

A CRITICAL APPRAISAL OF PENSION SYSTEM REFORMS IN NIGERIA

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I.	INTRODUCTION.....	165
II.	BACKGROUND	166
III.	PENSION REFORM ACT 2004	168
	A. Scope of the Act	168
	B. Contributory Pension Scheme	169
	1. Objectives of the Scheme	171
	2. Stipulation of Retirement Age.....	172
	3. Rate of Contribution.....	173
	4. Retirement Savings Account.....	174
	5. Pension Fund Administrator	174
	6. Pension Fund Custodians	179
	C. Transfer of Entitlements from Old Existing Schemes to the New Scheme.....	181
	1. Investment of Pension Funds and Assets	183
	2. Other Transition Provisions	185
	D. Nigeria Social Insurance Trust Fund (NSITF)	187
	E. Retirement Benefits.....	190
	1. Withdrawal from Retirement Savings Account	192
	2. Death of an Employee	192
	3. Exemption from Tax	193
	F. Minimum Pension Guarantee.....	194
	1. Fees, Charges, Costs and Expenses.....	195
	2. Statutory Reserve Fund	196
	3. Failure of a Pension Fund Custodian (PFC).....	197
	G. National Pension Commission	198

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1. Offences, Penalties, Etc.....	199
2. Dispute Resolution.....	199
IV. CONCLUSION.....	200

I. INTRODUCTION

The issue of pension in Nigeria has become one of the thorniest issues in the country today with millions of retired Nigerian workers, living in abject poverty and neglect as a result of the failure of the country's pension system.¹ Arguably, the Federal Government of Nigeria is the highest employer of labor within the formal sector of the economy.

However, the government has increasingly encountered difficulties in meeting its liabilities to its workers, both serving and retired. According to Professor Julius Ihonvbere, Special Adviser to the President on Policy and Programmes Monitoring, despite efforts being made by the Federal Government to mop the pension backlog, it still owes about ₦2 trillion (naira) to its workers. He disclosed that the monthly pension bill of the Nigeria Railways stood at ₦250 million, with a monthly wage bill of ₦210 million, as against a paltry sum of income from the same source.²

Curiously enough, as recently as December 2005, the Director-General of the newly established National Pension Commission put the outstanding Federal Government's pension liability at ₦2.56 trillion. Retired federal ministry and parastatal workers were owed ₦2 trillion, while the accumulated pension arrears for military, police and paramilitary retirees stood at ₦56 billion.³

Thus, it is a common spectacle to see pensioners forming unending queues at designated centers, in a bid to collect pension payments, with occasional reports of deaths on such queues on account of exhaustion and related causes. Additionally, retired soldiers have picketed military headquarters in all state capitals and the Federal Capital Territory, Abuja, over the non-payment of their pensions.

This paper intends to review the pension arrangement in Nigeria pre-2004 along with the salient provisions of the newly enacted Pension Reform Act 2004. This has been written to illuminate the current pension situation and show how the Act has attempted to bring an improvement upon the numerous retirees both in the public and the private sector. It will also consider its impact if any, on the mass of workers in the informal sector.

1. Victor Osakwe, *Pension Reform Act Passed by the National Assembly* (November 2004), <http://www.socialistnigeria.org/paper/2004/nov/7.html>.

2. Julius O. Ihonvbere, *The Obasanjo Second Term in Office: Reinventing and Repositioning Nigeria for Growth, Stability and Democracy*, 6 W. AFRICA REV. (2004), available at <http://www.westafricareview.com/issue6/ihonvbere.html>.

3. See THE DAILY CHAMPION (Nig.), December 13, 2005.

Overall, it should become clear whether or not a social safety net has been created, guaranteeing the Nigerian worker relative security in old age and retirement.

II. BACKGROUND

Prior to the Pension Reform Act,⁴ pensions were mandatory in the public sector, but optional in the private sector. On the one hand, Government workers' pension was devised under the Pensions Act.⁵ Under that Act, the pension or gratuity granted to retirees was on the basis of final pay⁶ and the sums were made chargeable to the Consolidated Revenue Fund of the Federation.⁷ It is important to note that the federal public service operated an unfunded non-contributory defined benefit Pay-As-You-Go ("PAYG") scheme. In a PAYG system, the government taxes active workers to pay for the benefits of retired workers. Under such systems, retirement benefits are a function of the rate of growth of the tax base, which in turn depends on the rate of growth of the labor force and the rate of growth of real wages per worker.⁸ In other words, the retirees may or may not receive their benefits depending on whether or not their employer has sufficient cash resources to make payments at that time.

Thus, we find a situation whereby, even though government guarantees gratuity and pension, the pension scheme is not funded by the setting aside of money from which the commitments could be serviced. Could this be as a result of poor economy/financial difficulties, inadequate government commitments, high rate of corruption and insincerity in the system?⁹

Without going into the dialectics of what factors may have been responsible, Governor Gbenga Daniels of Ogun State was quoted as saying that "the imminent collapse of the PAYG scheme is real and very unsettling for a nascent democracy. At the moment, the pension liability in the public sector is about ₦2 trillion and it is on the increase every passing day. There

4. Pension Reform Act No. 2 (2004), § 1 (Nig.), available at <http://siteresources.worldbank.org/INTPENSIONS/Resources/3954431122047906143/PenLe gNigeria2004.pdf>.

5. Laws of the Federation of Nigeria, (2004) Cap. P4. (Note that the 2004 compilations of the Laws of the Federation of Nigeria represented the law as of 31st December 2002).

6. Adetola Adegbayi, *Pension Industry Development in Nigeria—The Thrust of the Pension Reform Act 2004*, <http://www.leadway.com/pensiondev.pdf> (last visited October 24, 2006).

7. *Id.*

8. See L. Jacobo Rodríguez, *Chile's Private Pension System at 18: Its Current State and Future Challenges* (July 30, 1999), available at <http://www.socialsecurity.org/pubs/ssps/sp-17es.html>.

9. Bob Ojujoh, *The Pension Reform Act 2004: The Need for Amendment*, <http://globalag.igc.org/pension/world/2005/ACT.HTM> (last visited Jan. 14, 2006).

is likelihood of the pension salary bill outrunning the salary of our active workers in a few years.”¹⁰

One thing clearly stands out: there has been a crisis of non-payment/delayed payment of pension and gratuity across the public sector – the mainstream civil service, parastatals, military, state governments, universities, local governments etc.¹¹ The sheer size of the public sector workforce in Nigeria has made it difficult for the government to pay its workers their salary, let alone adequately meet its pension commitments.

Most institutions in the private sector did not have any pension or retirement benefits scheme for their employees. Some institutions operated schemes similar to the PAYG, while a few operated funded contributory schemes. In the latter case, contributions to a pension, provident or other retirement benefits fund, society, or scheme are made tax free, with deductions allowed in the ascertainment of income of an individual. However, such an arrangement must have been approved by the Joint Tax Board.¹² It would then appear that workers in the public sector enjoyed an advantage over their counterparts in the private sector, to the extent that pension/retirement benefits were guaranteed to one sector but not to the other.

Under the old Pensions Act,¹³ the retirement age stipulated was 60 years,¹⁴ or 35 years of continuous service,¹⁵ whichever came first. An officer who has put in service up to 10 years but less than 15 years, shall be entitled to the payment of gratuity only, but no pension is payable. However, where he has served for not less than 15 years, he shall be entitled to both gratuity and pension.¹⁶ Payment of gratuity and pension, whichever is applicable, is computed under the provisions of the Act.¹⁷

In general terms, the foregoing represents the conditions for the payment of gratuity and pension under the old Pensions Act. However, progressively and quite noticeably in recent years, the government has struggled with little success to meet its pensions obligations. Payment of retirement benefits has become erratic and irregular. Retirees no longer receive payment of their entitlements when due. The crisis generated by

10. Bethel Obioma, *Pension Crisis a global phenomenon–Daniel*, DAILY INDEPENDENT NEWSPAPER, November 30, 2005.

11. Owei Lakemfa, *Briefing Paper at the National Workshop on the New Pension Act, Its Implications and the Challenges for Organized Labour* (July 17, 2004), <http://www.nlcng.org/July2004/pensionworkshop.htm> (last visited Jan. 10, 2006).

12. See Personal Income Tax Act (1993), § 20(1)(g) (Nig.); Laws of the Federation of Nigeria, (2004) Cap. P8.

13. Laws of the Federation of Nigeria, (2004) Cap. P4.

14. *Id.* § 4.

15. Pension Reform Act, *supra* note 4, at § 8(3).

16. *Id.* § 3.

17. *Id.* §§ 1, 8(3).

this development has necessitated the reform undertaken by government, which culminated in the enactment of the Pension Reform Act 2004.¹⁸

III. PENSION REFORM ACT 2004¹⁹

A. *Scope of the Act*

The primary issue to determine is the scope of the Act and the provisions it made for a Contributory Pension Scheme (referred to as the “scheme”). In section 1(1), the Act provides that “there shall be established for *any employment in the Federal Republic of Nigeria*, a Contributory Pension Scheme” (emphasis added). It would appear that the provisions of the Act have general applicability to the entire federation, that is, it has country wide application at federal, state, and local government levels. This application raises a constitutional concern.

Section 4 of the 1999 Constitution of the Federal Republic of Nigeria²⁰ spells out the Legislative powers of the Federation. The National Assembly has the power to make laws for the peace, order and good government of the Federation or any part thereof, with respect to matters contained in the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution.²¹ In such matters, the National Assembly makes laws to the exclusion of the Houses of Assembly of States.²² In other words, the States Houses of Assembly cannot competently legislate over such matters. Even in matters that are in the Concurrent Legislative List, inconsistencies in laws made by the National Assembly vis-à-vis those made by any State House of Assembly are resolved in favor of the former. Such laws made by the latter are invalidated to the extent of their inconsistency.²³

It is instructive to note that “pensions, gratuities and other like benefits payable out of the Consolidated Revenue Fund or any other public funds of the Federation” (emphasis added) are placed under paragraph 44, Part I of Second Schedule to the Constitution, that is, within the Exclusive Legislative List. The Act provides that the scheme established under it shall apply to all employees in the Public Service of the Federation, Federal Capital Territory and the private sector. In the case of the public sector, to those who are in employment, but in the case of the private sector, to those who are in organizations in which there are five or more employees.²⁴

18. See generally Pension Reform Act, *supra* note 4.

19. *Id.*

20. NIGERIA CONST. art. 4, § 1 (1999).

21. *Id.* art. 4(2).

22. *Id.* art. 4(3).

23. *Id.* art. 4(5).

