Towards Clarifying the Powers of the Nigerian Banking Regulator

A Thesis Submitted to Brunel University for the Award of the Degree of Doctor of Philosophy

By
Folashade Adeyemo

College of Business, Arts and Social Sciences
Department of Politics, History and the Brunel Law School

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Contents

Abstract

This thesis examines banking regulation in Nigeria. The thesis has three main objectives; First, to elucidate the role and powers of the Central Bank of Nigeria, (CBN) as the apex regulator for the financial system and within the context of banking failures and crises. Second, to engage in a discourse vis-à-vis the law on banking regulation in Nigeria, with a particular focus on the revocation of banking licenses. Finally, to explore the role of other regulatory bodies which work with the CBN.

This thesis provides a historical analysis of banking exchanges from the pre-colonial era to modern times, in order to provide an understanding of how political, local and economic settings as well as theories of regulation have impacted and influenced the development of banking regulation in Nigeria. The thesis concludes that the development of banking regulation has been a consequence of the aforementioned factors.

The research examines Nigeria's historical experiences with banking failures, including the banking crisis of 2008. The thesis finds that the Nigerian regulator has adopted a reactionary strategy instead of a proactive and pragmatic approach to the various crises, which is imperative for an effective banking regulatory regime. Given the outcome of this examination, the thesis makes a case for reform.

In addition, the study examines the banking consolidation, a recapitalization exercise implemented by the CBN in 2004. This mandated all banks to achieve a set minimum capital base. It examines the legal issues which surfaced, including the revocation of banking licenses by the CBN, arguably in 'bad faith', in order to cogitate the overall potential impact on banking regulation.

The research embraces the UK and the US as comparator jurisdictions, so as to distill and critique their responses to the global financial crisis of 2007, against the backdrop of the approach adopted in the Nigerian banking crisis of 2008. It finds that the Nigerian response was the least effective of these jurisdictions and that cogent lessons may be drawn from the comparator jurisdictions. Furthermore, the thesis discusses possible reforms to move forward banking regulation in Nigeria.

Declaration

I declare that the work presented in this thesis is my own; any information originating from the other works have been quoted and referenced.

Folashade Adeyemo

Acknowledgments and Dedication

I would like to thank God for enabling me to finally complete this journey. For He knows the plans he has for me[1] and this has been a daily reminder.

Profound thanks to my mum. She is my rock, my prayer warrior and my angel. This PhD is for you. Biggest thanks to my sister and to Aunty Layo. Love you both like a fat kid loves cake.

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[1] Jeremiah 29:11.

Abbreviations

AMCON – Asset Management Corporation Nigeria

BBWA – British Bank of West Africa

BFLR – Banking and Financial Law Reports

BoE Bank of England

BOFIA – Banks and Other Financial Institutions Act

BS- Banking Supervision

CAC- Company Affairs Commission

CBN- Central Bank of Nigeria

CFRN Constitution of Federal Republic of Nigeria

ECOWAS – Economic Community of West Africa

ECSLR – East Central State Law Reports

EFCC- Economic and Financial Crimes Commission

FDIC – Federal Deposit Insurance Corporation

FHC- Federal High Court

FPR- Financial Policy and Regulation

FRB – Federal Open Markets Committee

FRC – Financial Reporting Council

FSA – Financial Services Authority

FSRCC – Financial Services Regulation Coordinating Committee

FWLR – Federal Weekly Law Reports

ICPC – Independent Corrupt Practices and Other Related Offences

IMF – International Monetary Fund

INEC - Independent National Electoral Commission

LFN - Laws of the Federation of Nigeria

LPELR - Law Pavilion Electronic Report

MFBs- Microfinance banks

NAICOM – National Insurance Commission

NASS – National Assembly

NCLR – Nigerian Customary Law Report

NDIC- Nigerian Deposit Insurance Corporation

NIC- National Industrial Courts

NPLs- Non-Performing Loans

NWLR- Nigerian Weekly Law Reports

OFISD- Other Financial Institution Supervision Department

PMIs- Primary Mortgage Institutions

PRA – Prudent Regulatory Authority

SAP – Structural Adjustment Programme

SC – Supreme Court

SEC – Securities Exchange Commission

SHC – State High Court

SOGA – Statutes of General Application

SSRN – Social Sciences Research Network

TARP- Troubled Asset Relief Programme

UK – United Kingdom

UKHL -United Kingdom House of Lords

US – United States

WACA- West African Court of Appeal

WLR – Weekly Law Reports

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Chapter One

Introduction

Part I

1. Introduction

This thesis examines the role of the Central Bank of Nigeria in the regulation of banks as well as during episodes of banking crisis and failure. This introductory chapter presents an overview of the research, the challenges within the current Nigerian banking system, the methodology to be adopted, an overview of the scholarly literature and the thesis structure.

1.2 The Role of a Regulator

The term 'regulation' should be distinguished from 'supervision'. In the case of regulation, it generally relates to the act of using rules and guidelines to regulate or control an institution. In the case of supervision, it generally relates to the act of overseeing the activities of an institution. One of the primary roles of a regulator *inter alia*, is to ensure the promotion of financial and monetary stability within the banking sector which it regulates.[1] This is the core objective of the CBN. Through an analysis of the historical banking failures and crises that have plagued Nigeria since the pre-colonial era, and its regulatory response to the financial crisis of 2008, this thesis will argue that the CBN has failed to realise these core objectives.

