Facts on Social Security in Africa,* available at www.ilo.org/public/english/bureau/inf.download (last accessed 27 May 2005).

[59] See U.S.Social Security Administration, *Social Security Programs Throughout the World: Africa, 2003,* Office of Research, Statistics and Evaluation, (2003) at 98.