24. Pension Reform Act, *supra* note 4, § 1(2)(a), (h).

Arising from the foregoing, the Act stands valid to the extent that the contributions of the employer in the case of the public sector are directly or indirectly chargeable to the Consolidated Revenue Fund. However, a strong case can be made against the applicability of the Act to the private sector. Within this sector, neither the contributions of the employer nor the employee are chargeable to the Consolidated Revenue Fund, or any public fund of the federation. Indeed, to that extent, the Act could be regarded as unconstitutional and therefore null and void.

Again, does the Act apply to public workers in the States and the Local Governments? This doubt is created by the limiting effect of section 1(2) of the Act. Once it is considered inapplicable to workers in the employ of the States government, *ipso facto*, it would not apply to workers under the Local Governments. This position is reinforced by the provisions of section 7 of the Constitution. It guarantees the existence of a system of local government, as the third tier of government, within the federal system of government, in Nigeria. Furthermore, each State Government is charged with the responsibility of bringing the local governments into existence by an applicable Law.²⁵

If the Pension Reform Act does not apply to the public service of the States and the Local Governments in Nigeria, what law then is applicable? Are the States to promulgate Pension Reform Laws, possibly within the tenor of the Act, if they consider its provisions desirable? Under what auspices, seeing that pension matters are neither within the Concurrent Legislative List, nor are they to be regarded as residual matters?

The fallout from the foregoing is that the scope and applicability of the Act has presented issues of constitutionality which go to the root of the validity of any law, be it federal or state. In our opinion, there is an immediate need to make a constitutional amendment to bring the Act into conformity. In the alternative, the Act itself must be amended to conform to the provisions of the Constitution as it stands.

B. *Contributory Pension Scheme*

The Act was signed into law on June 25, 2004. It became effective on July 1, 2004, for the public sector, and January 1, 2005, for the private sector.²⁶ Unequivocally, the Act established “for any employment in the Federal Republic of Nigeria, a *Contributory Pension Scheme* for payment of retirement benefits of employees to whom the Scheme applies”²⁷ By this provision, the hitherto unfunded pension system has been overthrown and substituted with a contributory scheme.

25. NIGERIA CONST. art. 7, § 1 (1999).

26. The commencement was not expressly stated in the Act itself, but garnered from government pronouncements and directives.

27. Pension Reform Act, *supra* note 4, § 1(1) (emphasis added).

Apparently, the scheme applies only to those workers who are to be regarded as “employees.” In our view, the term “employee” is restrictive in nature. According to section 108 of the Personal Income Tax Act,²⁸ “employment” includes any appointment or office, whether public or otherwise, for which remuneration is payable, and “employee” and “employer” shall be construed accordingly. Section 91 of the Labor Act²⁹ defines “employer” as any person who has entered into a contract of employment to employ any other person as a worker.

Put differently, only those workers with a contract of employment, with all its formalities, are required to participate in the contributory pension scheme. Indeed, for such category of workers, it is a mandatory component of the employment; it is not optional or discretionary, even for the employer. Failure to comply duly is visited with discernible sanction.

In Nigeria, there is a remarkable class of “workers”³⁰ who are classified as casual workers. In most cases, these casual workers cannot lay claim to any formal contract of employment. Nevertheless, they are engaged in various forms of work even for reputed and well recognized organizations and establishments. In a bid to circumvent the stipulation of section 7, Labor Act,³¹ establishments that engage those “casual” workers make a show of sacking such workers shortly before they have been three months on the job and re-engaging them thereafter. Often, this practice goes on, in that circle, for many years.

Arguably, this casual class of workers forms a considerable proportion of the working force in Nigeria. Indeed, this tendency of casualisation of workers has been recognized as a thorny issue in labor and industrial matters. From all indications, the casual worker stands excluded from the avowed benefits of the pension scheme as a form of insurance in old age for the Nigerian worker. This gap in the law becomes more pressing considering that there is no credible welfare system, indeed for the worker during tenure, as well as in retirement, in Nigeria.

It is desirable that the government takes a hard look and stance over the matter of casualisation of labor in the country. Granted, there may be seasons during which a worker might not hold onto a tenured job, or one that has some degree of continuation. However, a situation where despite his qualifications, a worker is “permanently casualised” for the greater portion of his productive working life, or the entirety of it, leaves so much

28. Laws of the Federation of Nigeria 2004, Cap. P8.

29. Labour Act, (1990) Cap. 198, § 91 (Nig.).

30. Casual workers are workers in the sense that they render service which is remunerated.

31. Labour Act, (1990) Cap. 198, §7. The section states that not later than 3 months after commencement of employment, the employer shall give to the worker, a written statement which specifies the salient terms of the employment. This may not be the contract of employment itself, but at least serves as evidence of it.

to be desired. This trend would appear to put the lie to the avowed objectives of the pension scheme, as stated in section 2 of the Act.

1. Objectives of the Scheme

The objectives of the contributory pension scheme are stated under section 2.³² It is aimed at ensuring that every retiree receives his 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 retirees in the public service of the federation, the Federal Capital Territory and the public sector.³³

At face value, this package looks attractive and a seeming attempt at improvement over the previous unfunded pension system. However, in our view, the most critical aspect is the projections made for the welfare of the senior citizens in their old age. The scheme only says it would assist improvident citizens to save towards sustenance in old age.³⁴ The question is what is the benchmark? In real terms, what is the aim? Is it to ensure their survival at whatever level, even if below subsistent level? The catch is in the word “assist.”

In the entirety of the Act, there is no provision for a minimum retirement pay. Even this would need to be indexed against such variables as minimum wage for workers and inflation level. The truth of the matter is that even during the productive, working years, the preponderance of Nigerian workers earn below a “living wage.” The point being made here is that the worker earns less than required to meet his needs. Now, he is compelled to make savings of a certain percentage. While quite commendable, what will be the real value of the total savings at the end of the day?

In America, the government has begun awareness of the need and the possibility of a reform of the Social Security system, but this has met with resistance, particularly from the senior citizens who under the existing system are assured of a decent monthly pension pay. American senior citizens are content with the certainty and security the system affords them. They are “insured” against lack and neglect. What does the scheme offer under the Nigerian system?

Following from this, it is little excitement, if any, that the benefits would be paid as and when due, or that there are uniform applicable rules. The substance of a pension system is in its adequacy to ‘take care’ of the retired person, particularly in old age, when he doesn’t have the strength to take care of himself or his still surviving family.

32. Pension Reform Act, *supra* note 4, § 2.

33. *Id.* § 2(a)-(c).

34. *Id.* § 2(b).

2. Stipulation of Retirement Age

Section 4, Pensions Act³⁵ set the retiring age at fifty years. In the alternative, the officer should retire having put in thirty-five years of service, whichever comes earlier.³⁶ The Pensions Act has been repealed by the new Pension Reform Act.³⁷ The question then becomes what is the retirement age for workers in Nigeria? The Pension Reform Act is strangely silent on this. Without much difficulty, the private sector could devise its own cut off point for workers in its service, but what about the public service?

It would appear that the provision of section 8(1)³⁸ has no basis. It exempts from the scheme, employees who have three years or less to retire.³⁹ The utmost that can be made from the provision is that an officer has a maximum of thirty-five years he could spend in service after which he will have to disengage, that is, proceed on retirement. This can be construed from section 8(3) which states that such officers shall continue to derive retirement benefit under such existing scheme as provided for in First Schedule to the Act.⁴⁰

Under the First Schedule, computation of retirement benefits is based on a maximum number of thirty-five years.⁴¹ In view of this, under present law, retirement in Nigeria, particularly in the public sector, is to be determined with reference to years in service. The age of the employee does not appear to be relevant. This position is undesirable and unsatisfactory. An employee who entered on an employment at age forty might as well continue with that employment until age seventy-five (since he could remain in service up to thirty-five years), by which time he would have been past his prime and productive years, and ought to have gone into retirement, drawing his benefits in old age.

The closest to a retirement age under the Act is the provision of section 3(1). It states that a contributor to the scheme who has opened the mandatory 'retirement savings account' shall not be permitted to make withdrawals from the account until he has attained the age of fifty, unless he has to retire at an earlier time on medical grounds, disability or in accordance with the terms and conditions of his employment.⁴²

This stipulation of retirement age, apparently envisages voluntary retirement. This is a situation whereby an employee opts to retire from

35. Pension Reform Act, *supra* note 4, § 3(1).

36. *Id.* § 8(3), First Schedule.

37. Pension Reform Act, *supra* note 4, § 99(1)(a).

38. *Id.* § 8(1).

39. *Id.*

40. *Id.* § 8(3).

41. Pension Reform Act, *supra* note 4, § 8(3), First Schedule.

42. *Id.* §§ 3(1), (2)(a)-(c).

service of his own volition, for reasons other than being required to do so by statute on account of age or number of years in service. To this end, the authentic age of the employee would be the age he indicated in his records at the time he took up the employment.⁴³ This is a precaution against cases whereby an employee at a later stage in service attempts to alter or amend the record on his age one way or the other. However, one finds out that in most of the cases, such ‘doctoring’ of records of service is done surreptitiously and without regard to due process. Nevertheless, the provision is useful to the end that in proven cases such a ‘doctoring act’ becomes unlawful and thereby invalidated.

3. Rate of Contribution

Under section 9 of the Act, with reference to “the Public Service of the Federation and the Federal Capital Territory,” both the employer and the employee are required to contribute a minimum of 7.5% respectively of the employee’s monthly emolument to the scheme.⁴⁴ In the case of the Military, a minimum of 12.5% should be contributed by the employer while the employee contributes a minimum of 2.5%.⁴⁵ In other cases, especially for the private sector, the employer and the employee are expected to contribute a minimum of 7.5%, respectively.⁴⁶

Noticeably, in every other case, whether in the public or the private sector, the minimum contribution from both the employer and the employee is 7.5% respectively, except in the case of the Military, where the employer is required to contribute a minimum of 12.5%.⁴⁷ Considering that the employer’s contributions, in this case the Federal Government, are to be made out of public funds, there is no visible justification why the government’s contribution should be skewed in favor of the military. Could it be an incentive for the military not to truncate the democratic system of government, seeing that they are given preferential treatments under existing dispensation?

This position should not be allowed to stand. Military service, in the broadest sense, is not essentially different from other brands of public service. All public workers should be given a sense of fair treatment under the law. This point becomes more pressing considering the fact that the police are treated equally with the rest of the Public Service. The Police and Other Agencies Pensions Offices Act of 1993, and the Police Pension Rights of Inspector-General of Police Act of 1993, were both repealed by the Pension Reform Act.⁴⁸

43. *Id.* § 3(4).

44. Pension Reform Act, *supra* note 4, § 9(1)(a)(i)-(ii).

45. *Id.* § 9(1)(b)(i)-(ii).

46. *Id.* § 9(1)(c)(i)-(ii).

47. *Id.* § 9(a)-(c).

48. Pension Reform Act, *supra* note 4, § 99(1)(b).

4. Retirement Savings Account

Under section 11, every employee is required to maintain a Retirement Savings Account (RSA) in his name with a Pension Fund Administrator (PFA) of his choice.⁴⁹ The contributions of both the employee and the employer are to be remitted promptly from month to month into this account. The lodgment should be made by the employer, having deducted the employee's contribution from his salary at source.⁵⁰ Where the employer fails to remit on time (within seven days of payment of the employee's salary) he is liable for a penalty of not less than 2% of the total contribution that remains unpaid for each month or a part of it.⁵¹ The penalty is treated as a recoverable debt to the employee's RSA.⁵²

It is important to note that the employee's RSA is mobile and transferable. Thus, upon transfer by the employee from one employer or organization to another, the employee shall continue to maintain the same RSA.⁵³ Before now, procedure for merger of service for the purpose of continuity of service, relevant for computation of retirement benefits has proven rather cumbersome. It is further complicated by administrative bottlenecks, bureaucracies and tendencies towards corruption and inefficiencies in the civil service. Thus, it is sometimes a nightmare for a retiree to wade through the maze of paper work and 'protocol' that attend a merger of service. It is even worse when the employee served under more than one level of government, for example, merger of service under the Federal and State Civil Service.

However, it is hoped that those identified problems and related ones would be considerably, if not totally obviated, under the present scheme. In addition, the flexible nature of the scheme and the RSA should encourage mobility of labor in Nigeria. A 'type' of the Nigerian worker, particularly in the public sector, is one who stays on a job, until he has to retire. We do even find occasions when the worker is reluctant to disengage from the employment. To forestall retirement, the worker makes designs to alter his age as contained in the records of service. Hopefully, this manner of practice could be discouraged under the present scheme.⁵⁴

5. Pension Fund Administrator

Section 44 prescribes that from henceforth, pension funds are to be managed by Pension Fund Administrators (PFA) licensed by the National

49. *Id.* § 11(1).

50. *Id.* § 11(5)(a).

51. *Id.* § 11(5), (7).

52. *Id.*

53. Pension Reform Act, *supra* note 4, § 13.

54. Pension Reform Act, *supra* note 4, § 3(4) (the authentic age of an employee entering the public service or any other employment shall be that submitted by him on entering the service or taking up the employment).

Pension Commission (hereinafter called the “Commission”).⁵⁵ This is done by the opening of RSAs for employees, each with a distinguishing Personal Identity Number (PIN), investment and management of the pension funds and assets, maintaining of books of account relating to the pension funds, providing of regular information on investment strategy, market returns and other performance indicators.⁵⁶ In addition, they are to provide customer service support to employees, calculate employees retirement benefits, and pay the appropriate benefits.⁵⁷

Pointedly, the employee is empowered to appoint a PFA of his choice, apparently among those to be licensed by the Commission, with whom he opens a RSA.⁵⁸ The employee is at liberty to transfer his RSA from one PFA to another, not more than once in a year, without giving any reason for so doing.⁵⁹ All the employee needs to do is to supply his employer with particulars of his RSA, when he opens one with a particular PFA or of a change in the PFA when he has cause to change him.⁶⁰ This is necessary to enable the employer to remit appropriately the monthly contributions made by both the employee and the employer.

The role of the PFA is very crucial to the state of health and success of the contributory pension scheme. Indeed, the PFA is the strongest link in the scheme. This arises from the fact that the *management* of the pension funds, being the whole essence of the scheme, is vested in the PFAs. The employee has no direct dealings with his RSA, except through the PFA.⁶¹

Arising from the foregoing, the licensing, operation, management, performance, competence, integrity, continuity and success or failure of the PFA becomes an important issue to the employee. The Nigerian employee is being saddled with a responsibility he is ill prepared for – that of being partly responsible for what becomes of his retirement benefits ‘sheltered’ in the RSA. This responsibility arises from the employee being the “appointor” of his PFA, and also from his liberty to dump one PFA for another, purely at his discretion. In other words, the employee must keep a watchful eye on “his” PFA.

Arguably, the average Nigerian is generally unresponsive to happenings around him arising from a low level of awareness, consciousness and preparedness to get involved. The average worker, arising from deprivations he suffers from financial inadequacies, inability to meet the needs and demands placed on him, on account of poor salary and wages, among others, considers himself as an outsider in matters of finance

55. *Id.* § (44).

56. *Id.* § 45(a)-(d).

57. *Id.* § 45(e)-(g).

58. *Id.* § 11(1).

59. Pension Reform Act, *supra* note 4, § 11(2).

60. *Id.* § 11(3).

61. *Id.* § 11(4).

and investments. As a result, the government had to advance loans to workers under the PSPSL plan before some could buy shares in companies under the privatization exercise. To require the average Nigerian worker to 'supervise' his PFA will no doubt prove to be a Herculean task for him.

The Commission has the prerogative to license PFAs that would operate under the pension scheme.⁶² In coming to a decision, a prospective PFA is required to furnish an application to the Commission.⁶³ The applicant must be a duly registered limited liability company, with the object of managing pension funds, have a minimum paid up share capital of ₦150,000,000 or such sum as may be prescribed by the Commission from time to time.⁶⁴ It must have requisite professional capacity and competence to manage pension funds, give satisfactory undertaking that it would not engage in any other business than the management of pension funds, and meet any other additional requirement(s) specified by the Commission.⁶⁵

However, the Act permits a licensed life insurance company to apply and be issued with a license to function as a PFA.⁶⁶ The applicant must have met all other requirements necessary for the issuance of a license as PFA.⁶⁷

On February 20, 2006, licenses were presented to 12 PFAs as the first set of licensed operators in the pension industry under the Act. They are: IBTC Pension Managers Limited; Premium Pension Limited; Pensure PFA Limited; Sigma Vaughn Sterling Pension Limited; Pensions Alliance Limited; ARM Pension Managers Limited; First Alliance Pension & Benefits Limited; Trustfund Pensions Plc.; First Guarantee Pension Limited; Legacy Pension Managers Limited; NLPC Pension Fund Administrators Limited; and Crusader Pensions Limited.⁶⁸ There is also one Closed PFA, Shell Nigeria Closed Pension Fund Administrator Limited.⁶⁹

Any operator who fails to obtain a license, as an individual, is liable upon conviction to a fine not less than ₦5,000,000 or imprisonment for a term not exceeding five years or to both.⁷⁰ Where the operator is a

62. *Id.* § 49(2).

63. Pension Reform Act, *supra* note 4, § 49(1).

64. *Id.* § 50(a)-(b).

65. *Id.* § 50(1)(c)-(f).

66. *Id.* § 50(4).

67. Pension Reform Act, *supra* note 4, § 50(4).

68. Business News Today, *Pension Revolution Takes Hold...FG moves to determine and pay liabilities* (February 21, 2006), available at <http://www.infopool.accessbankplc.com/central/index.cfm?app=news&newsID=21/Feb/2006>.

69. See Pension Reform Act, *supra* note 4, §§ 39-41. Where an employer has before the Act operated and managed pension funds of its employees under an existing pension scheme, such may apply to the Commission to be licensed as a closed pension fund administrator to enable it continue to manage such funds. However, it must meet the requirements specified under the Act.

70. Pension Reform Act, *supra* note 4, § 48(a).

corporate body, it is liable to a fine not less than ₦10,000,000 in addition to a fine not less than ₦2,000,000 each and/or a term of imprisonment not less than five years, for each of its directors or officers.⁷¹

There are various provisions under the Act which seek to regulate the operations of the PFA's with a view to ensuring rectitude, integrity, character, probity, proficiency and competence on their part. The Commission may refuse to issue a license to an applicant as PFA, as well as revoke an existing license, for good reasons.⁷² In the event of a revocation, the Commission shall cause to be transferred to another PFA, RSAs being managed by the offensive PFA,⁷³ to the end that the revocation would not prejudice the entitlements of any beneficiaries of the RSAs.⁷⁴

The PFAs must keep proper books of accounts and records, submit their audited accounts to the Commission for approval within a stipulated time, after which such accounts shall be duly published and exhibited.⁷⁵ They must submit an annual report to the Commission.⁷⁶ External auditors appointed by PFAs owe a duty to duly inform the Commission of any circumstance that could be prejudicial to the discharge of functions by a particular PFA; failure to do so entails liability on the part of the auditor.⁷⁷

The PFA shall ensure that the pension funds, at all times, are managed in accordance with relevant provisions of the statute and regulations made under it. It should promptly report to the Commission circumstances inimical to the observance of this duty, including unusual occurrences, information on frauds, forgeries and thefts, and staff dismissed on the ground of fraud. Failure to make these reports results in a penalty for the administrator or custodian in violation.⁷⁸ "No PFA shall hold any pension fund assets, nor should such assets be kept with a pension fund custodian (PFC) in which the PFA has any business interest, shares or any link whatsoever."⁷⁹

In addition, a PFA shall establish a Risk Management Committee and an Investment Strategy Committee that would assist the PFA in the carrying out of its functions. The Commission must approve the appointment of any Chief Executive Officer or Director of a PFA. The PFA shall employ a Compliance Officer and maintain a statutory reserve fund.⁸⁰

71. *Id.* § 48(b).

72. *Id.* § 53(1).

73. *Id.* § 54(6)(a).

74. *Id.* § 54(4).

75. Pension Reform Act, *supra* note 4, § 56(1), (3)(a)-(b).

76. *Id.* § 57.

77. *Id.* § 58(1), (3).

78. *Id.* § 64.

79. *Id.* § 65(2).

80. Pension Reform Act, *supra* note 4, §§ 68-69.

No doubt, the foregoing provisions are far reaching and well intended, designed as safety valves to the operations of PFAs under the scheme. However, it would be noted that most of the licensed PFA's are newly established with no track records of pension funds management. Employees would still have to make choices among them, for the purposes of opening personal RSAs as directed by statute. At this initial stage, the choice may appear to be largely as one going down a blind alley. This is significant considering the fact that once a choice is made, the employee does not have the opportunity of a reversal until one year later.

In our opinion, the periodicity could be increased from once a year to twice a year. Under the Chilean system, at the outset, the employee had the liberty to make one transfer from one AFP to another, every three months, which is no more than four times in a year.⁸¹ However, this has been reduced to twice in a year, since 1997, in order to bring down administrative costs and prevent too frequent rotation of workers among the AFPs.⁸²

One appreciates the need for the PFA to manage pension assets for a reasonable portion of the year, so that the assets might stand the chance of yielding appreciable returns. Then, once may appear too frugal; the possibility of switching PFAs twice in a year should better meet the expedencies of the matter. Otherwise, the PFA could afford to be slack in a particular year, calculating that no change could be made concerning it until one year is passed, in any period of time under reference.

It should be pointed out that the Commission must take caution not to have too few PFAs, considering that a lot of funds are likely to be generated under the scheme. In estimate, the scheme is expected to yield about ₦600 billion annually, given uninterrupted contributions and strict regulatory checks on operators. Twenty million employees are expected to contribute an average of ₦2,500 per month, such that ₦50 billion would be realized every month. Already, this possibility has started to generate interest and excitement in the relevant industries. According to Mrs. Seyi Ifaturoti, President, Chartered Insurance Institute of Nigeria (CIIN), the potentials of the pension reform would boost growth in the insurance industry.⁸³

With due premium given to credibility, employees should be made to have considerable choices to make among licensed PFAs. One of the identified problems with the Chilean experience is the 'tyranny' of the few private companies known as *Administradoras de Fondos de Pensiones* (AFPs) who manage the fully-funded pension system. The AFPs (equivalents of the Nigerian PFAs) are corporations specially established for

81. Eva Liu, *Information Note: The Chilean Pension System*, 1, 6 (1997), <http://www.legco.gov.hk/yr97-98/english/sec/library/967in03.pdf>.

82. See Rodríguez, *supra* note 8.

83. See generally, Bethel Obioma, "Reform to yield ₦600b annually," <http://www.independentng.com/moneymarket/modec070503.htm> (last visited Jan. 13, 2006).

the sole purpose of administering the pension funds for their affiliates⁸⁴ (the affiliates are similar to those who open RSAs with particular PFA's under the Nigerian Pension Reform Act). Over the years, the Chilean AFPs have shrunk from over twenty to six,⁸⁵ greatly reducing competition.

6. Pension Fund Custodians

Pension funds and assets are to be kept exclusively by Pension Funds Custodians (PFCs) licensed by the Commission.⁸⁶ The PFCs perform the following duties:

receive the total contributions remitted by the employer under section 11 of this Act on behalf of the pension fund administrator within 24 hours of the receipt of contributions from any employer; notify the pension fund administrator with 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 retirement savings account; on behalf of the pension fund administrator, 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 pension fund administrator 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 pension fund administrator and the Commission; and execute in favour of the pension fund administrator relevant proxy for the purpose of voting in relation to the investments.⁸⁷

The Act imposes a penalty on anyone who functions as a PFC without a license issued by the Commission.⁸⁸ In seeking for license as a PFC, the applicant must be "a licensed financial institution registered under the Companies and Allied Matters Act,⁸⁹ has a minimum net worth of ₦5

84. See generally Liu, *supra* note 81; Joaquin Vial Ruiz-Tagle, *The Chilean Pension System*, AWP 5.6 Eng. (1998), <http://www.oecd.org/dataoecd/21/38/2429310.pdf> (both articles explain background information regarding the Chilean AFPs).

85. Larry Rohter, *Chile's privatized pension system is election issue* (January 10, 2006), <http://www.iht.com/articles/2006/01/10/business/chile.php#>.

86. Pension Reform Act, *supra* note 4, § 46.

87. *Id.* § 47.

88. *Id.* § 48.

89. See generally Companies and Allied Matters Act, (2004) Cap. C 20 (Nig.).

billion unimpaired by losses, or be wholly owned by a company”⁹⁰ that meets this requirement, and “has a total balance sheet of at least ₱125 billion” or be wholly owned by such a company.⁹¹

The custodian company (or its parent company) shall issue a guarantee to the full sum and value of pension funds and assets it holds (for instance, where it held funds under an existing pension scheme before the commencement of this Act) or would hold under the new scheme, undertake to hold the pension fund assets to the exclusive order of the PFA on trust for the employees. The applicant must not have been “a custodian of any fund which was mismanaged or had been in distress due to any default, either fully or partially of the custodian.”⁹²

The PFC must maintain all of their pension funds and assets in keeping with the orders of the appropriate PFA; the funds shall not be used for the PFC’s own financial purpose in any way.⁹³ In addition, the PFC shall keep proper books of accounts and records, cause its accounts to be duly audited by qualified external auditors, and submit the same to the Commission for approval. Thereafter, the audited account shall be published in the dailies and exhibited in each of its offices and branches. It shall submit to the Commission an annual report on the pension funds it managed, in the preceding year. The PFC shall always hold the pension funds in accordance with statutory provisions, regulations, and guidelines made by the Commission.⁹⁴

The PFC shall duly inform the Commission of fraud, forgery or theft in its organization and the dismissal of any staff on the ground of fraud. Such a dismissed staff shall not be employed by any PFC, except with prior approval of the Commission.⁹⁵ The Act imposes penalty of a minimum of ₱1 million for every violation of the provisions outlined above by either a PFA or PFC.⁹⁶

At the moment, four PFCs have been licensed by the Commission: UBA Pensions Custodian Limited; Zenith Pensions Custodian Limited; First Pension Custodian Limited; and Diamond Pension Custodian Limited.⁹⁷

90. Pension Reform Act, *supra* note 4, § 52 (the Commission has the power to vary this prescription from time to time).

91. *Id.*

92. *Id.* § 52(f).

93. *Id.* § 60.

94. Pension Reform Act, *supra* note 4, § 59.

95. *Id.* § 63.

96. *Id.* § 64(1).

97. *Id.* § 55 (the Commission must publish the names of the PFC’s licensed by the Commission according to the Pension Reform Act.).

C. *Transfer of Entitlements from Old Existing Schemes to the New Scheme*

Under the Act, benefits that have accrued to employees in the public sector (Public Service of the Federation and the FCT) under the previous unfunded scheme shall be converted to bonds. By this, the Federal Government is required to issue “Federal Government Retirement Bonds” (hereafter referred to as “Bonds”) in favor of the employees; these bonds are to be redeemed when the employee retires. The amount so redeemed would then be added to the employee’s RSA.⁹⁸

In making provisions towards redemption of the Bonds, the Central Bank of Nigeria is mandated to establish, invest and manage funds to be known as the “Retirement Benefit Bond Redemption Funds” (hereafter referred to as “the Redemption Funds”). On a monthly basis, the Federal Government shall pay into the redemption Funds an amount equal to 5% of the total monthly wage bill payable to employees in the public service of the Federation and the FCT. The Central Bank shall utilize such funds to redeem the Bonds as the occasion arises. Once all of the bonds have been redeemed, the payments into the Redemption funds will stop.⁹⁹

Section 12(1)(b) of the Act contains provisions, the import of which is slightly unclear, in general terms and particularly as it relates to employees of Public Service of the Federation and the FCT. It states that, with reference to the retirement benefits of any employee under a previously existing scheme, the RSA of the employee shall be credited with funds to which the employee is already entitled; in the event of insufficiency of funds to meet this liability, the shortfall shall immediately become a debt of the employer concerned. The debt shall be treated with same priority as salaries owing, that is, it becomes a present debt, to which the employee has an immediate right of recovery. It states further that the employer shall issue a written acknowledgement of the debt to the relevant employee; the employer shall also take steps to meet the shortfall. By section 12(2), the employer shall duly notify the Commission of the debt and the steps taken or to be taken, to settle the debt.

The above provision is made applicable to employees of the Public Service of the Federation, the FCT and the private sector. In the case of the public sector, where admittedly the scheme had been totally unfunded, how is the employee’s RSA to be credited as directed by the Act?¹⁰⁰ Let us assume the acknowledgement of the debt is accomplished in the bonds to be issued by the Federal Government.¹⁰¹ Does this represent a present debt in

98. *Id.* § 12(1)(a).

99. Pension Reform Act, *supra* note 4, § 29(4).

100. *See generally id.* § 12(1)(b) (explaining how the RSA is to be credited according to the Pension Reform Act).

101. *See generally id.* § 12(1)(a) (explaining how bonds are issued by the Federal Government under the Pension Reform Act).

the class of salaries? The Bonds are redeemable only upon the retirement of the employee. In some cases, the retirement of the employee may not be until thirty years after the employee enters the retirement scheme.¹⁰² In addition, the Retirement Funds out of which the Bonds are to be satisfied are in residence with the Central Bank of Nigeria.¹⁰³

Thus, if the provision is to be given full import, it would mean that the arrangement made by the Federal Government to gradually settle its liability to its employees under the old pension scheme is inconsistent with the provisions of the Act. To that extent, the arrangement is illegal. Indeed, it would mean that the affected employees have a present right in themselves, to make an immediate demand for the sums, rather than wait till when they retire. It is doubtful if the Federal Government could successfully plead in defense that, under the old scheme, such sums do not constitute a present liability until the employee has retired. In any event, even under the old scheme, employees' retirement benefits have remained outstanding for many months, and it does appear that there is little, if anything, that any employee (in retirement) has felt able to do to compel the Government to pay up.

The point that arises here is that the strength of the provision would appear lost with reference to the private sector, where it could not be applied against the Government without difficulty. Notwithstanding where there had been an existing funded pension scheme, for instance, where contribution is made by both the employee and the employer in the private sector, the affected employer is required to credit the outstanding sum to the employee's RSA under the new scheme. Otherwise, it should make adequate and certain satisfactory arrangements as to how any shortfall would be settled.

It should be pointed out that where there is delay in crediting the funds to the RSA of an employee, particularly over a considerable period of time, then such employee would ordinarily have been denied returns that would have accrued on such funds if they were invested in accordance with the provisions of the Act.¹⁰⁴ We suggest that such funds should attract some interest, in the hands of the employer, (regardless of whether it is government or private) not less than 5%. The Commission may even

102. *Id.* § 12. After all, anyone who has more than three years to retire is directed to join the new scheme. For instance, someone who has only put in three years of service prior to the commencement of the Act could still have up to thirty-two years in service using a thirty-five year cut-off point.

103. Pension Reform Act, *supra* note 4, § 29.

104. *See generally id.* §§ 72-78 (general background information from the Act).

consider a higher percentage when the funds remain outstanding beyond a stipulated period.¹⁰⁵

A parallel is drawn in the Chilean experience. Under that system, for workers who made a switch from the old system to the new, the government issued “recognition bonds” to recognize the contributions made to the old system by those workers. However, unlike in Nigeria, “the bonds pay 4% annual interest, and may be cashed in by workers upon their retirement.”¹⁰⁶ In our view, this practice is consistent with the spirit of the new pension scheme, which among others, is aimed at providing the employee with investible retirement funds which grow over the years and are made available to the employee’s use upon retirement. We recommend that a similar regime be introduced into the Nigerian pension scheme.

1. Investment of Pension Funds and Assets

“All contributions under this act shall be invested by the PFAs, with the objectives of safety and maintenance of fair returns on amount invested.”¹⁰⁷ Subject to guidelines issued by the Commission, the funds and assets may be invested in bonds, bills and other government securities, debentures, redeemable preference shares or ordinary shares of companies listed on the Stock Exchange and with good track records in the last five years. Others include:

bank deposits and bank securities; investment certificates of closed-end investment fund or hybrid investment funds listed on a Stock Exchange registered under the Investments and Securities Act 1999 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 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.¹⁰⁸

“The PFA may invest the pension funds assets in units of any investment funds,”¹⁰⁹ but not outside the above classification of investments.¹¹⁰

105. See generally *id.* § 11(7). This is comparable to the imposition of a minimum penalty of 2%, where the employer fails to promptly remit contributions made to the employee’s RSA.

106. Public Interest Institute, *Chile’s Private Pension System*, 3 INSTITUTE BRIEFS 10, 1-2 (August 1996), <http://www.limitedgovernment.org/publications/pubs/briefs/pdfs/brf3-10.pdf>.

107. Pension Reform Act, *supra* note 4, § 72.

108. *Id.* § 73.

109. *Id.* § 74(1).

110. *Id.*

In addition, the funds and assets may be put in investments outside Nigeria. However, this can only be done subject to the approval of the President of the Federal Republic of Nigeria, acting on the recommendations of the Commission.¹¹¹

The Act places specific restrictions on investment of pension funds and assets: they are not to be invested in shares and other securities issued by the PFA or PFC, or the shareholder of the PFA or PFC. In addition, the PFA should not sell the assets to itself or anyone directly or indirectly related to it; neither must it purchase such pension fund assets nor apply them by way of loans and credits or as collateral for any loan taken by any person. The Commission may impose other restrictions in order to protect the interest of the beneficiaries of the RSAs.¹¹²

In making investment choices, the PFA must have due regard to the risk rating of instruments made by a risk rating company registered under the Investments and Securities Act 1999.¹¹³ Default by the PFA in complying with any provision of the Act attracts a penalty not exceeding ₦500,000 for every day the non-compliance continues, in addition to forfeiture of the profit from that investment to the beneficiaries of the RSAs.¹¹⁴ If the default led to a loss, the PFA shall make up for the loss.¹¹⁵

One of the high points in the new pension scheme, apart from crediting the employee's retirement savings into the RSA with the PFA, is the fact that the pension fund assets are to be privately managed and invested by professional pension fund managers. This is with a goal of bringing appreciable returns on investment, accruable to the benefits of the beneficiaries of the RSAs. This is important, considering that the funds and assets are to be held by the PFA over a long period while the employee is still in employment and even after he has gone into retirement. Indeed, the scheme is designed to survive the death of the employee, at any point, be it in service or in retirement.

Arising from this, quite apart from the safeguards put around the manner and class of investment of these funds and assets,¹¹⁶ there should be a stipulation of a minimum return on investment, which these funds should attract, for the benefits of the beneficiaries of the RSAs.

The Chilean system imposes a maximum and a minimum return to the AFPs to pay their members (the employees who maintain accounts with

111. *Id.* § 74(2).

112. Pension Reform Act, *supra* note 4, § 77.

113. *Id.* § 77(2).

114. *See id.* § 78

115. *Id.*

116. The safeguards are quite notable and important to the workings of the pension scheme. However, they should be open to due modifications by the Commission, in the light of realities of the market and the economy as a whole. At all times, safety and profitability should be the guiding principles.

them) which are set in relation with the average performance of the whole system over the last twelve months. The minimum is either 50% of the average return across AFPs, or two percentage points lower than the average. In case the fund falls short of the minimum, the AFP has to make up the difference by withdrawing funds from its reserves.

On the other hand, if the AFP has a real investment return above the 50% average for all the pension funds, or exceeds it by 2% points, it has to deposit the excess funds in a “profitability reserve” account to be used in case the AFPs portfolio underperforms.¹¹⁷ In our view, there is some merit in the Chilean approach. This way, funds in the RSAs stand a fair chance of appreciating over a period. Therefore, the gap in the Act, by not making specific provisions on minimum return on investment, should be filled by regulations to be made by the Commission under the Act.

2. Other Transition Provisions

Apart from the establishment of the Redemption Funds arising from issuance of Federal Government Retirement Bonds,¹¹⁸ the Act establishes Pension Transitional Arrangement Departments (referred to as “the Department”) for the Public Service of the Federation and the FCT, respectively. In both cases, the Department performs similar functions.¹¹⁹ The Department inherits the existing pension boards and offices in the public service of the Federation.¹²⁰

The Department is saddled with the responsibility of managing all matters relating to the retirement benefits of pensioners remaining under the whole scheme as well as those exempted by the Act from the new scheme.¹²¹ These include making budgetary estimates for existing pensioners and the officers exempted from the Scheme, under section 8; receiving budgetary allocations from the Government and making payments to pensioners as and when due; and ascertaining deficits in pension payments, if any, to affected pensioners, and carrying out such other related functions as might be specified by the Commission, to ensure the welfare of pensioners.¹²²

In particular, the Department shall on a monthly basis render returns of the comprehensive list of pensionable staff, pensioners, deceased pensioners and their next of kin to the Commission.¹²³ It shall pay gratuity and pension to the existing pensioners and the category of officers exempted under section 8 of the Act, in accordance with the relevant and applicable

117. Ruiz-Tagle, *supra* note 84, at 8-9.

118. *See* Pension Reform Act, *supra* note 4, §§ 12, 19.

119. *See id.* §§ 30, 31.

120. *Id.*

121. *See id.* § 8.

122. Pension Reform Act, *supra* note 4, § 32.

123. *Id.* § 30(3).

computations under the existing PAYG pension scheme.¹²⁴ Effectively, the Department inherits the responsibilities, funds, assets or liabilities of all existing pension offices in the Public Service of the Federation and the FCT.¹²⁵

Except for the savings provisions in the Act,¹²⁶ it would have been illegal for any further payments to be made with reference to the previously existing PAYG pension scheme. This is on account of the repeal of the Pension Act 1990 and related Acts by the Pension Reform Act.¹²⁷ However, the Department shall continue to exist and perform its functions until the death of the last pensioner or category of employee entitled to retire with pension before the commencement of the Act.¹²⁸

It should be noted that the system is still in a transition phase, the old PAYG system coexisting with the new contributory pension scheme (this will continue until the benefits paid to the pensioners that remain in the old system cease.)¹²⁹ Under the Chilean system, the closing date of the old system is estimated to be around 2045!¹³⁰ The new system commenced in Chile on May 1, 1981.

It does not appear that there are available statistics or data yet, with which to estimate when the PAYG system would come to an end under the Nigerian pension system. This forecast is likely to be further beclouded with the spate of ghost workers in the Nigerian public work force. As late as January 2006, the Federal Government has accused senior officials of 220 government parastatals of falsifying records of workers to mislead government into paying ghost workers and incur ₦3 trillion pension debts.¹³¹

The transition from a PAYG system to a fully-funded one has major fiscal implications. In terms of flows, the government faces a sharp decline in its income due to contributions that moved to the new system, while it fully funds pensions in the old system. The fiscal implications depend essentially on the sources of funds used to finance the reform. There are basically three ways to finance the transition: by debt, tax or a combination of both.¹³²

124. *Id.* § 33.

125. *Id.* § 34.

126. *See* Pension Reform Act, *supra* note 4, §§ 99, 100.

127. *See id.* §§ 99-101.

128. *Id.* § 38.

129. *See* Ruiz-Tagle, *supra* note 84.

130. *Id.*

131. Osaro Okhomina, *Pension: FG accuses parastatals of forgery*, VANGUARD, Jan. 30, 2006, available at <http://www.vanguardngr.com/articles/2002/cover/January06/30012006/f230012006.html>.

132. *See* Ruiz-Tagle, *supra* note 84.

Apparently, the government in Nigeria hopes to finance the transition through the first option. It does this by issuing Federal Government Retirement Bonds and establishing Retirement Benefit Bond Redemption Funds.¹³³ Payment of pension to those who were already retired or allowed to retire under the old scheme would still be made by budgetary allocations. In the medium term, the Bonds will gradually rise as people in the new system, but who have contributions in the old system, retire. However, this fiscal burden on the government should gradually reduce over time.

In the private sector, existing pension schemes are permitted to continue, if the employer so wishes. The scheme must be fully funded; funds and assets under the scheme shall be held by a PFC; contributions in favor of an employee with the attributable income shall be computed and transferred to a RSA opened for the employee; every employee shall be at liberty to choose to come under the Scheme established under the Act; the RSA and the funds transferred therein shall be maintained with a PFA of the employee's choice.

The employer shall undertake to the Commission that the scheme shall be fully funded always and any shortfall made up within 90 days. In addition, it shall demonstrate possession of managerial capacity to manage pension funds and assets, in the preceding five years. The employer who wishes to manage the pension funds under its scheme shall apply to the Commission for license as a closed pension fund administrator, provided it holds minimum pension funds and assets of ₦500 million and satisfies other requirements specified under the Act. Otherwise, the scheme shall be administered by a licensed PFA.¹³⁴

All existing pension schemes shall submit to the Commission a statement of affairs including assets, liabilities, list of members, current statements, in the case of contributory scheme, and pensionable salary in the case of benefits scheme.¹³⁵ A closed pension fund administrator shall be subject to supervision and regulation by the Commission.¹³⁶ It is required to function just as any PFA.¹³⁷ To date, the only licensed Closed PFA is Shell Nigeria Closed Pension Fund Administrator.

D. Nigeria Social Insurance Trust Fund (NSITF)

The Act makes specific provisions for the continued operation of the Nigeria Social Insurance Trust Fund (NSITF). The National Provident Fund (NPF), precursor of the NSITF, was established in 1961 by an Act of Parliament. It was a social protection scheme meant to operate within the following national social policy framework. It provided

133. See Pension Reform Act, *supra* note 4, §§ 12, 29.

134. See *id.* §§ 39, 40.

135. *Id.* § 39(3).

136. See *id.* § 41.

137. *Id.*

a national Fund for private sector workers and non-pensionable public servants; a non-contributory pension scheme for civil servants; a public health care system, financed from tax revenues; and obligations imposed on employers under the labor law and related legislation providing benefits in respect of occupational accident or disease, sickness and maternity pay compensation on termination of employment.¹³⁸

The Provident Fund was largely a Savings Scheme with meager monthly contribution of ₦4 by the workers and another ₦4 by the employers, and offered basic protection against the hazard of Invalidity, Unemployment, Old Age and Death. However, due to poor compliance by employers, difficulties with Scheme administration, restricted investment policies, meager contribution (₦96 per annum), grossly inadequate benefit payments and one-off lump sum benefit to claimants, the NPF scheme recorded limited success, if any.¹³⁹

Consequently, the NPF was transformed into the NSITF. The NSITF was established by Act No. 73 of 1993.¹⁴⁰ “It took over the assets and liabilities of the defunct NPF¹⁴¹ and became operational on July 1, 1994.”¹⁴² Furthermore, “[a]ll registered members of the former NPF scheme became automatic members of the new scheme and their contributions were similarly transferred to their members’ contribution records using existing membership numbers under the new scheme to ensure continuity.”¹⁴³

Additionally, “[t]he NSITF Act made it mandatory for all employers and employees in the private sector to promptly register as members as soon as they commence operations.”¹⁴⁴ In the event that an employee or employer fails “to abide by the provisions of the Act,” such omission “is considered a criminal offence and could lead to legal proceedings and the payment of fine or imprisonment.”¹⁴⁵ Notably, the main purposes of the NSITF include:

prompt registration of all employers and their workers (as members) that qualify for registration, in the private sector; collection of their due monthly contributions and penalizing defaulting employers for late payments; management of

138. Nigerian Social Insurance Trust Fund, *Evolution of Nigeria Social Insurance Trust Fund*, available at <http://www.nsitf.com/evolution.asp> (last visited September 29, 2006) [hereinafter NSITF].

139. *Id.*

140. *Id.*

141. *Id.*

142. NSITF, *supra* note 138.

143. *Id.*

144. *Id.*

145. *Id.*

contributors' fund and investment of contributions collected in both real and financial assets; payment of different types of lump-sum grants and long-term monthly pension to qualified claimants; and maintenance of relevant information system to support the Fund nationwide.¹⁴⁶

The rate of contribution is 3.5% by employee and 6.5% by employer.¹⁴⁷ Benefits available under the Fund are: "Retirement Benefit (Grant and Pension); Invalidity Benefit (Grant and Pension); Survivors' Benefit (Grant and Pension); and Funeral Grant."¹⁴⁸ For those 'in transit' who could not qualify for benefits under the scheme, the Fund offers Transitional Benefit (Grant and Pension), Deferred NPF Benefit, and Emigration."¹⁴⁹

According to section 42 of the Pension Reform Act,¹⁵⁰ the NSITF shall establish a company to function as a PFA. RSAs would then be opened for every one who has contributed to the NSITF. Such contributions and income attributable to the individuals shall be credited to their RSAs. The PFA established by the NSITF shall administer the pension funds in those RSAs for five years. Only then can the individual contributors exercise their right to appoint a PFA of their choice. In other words, the contributors to the NSITF may not switch from its PFA to another until after the expiration of five years. Of course, those who are satisfied with the services of the Fund's PFA may choose to remain and continue to maintain their RSAs with the Fund.

In the event that a contributor to the NSITF has retired before the Act came into force, the funds due to him shall be paid to him in accordance with the provisions of section 4 or in a lump sum in accordance with the rules and regulations of the Commission.¹⁵¹ Where such a person has died, his estate or beneficiaries shall be paid the entitlements of the deceased, according to the law.¹⁵²

The pension funds and assets held and managed by the NSITF shall be turned over to a PFC.¹⁵³ The Commission is to supervise the transfer of the funds and all necessary payments to be made pursuant to the above provisions.¹⁵⁴

In response to this redefined role of the NSITF, union leaders in Nigeria expressed their disturbance by the absence in the new pension

146. *Id.*

147. NSITF, *supra* note 138.

148. *Id.*

149. *Id.*

150. Pension Reform Act, *supra* note 4, § 42(1).

151. *Id.* § 42(4).

152. *Id.* § 42(5).

153. *Id.* § 42(6).

154. *Id.* § 42(7).

scheme under the Act, of defined benefit as well as social security benefits as provided by the NSITF. To them, all that government wants to achieve in the present reform is to use contributors' money to service public sector retirees and other political expediency.¹⁵⁵

It is unclear if the NSITF would continue to co-exist with the Scheme under the Act, particularly after the five year transition period granted the Fund under the Pension Reform Act. Will the Fund simply mutate into a PFA, or will it exist independently of the PFA Company established by it? What happens in the event that a good proportion of the RSAs being managed by the Fund are transferred to some other PFA's by contributors, at the end of the five year period? Can the Fund still continue to exist full fledged or will its affairs be wound up appropriately? These are some of the issues that would need to be resolved over time, perhaps by regulation to be made by the Commission.

Curiously, section 71(2) of the Act states that the NSITF "shall provide every contributing citizen Social Security Insurance Services other than pension, in accordance with the NSITF Act."¹⁵⁶ The question is what will be the basis of these services, in the face of transfer of the contributions and income of each contributor under the Fund to RSAs opened with a PFA company established by the Fund for that purpose?¹⁵⁷ Does the Act anticipate dual contributions by an individual – one towards his RSA with the Fund's PFA, for pension purposes, and the other with the Fund itself, towards other social security services? This can only be a tenuous assumption that could turn out to be unrealistic in the face of competing interests and demands on the contributor's income.

Section 71(3) of the Act states that the NSITF Act "is deemed amended in all particulars, to bring it in full compliance with the Pension Reform Act." It is left to be seen what would be the real status of the Fund with the implementation of the provisions of the Pension Reform Act.

E. Retirement Benefits

Upon retirement or attaining the age of 50, whichever comes later, the holder of a RSA shall utilize the funds standing to his credit by: programmed monthly or quarterly withdrawals calculated on the basis of an expected life span; life annuity¹⁵⁸ purchased from a licensed insurance

155. Chris Nwachuku, *17 Private Sector Unions Reject Pension Scheme*, THIS DAY ONLINE, July 19, 2004, available at <http://globalag.igc.org/pension/world/2004/reject.htm> (last visited Jan. 1, 2006).

156. Pension Reform Act, *supra* note 4, § 71(2).

157. See Pension Reform Act, *supra* note 4, § 42(1), (4)-(7).

158. An annuity is a financial contract between an insurance company and the policy holder (purchaser) that provides for a series of payments at regular intervals to be received for a number of years or over a lifetime, usually after retirement. Annuities are hybrids of insurance and investments. Fixed annuities guarantee a certain payment amount, while variable annuities do not, but do have the potential for greater returns. Both are relatively

company, with monthly or quarterly payments; and a lump sum from the balance standing to the credit of the RSA, provided that the residue after the lump sum withdrawal would be sufficient to procure an annuity *or* fund programmed withdrawals that will produce an amount not less than 50% of his annual remuneration, as at the date of his retirement.¹⁵⁹

There is an ambiguity introduced into the provisions by the word “or” in section 4(1)(c) of the Act. Does it mean that the programmed withdrawals and the life annuity are meant to be mutually exclusive? Or are they co-extensive? In addition, a sufficient link is not provided between the life annuity to be purchased by the holder of the RSA at the appropriate time and the life insurance policy that should have been maintained by the employer in favor of the employee while the latter was still in that employment.¹⁶⁰

Presumably, the life insurance policy becomes the fulcrum of the life annuity. In the event this assumption is correct, it would mean that the programmed withdrawal and the life annuity will co-exist. This argument is strengthened by the fact that the life insurance policy could not have been a subject of the RSA; while the RSA is kept with the PFA, the insurance policy is held by the relevant insurance company. Indeed, only in the event that the employee dies, do we have his entitlements under the life insurance policy paid into his RSA. Apparently, this is to facilitate eventual payments of the funds to beneficiaries of the employee in question.¹⁶¹

Fallout from the foregoing is that insurance companies are expected to play vital roles in the implementation of the retirement benefits of employees under the pension scheme. Apparently, their involvement is also required in the calculation of the expected life span of a particular employee, relevant to determining the amount of the programmed monthly or quarterly withdrawals to be made by him in retirement.¹⁶² Therefore, it becomes imperative to have the emergence of credible and reliable (companies with character and track records) insurance companies in the industry. This development also calls for greater regulatory supervision and control by the National Insurance Commission (NAICOM).

The payment of a lump sum from the RSA to the retiree, serves as a weak “replacement” for the payment of gratuity under the PAYG system. This payment is contingent on a leftover of funds in the RSA sufficient to provide the retiree with no less than 50% of his last salary while in

safe, low-yielding investments. An annuity has a death benefit equivalent to the higher of the current value of the annuity or the amount the buyer has paid into it. *See* <http://www.investordictionary.com/definition/annuity.aspx> (last visited Feb. 3, 2006); also available at <http://www.investorwords.com/225/annuity.html> (last visited Feb. 3, 2006).

159. Pension Reform Act, *supra* note 4, § 4(1)(c).

160. *Id.* § 9(3).

161. *Id.* §§ 5, 9(3).

162. *Id.* § 4(1)(a).

employment. Thus, it is not a certain payment that could be envisaged by the pensioner.

This qualification leaves in doubt the provision made under the scheme for possible capitalization of the pensioner to enable him start a business venture where he desires to do so, rather than become dependent on the periodic withdrawals which, in some cases, could be largely illusory and insufficient to meet the needs of the pensioner and that of his family.

However, where an officer exempted from the Scheme under section 8¹⁶³ is retired by his employer on the ground of mental or physical incapacity, he shall be paid gratuity and pension under the applicable rules of the PAYG system.¹⁶⁴

1. Withdrawal from Retirement Savings Account

The holder of a RSA shall not be permitted to make withdrawals from the account until he has attained the age of 50, even where he has retired before this age. Exceptions exist when he has been required to retire before this age on medical grounds, permanent disability, or in accordance with the terms and conditions of his employment.¹⁶⁵

In the event that the employee retires before age 50 on account of provisions in his contract of employment, he may, on request, be allowed to withdraw a lump sum not more than 25% of the amount standing to his credit in the RSA. This would be on the condition that the affected individual will not make the withdrawal until six months after the retirement and that he has not secured any other employment during that period.¹⁶⁶

2. Death of an Employee

When an employee dies, his entitlements under the life insurance policy maintained by his employer in his favor, are paid into his RSA. The proceeds are then paid in a similar fashion (as it would be paid to him if he were alive and goes into retirement¹⁶⁷) to his beneficiary under a will, in case there is one, or his wife and children, where he died intestate. In case there are no wife and children, payment would be made to his specified next-of-kin, or any other person appointed by the Probate Registry as administrator of the estate of the deceased employee.¹⁶⁸

An employee who is declared missing and is not found in the space of one year may be presumed to be dead. In such a case, provisions which apply to a dead employee shall apply to him with equal force.¹⁶⁹

163. *Id.* § 8(1), (2).

164. Pension Reform Act, *supra* note 4, §§ 33, 37(1).

165. *Id.* § 3(1), (2).

166. *Id.* § 4(2).

167. *Id.* § 4.

168. *Id.* § 5(2).

169. Pension Reform Act, *supra* note 4, § 6(1), (2).

In our view, the supposed free application of the provisions of section 4 to beneficiaries of a deceased employee is misconceived. Otherwise, whose life expectancy would be applied – the wife’s or the children’s or even those other categories of beneficiaries – next-of-kin or administrators? Would they also be allowed, where appropriate, to make a lump sum withdrawal? These and related issues require clarification by the Commission in the absence of legislative amendment.

In addition, the provisions of section 5 appear to run contrary to law. It assumes that in the absence of a will, the next preferred beneficiaries are the wife and children, but that only in their absence can a specified next-of-kin take benefits. We submit that in the absence of a will, a specified next-of-kin takes over as beneficiary, even over the wife and children, in the event that the two categories do not coincide.

This argument is reinforced by the provisions of section 36 of the Act. Here, upon the death of an officer, in active service, who is exempted from the Scheme under section 8 of the Act, the Department¹⁷⁰ shall pay, *en bloc*, his next-of-kin or designated survivors a gratuity and pension to which the officer would have been entitled at the time he died, calculated under relevant rules of the PAYG system.¹⁷¹

3. Exemption from Tax

Sums paid as retirement benefits are made tax exempt in the hands of the beneficiaries.¹⁷² However, voluntary contributions made by contributors are not so exempt, except where such contributions were made and not withdrawn for a period of not less than five years.¹⁷³ Ordinarily, pension, charge or annuity is chargeable to tax under the Personal Income Tax Act.¹⁷⁴ Also, only gratuities are exempt from tax under the provisions of section 19 and the Third Schedule.¹⁷⁵ Contributions to a pension, provident or other retirement benefits fund, society or scheme are tax free and allowed to be deducted in the ascertainment of income of an individual from any source that would otherwise have been chargeable to tax.¹⁷⁶ Contributions to the contributory pension scheme are also rendered as tax deductible expenses in computing tax payable by an employer or employee under relevant income tax laws.¹⁷⁷

Arising from the foregoing, payment of tax on pension and other retirement benefits are simply deferred till the time when the individual

170. *Id.* §§ 30, 31.

171. *Id.* §§ 33, 36.

172. *Id.* § 7(1).

173. *Id.* § 7(2).

174. Laws of the Federation of Nigeria, (2004) Cap. P8, § 3(1)(e).

175. *See* Personal Income Tax Act, (1993), § 19 ¶¶ 17-20, Third Schedule (Nig.).

176. *Id.* § 20(1)(f), (g), Fourth Schedule.

177. Pension Reform Act, *supra* note 4, §10(1).

begins to draw on them. In other words, they are not generally free from tax. However, under the present dispensation, retirement benefits have become wholly free from tax. This net covers payments made under the PAYG system to employees who retired or are allowed to retire under the system. This is because the system has been revalidated, to this extent, by the Pension Reform Act.¹⁷⁸

F. Minimum Pension Guarantee

The Act speaks of an unspecified amount as minimum guaranteed pension for those who have contributed for a yet to be specified number of years to a licensed PFA. The Commission is required to specify applicable bench marks, by regulation. This has not yet been done. One of the issues arising is to determine who makes the guarantee – the government or the PFA? In addition, what is going to be the minimum amount guaranteed as pension to a contributor? How long must he have been a contributor? What other requirements must he meet to be entitled to the minimum pension?

Under the Chilean system, this matter has proved to be one of the sorest points in the system. The system guarantees contributors a pension not below 70% of working income, that is, an individual's last monthly salary. If there are insufficient funds to generate the required pension levels in the account, the pension fund company must make up the difference. If the company is unable to meet its obligations, the State, which guarantees the system, has to cover the shortfall.¹⁷⁹

The guaranteed minimum pension is currently worth about \$150 a month,¹⁸⁰ an amount which has changed over the years.¹⁸¹ There is also the non-contributive "assistance pension" offered by the State which currently amounts to about \$65 a month. However, most affiliates (contributors who maintain accounts with the AFPs) do not apply for this assistance because it is subject to quotas and targeted toward the extremely poor. In addition, to qualify for the guaranteed minimum pension, the worker must have made contributions to the system for a minimum of 20 years. The above equation leaves most of the Chilean workforce with no entitlement at all regarding

178. See Pension Reform Act, *supra* note 4, § 8, First Schedule.

179. See Photius Coutsoukis, *Chile Social Security*, http://www.photius.com/countries/chile/society/chile_society_social_security.html (last visited Oct. 5, 2006).

180. *Pondering Pensions: Ageing model requires facelift*, THE ECONOMIST (November 10, 2005), available at http://www.economist.com/World/1a/displayStory.cfm?story_id=5149330&no_na_tran=1.

181. In 2002, the minimum pension was \$110 per month compared to a minimum wage of \$156 per month; see Reese Erlich, *Chile's private retirement system holds clues for U.S.*, Apr. 23, 2002, available at http://www.sptimes.com/2002/04/23/Worldandnation/Chile_s_private_retir.shtml. The 2004 figure was set at \$100 a month; see Manuel Riesco, *Private Pensions in Chile, a Quarter Century On*, available at http://www.cep.cl/Cenda/Cen_Documentos/Pub_MR/Articulos/Varios/Pensiones_USA_1.html (last visited Oct. 5, 2006).

pensions – except withdrawing the meager funds accumulated in their pension accounts. These results have been confirmed by the World Bank.¹⁸²

It turned out that many contributors have not been able to make the required 240 monthly payments into a private fund over a 20-year period. Many low-wage earners registered with the private system evade the mandatory monthly payments by underreporting their income, assuming that the minimum pension will yield more than whatever their retirement accounts offer. A majority of participants only make an average of two to three monthly payments a year.¹⁸³

The lesson from the foregoing is that the Commission, in setting parameters for the minimum pension guarantee, must be realistic so that access to the minimum is possible. After all, the aspiration of such a provision is to provide some form of social security for the class of workers who do not have enough to cater for themselves in retirement. The parameters should not unwittingly exclude the very people it aimed to assist – “the improvident individuals”.¹⁸⁴ In addition, it must be made clear who bears responsibility for the guarantee – the PFAs or the Government (in all cases, whether public or private sector employee) or both.

1. Fees, Charges, Costs and Expenses

PFAs are authorized to deduct fees, charges, costs, and expenses they incur on transactions made in respect to employees' RSAs. Aside from these, all income earned from investment of pension funds must be duly credited to the RSAs. The only limitation is that these deductions should be reasonable.¹⁸⁵ Arguably, the test of “reasonableness,” though patently objective, may end up being subjective in reality. It would be appropriate for the Commission, by regulation, to specify useful indices for making these deductions in order to avoid arbitrariness and accusations of undue profiteering against the PFAs by RSA holders.

In Chile, an AFP is permitted to charge a fee for (i) mandatory contributions into the affiliate's individual capitalization account to fund its retirement pension; (ii) voluntary savings withdrawals; (iii) transfer of account balances from another AFP; and (iv) payments of programmed withdrawals. Each AFP is allowed to set the level of fees it charges to its affiliates. Fees may be changed at any time by an AFP upon three months notice to affiliates, the Superintendent of Pension Funds (SAFP, which is

182. Manuel Riesco, *25 Years Reveal Myths of Privatised Federal Pensions in Chile*, AMERICAS PROGRAM (IRC), Mar. 10, 2005, available at <http://www.americaspolicy.org/commentary/2005/0503chilessref.html>.

183. Cynthia R. Rush, *Bush's Chile Model: Take Their Pensions and Run!*, EXECUTIVE INTELLIGENCE REVIEW, December 17, 2004, available at http://www.larouche.org/other/2004/site_packages/ss_privatization/3149_chile_model.html.

184. See Pension Reform Act, *supra* note 4, § 2(b).

185. See *id.* § 70(1).

equivalent of the Commission under the Nigerian system) and the public. Although there is no legal limit on the fees which an AFP may charge, (except that each AFP is required to charge the same level of fee to each affiliate, such that commissions must be a certain percentage of contributions regardless of a worker's income)¹⁸⁶ competitive pressures have resulted in a narrow range for fees charged by different AFPs.¹⁸⁷

This environment has generated anger, resentment and criticism in the public against the AFPs. In the opinion of the public, they charge gigantic commissions for their services, making the system unbelievably costly. A May 2002 report by the United Nations Development Fund (UNDP in conjunction with Chilean experts) found that the AFP's charge commissions on the order of \$500 million annually. Between 1981 and December 2000, commissions totaled \$6.2 billion. The SAFP estimated that as of March 2002, some 25-32% of each mandatory deduction went to payment of commission!¹⁸⁸

This issue becomes more critical under the Nigerian pension system where we have two bodies – the PFA and the PFC functioning, in related terms, with respect to the pension funds and assets. Naturally, both must “reap something” for their efforts and activities. This contrasts with the singular body, the AFP, under the Chilean system. It has been suggested that deliberate policy must be put in place to ensure that ‘administrative fees’ do not become too high.

2. Statutory Reserve Fund

Every PFA is authorized to maintain a statutory reserve fund which is credited annually with 12.5% of the net profit after tax or such other percentage as the Commission may stipulate from time to time. This is treated as a contingency fund used to meet claims for which it may be liable as determined by the Commission.¹⁸⁹ As it stands, this 12.5% is quite considerable. It is equally significant that the Commission has the powers to review it one way or the other. Apparently, it is quite distinct from the

186. This has prevented the AFPs from adjusting the quality of their service to the ability (or willingness) of each segment of the population to pay for that service. However, this restriction (if it could be called that) has created an incentive in the AFPs to seek to capture the accounts of high-income workers, since the profit margins on those accounts are much higher than on the accounts of low-income workers. See Jacobo L. Rodríguez, *The Current State of Chile's Private Pension System*, CATO INSTITUTE, July 31, 2001, available at <http://www.cato.org/testimony/ct-jr073101.html>.

187. See Liu, *supra* note 81.

188. Rush, *supra* note 183; *Chile's Privatization Failures*, available at <http://www.tcf.org/Publications/RetirementSecurity/chilefactsheet.pdf> (last visited Oct. 5, 2006); Larry Rohter, *Chile's privatized pension system is election issue*, INTERNATIONAL HERALD TRIBUNE, Jan. 10, 2006, available at <http://www.iht.com/articles/2006/01/10/business/chile.php#>.

189. See Pension Reform Act, *supra* note 4, § 69.

fees, charges, etc. that could be laid out by the PFA on the income derived from investment of pension funds.

In contrast, the Chilean system permits a reserve of at least 1% of the total value of the fund. This requirement was set up to provide the AFPs with the necessary funds in case they do not obtain the “minimum return” from its portfolio. This is against the background of an imposed maximum and minimum return to the AFPs to pay their members, which are set in relation to the average performance of the whole system over the last twelve months.

In case the fund falls short of the minimum, the AFP has to make up the difference by withdrawing from its reserves. On the other hand, if the AFP has a real investment return above the specified minimum, it has to deposit the excess funds in a “profitability reserve” account for use in the case that the AFPs portfolio underperforms. AFPs must invest this reserve requirement in the same portfolio as the pension fund under its administration.¹⁹⁰

It might prove useful where the Commission provides clarifications: liability here should not be tantamount to culpability, as where the PFA in question incurred the liability due to fault, incompetence, or the like. It should be construed strictly and limited to liabilities justifiably incurred by the PFAs.

3. Failure of a Pension Fund Custodian (PFC)

In the event that a PFC fails and goes into liquidation, funds or assets it holds shall not be used to meet the claims of any of the custodian’s creditors, neither shall they be seized or made subject to the execution of a judgment debt, or their transfer to another PFC stopped.¹⁹¹ No mention is made in the Act of the failure or liquidation of a PFA. Perhaps this eventuality was not regarded as critical with regards to the pension funds and assets which had never been in the possession of the PFA.

However, one would feel more comfortable with a further guarantee by the government for the PFCs. This is to say that, where all else fails, the government would come to the rescue of a failed PFC in the interest of the contributors who indirectly own those funds and assets. This condition is even more pertinent to the fact that the individual contributors have no direct relationship or dealings with the PFCs. What happens in the event of the failure of a PFA? Perhaps RSA holders would have recourse to the Commission if they must gain access to their RSAs, even for the purpose of transfer to another PFA.

190. See Liu, *supra* note 81.

191. Pension Reform Act, *supra* note 4, § 98.

G. National Pension Commission

The Act provided an institutional and regulatory framework for pension administration in Nigeria by the establishment of the National Pension Commission.¹⁹² The principal object of the Commission shall be to regulate, supervise and ensure the effective administration of pension matters in Nigeria.¹⁹³ The Commission is vested with legal personality and the common attributes of such status.¹⁹⁴

The Commission has extensive powers enumerated under section 21 of the Act. These include the power to formulate, direct and oversee the overall policy on pension matters in Nigeria; request or call for information from any employer, pension administrator, custodian or any other person or institution on matters relating to retirement benefit; charge and collect fees, levy or penalties as may be specified by the Commission; establish standards, rules and regulations for the management of the pension funds under the Act; investigate any PFA or PFC or other party involved in management of pension funds; order the transfer of management or custody of all pension funds or assets under the management of or held by a PFC when necessary; and do such other things which in its opinion are necessary to ensure the efficient performance of the functions of the Commission.¹⁹⁵

These powers are required to enable the Commission to perform the whole gamut of functions contained in section 20 of the Act. It shall regulate and supervise the Scheme; issue guidelines for the investment of pension funds; approve, license, regulate and supervise PFAs, PFCs and other institutions relating to pension matters; establish standards, rules and guidelines for the management of the pension funds; ensure the maintenance of a National Data Bank on all pension matters; carry out public awareness and education on the establishment and management of the Scheme; promote capacity building and institutional strengthening of PFAs and PFCs; 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.¹⁹⁶ Other functions and powers are scattered in provisions under the Act.

A hard look at the powers and functions of the Commission under the Act discloses that the Commission carries the sole responsibility for pension administration in virtually all its ramifications. Obviously, there is no shortage in its enabling powers.

However, one is quick to point out that the bane of institutional and regulatory bodies in Nigeria has not been inadequacy of powers, but failure

192. *Id.* § 14.

193. *Id.* § 15.

194. *Id.* § 14(2).

195. *See* Pension Reform Act, *supra* note 4, § 21(a)-(i).

196. *Id.* § 20(a)-(i).

to incorporate governance and due oversight on the part of such bodies. In fact, the eventual failure of a PFA or PFC could be attributed to a failure of the Commission to satisfactorily discharge its own duties under the Act. This demands, in the overall interest of the system, a demonstration of competence, vigilance, political will and fairness in the operation of the Commission.

1. Offences, Penalties, Etc.

The Act specifies personal and corporate liability for offences committed under the Act.¹⁹⁷ It specifies a general maximum penalty of ₦250,000 or a jail term not exceeding one year for any offence committed under the Act where no specific penalty had been prescribed by the Act.¹⁹⁸ Any PFA or PFC who misappropriates pension funds commits an offence and is liable upon conviction to a fine equal to the amount misappropriated, imprisonment for a term not less than 10 years, or both fine and imprisonment.¹⁹⁹

In our opinion, there seems to be a slight misconception in the stipulation of penalties. The penalties are stiff, no doubt; but their utility is detracted by the conjunction “or” which leaves room for imposition of either fine or imprisonment. Rather, the greater stress should be placed on the recovery and restoration of the funds that had been the subject of misappropriation. This is in line with a view to recovering them for the benefit of the contributors under the Scheme who are likely to be affected by the misappropriation.

In addition, under Criminal Law, fines are forfeitures made to the State; they do not personally assuage litigants who have been affected in a private capacity, for instance, by any loss of funds or other forms of property. Therefore, it would be appropriate to have a specific provision in the Act directing that the funds misappropriated be restored, possibly from a portion of the fines imposed on the guilty party. This would be in line with a State guarantee given by the government for failure of any PFA or PFC. Penalties for specific offenses are found in other provisions in the Act.

2. Dispute Resolution

Disputes arising between parties under the Act are to be referred to the Commission in the first instance, and thereafter to arbitration. Arbitral awards are binding and enforceable in the Federal High Court.²⁰⁰ Preliminary notice of an impending suit must be given to the Commission

197. Pension Reform Act, *supra* note 4, § 88-89.

198. *Id.* § 85.

199. *Id.* § 86.

200. *Id.* §§ 92-94; *see also* Arbitration and Conciliation Act §§ 31, 51 (Nig.); Laws of the Federation of Nigeria, (2004) Cap. A18.

before the commencement of such a suit;²⁰¹ otherwise, it would be incompetent and liable to be thrown out by a preliminary objection.

Arbitration proceedings cannot commence unless there is an agreement in writing duly signed or otherwise authenticated by the parties.²⁰² Thus, there has to be mutual consent to submit to arbitration. It is also significant that, for good cause, a party could apply to set aside an arbitral award or the Court could refuse recognition or enforcement of the award.²⁰³

There is no firm objection to the 'arbitration clause' in the Act so long as it is taken as a prescription to explore alternative dispute resolution (ADR) and not as a ploy to shut out the parties, particularly the contributors to RSAs, from the jurisdiction of the regular courts of the land. This option is desirable in view of the patent congestion in the courts and the tardiness in the Nigerian legal process. Moreover, the direction towards arbitration is optional and not mandatory.

IV. CONCLUSION

Across the globe, the wind of reforms in the pension system has blown in virtually every continent.²⁰⁴ Countries around the world need to reform their pension systems to meet demographic challenges and to reflect changes in labour markets and industrial, economic, and social structures. A good number of countries around the world have introduced individual accounts as a substitute for all or part of their public PAYG pension schemes. The spread of these schemes through Latin America from the mid 1990's and through Eastern Europe in the years since then is quite dramatic. Many more countries are at various stages of the reform process, including Lebanon and Ukraine.

Countries that have introduced various forms of reforms include: Bolivia, Chile, El Salvador, Mexico, Argentina, Costa Rica, Uruguay, Croatia, Latvia, Poland, Hungary, Bulgaria, Sweden, Lithuania, Colombia, Australia, and Slovak Republic.²⁰⁵ Nigeria introduced its Pension Reform Act in 2004. Both the United States²⁰⁶ and Britain are in the throes of introducing similar reforms to their social security systems. In Britain, the

201. Pension Reform Act, *supra* note 4, § 95-96.

202. Arbitration and Conciliation Act § 1 (Nig.).

203. *See id.* §§ 30, 32, 48, 52.

204. *See generally*, Posting of OneGoodMove, *Privatization Sucks*, December 18, 2004, http://onegoodmove.org/1gm/1gmarchive/2004/12/privatization_s.html (last visited Oct. 5, 2006).

205. Testimony of Edward R. Whitehouse, *United States House of Representatives Committee on Ways and Means Sub-Committee on Social Security Reform* (June 15, 2005), <http://www.oecd.org/dataoecd/35/45/35004104.pdf> (last visited Oct. 5, 2006).

206. *See* William Poole, President, Federal Reserve Bank of St. Louis, remarks to colleagues entitled *Demographic Challenges to State Pension Systems Around the World*, available at http://www.stlouised.org/news/speeches/2005/2_24_05.html.

Department for Work and Pensions is leading a National Debate on the future of pensions in the country. To this end, a National Pensions Day took place on Saturday, March 18, 2006.²⁰⁷ Meanwhile, the Pension Commission set up by the British Government had submitted its second report in November 2005.²⁰⁸

The reforms have been necessitated mainly by changing demographics and funding problems in the government-run pension system. The previously existing schemes used the tax payments of current workers to fund the pension benefits of retired persons and their dependents. However, these systems have increasingly proved unsustainable.²⁰⁹

Thus, the argument has shifted from whether or not there should be reforms to the kind of reforms that should be made. The apparent choice has been a privately managed individual capitalization account built up over the years. Upon retirement, funds accumulated in such accounts form the mainstay of retirement benefits for workers.

From all indications, the Nigerian profile is a good one. Though overtly patterned after the Chilean system, it has shown considerable deference to local conditions, particularly with the joint contributions made by both employer and employee into the retirement savings account opened by the employee with the PFA of his choice. In Chile, contributions are made solely by the employee.

However, the success or otherwise of the system will depend largely on the implementation of the scheme under the oversight of the National Pension Commission. This is in addition to deliberately filling the gap, via responsive regulations made by the Commission, to bring into effect salient provisions of the Act.

207. See The Pension Service, *National Pension Debate Gets Underway* (February 2006), <http://www.thepension.service.gov.uk/aboutus/2006/feb/nat-pen-debate.asp>.

208. See The Pensions Commission, *A New Pension Settlement for the Twenty-First Century: The Second Report of the Pensions Commission*, available at <http://www.pensionscommission.org.uk/publications/2005/annrep/main-report.pdf>.

209. See Poole, *supra* note 206.