It has been previously argued that the CBN should adopt the UK approach,[2] rather than continue in its dual roles of regulator and supervisor.[3] While this argument may not be endorsed by the CBN, it will allow the CBN to focus on discharging one role exclusively and adequately.[4]

[1] George J Benston and George G Kaufman ,'The Appropriate Role of Bank Regulation', [1966] 106 (436) The Economic Journal 688-697.
[2] Tunde Ogowewo, and Chibuke Uche, '(Mis) Using Bank Share Capital as a Regulatory Tool to Force Bank Share Capital in Nigeria', [2006] 50 (2) Journal of African Law (Ogowewo and Uche, 2006) 166, 161-186.
[3] *ibid*.
[4] *ibid*.

1.2.1 The Nigerian Regulator

The thesis examines the CBN, in the context of the Banks and Other Financial Institution Act,[5] and the Central Bank of Nigeria Act[6] which are the main laws which govern banking in Nigeria. The statutory regulatory provisions have been compared with regulatory mechanisms in the UK and the US. These countries have been used as comparators because of the *development* of their regulatory roles, and regulatory regimes, particularly in light of the 2007 global financial crisis. This examination of this financial crisis reveals critical lessons that can be drawn to improve the regulatory regime in Nigeria.

This thesis argues that in discharging regulatory and supervisory obligations, it is imperative that the regulatory framework is equipped with an effective infrastructure, and that the laws to permit this discharge are explicit in the provisions. This is based on the presumption that the regulatory regime is effective not only in the management of a crisis, but also in its prevention. Given the pre-colonial evolution of the banking industry in Nigeria, and the changes that the banking sector itself has embraced including the number of banks within the sector, and the eventual establishment of the CBN in 1959, it is submitted that the regulatory infrastructure, the laws underpinning this, and the methods adopted to regulate, are not robust enough to achieve these.

The arguments of this thesis are supported by two events that occurred in the Nigerian banking sphere, which shaped banking regulation and amplified the role of the CBN. The first is the consolidation policy, a regulatory reform exercise designed by the CBN in 2004, which significantly reduced the number of banks.[7] The CBN directed banks to achieve a

[5] Banks and Other Financial Institutions Act, As Amended (1991) Cap B3, LFN, 2004. Now referred to as BOFIA 2004, unless otherwise stated.
[6] Central Bank of Nigeria Act No. 7 (1991) 2007, now referred to as the CBN Act 2007, unless otherwise stated.
[7] Also referred to in this thesis as 'The exercise', or '*recapitalization* exercise'.

minimum capital base of N25billion naira,[8] within an 18-month period. The only approved method of achieving this recapitalisation was by mergers and acquisitions.

The second is the banking crisis of 2008, which was induced by the global financial crisis in 2007. This crisis affected 8 systemically important banks.[9] The term *systemic importance* refers to banking institutions which are significantly *important to the financial system*, by virtue of their interconnectedness within the banking framework. This term is usually referenced in the instances of banking industry failures. A bank which represents systemic importance in an industry is deemed too important to fail, because its failure would have a severe effect on the remainder of the system.[10] The regulatory response was the creation of an Asset Management Company, (AMCON), in 2010.[11]

However, a better CBN response should have been to pay closer attention to the regulatory regime itself, to ensure that it was effective. This response would not only have cured banking failures; it would also have played a substantial role in preventing them from occurring.

'Banking failures' and 'banking crises' should be distinguished as important and reoccurring concepts in the thesis. While the two have been inextricably linked, the former could be described as the failure of banks to meet up with their financial obligations to depositors, rendering the financial institution as *failing* or *failed*. It may be possible to revive the bank by implementing strategies. In the case of Nigeria, the Nigerian Deposit Insurance Corporation

[8]This is equivalent to £65, 290, 07, as of 15th February 2017. See, http://www.xe.com/currencyconverter/convert/?Amount=25000000&From=NGN&To=GBP Accessed 15th February 2017.

[9] Mathias Drehmann and Nikola Tarashev, 'Measuring the Systemic Importance of Interconnected Banks' [2013] 342 Journal of Financial Intermediation 3- 22; George G. Kaufman and Ken E Scott 'What is Systemic Risk and Do Bank Regulators Retard or Contribute to it?' [2003] 3 (7) The Independent Review 371- 391.

[10] Marc Labonte, 'Systemically Important or 'Too Big to Fail' Financial Institutions" Specialist in Macroeconomic Policy [2015] Congressional Research Service 11, 1-60.

[11] The Asset Management Corporation and was established by the AMCON Act 2010, s.1. Now referred to as AMCON 2010 unless otherwise stated.

(NDIC), is able to assume management of such banks. In the case of *distress*, the bank is experiencing difficulties, and there is a need for the apex bank, if relevant, to intervene. [12]

It is further contended that regular monitoring of the banks was necessary, as an implied role of the regulator. This would enable the CBN to fulfil the enumerated objectives of BOFIA and the CBN Act, and allow the CBN to interrogate the financial health of the bank. The CBN's historically embedded reactive approach to bank regulation needs to change to a proactive, resourceful and pragmatic one, to ensure effective banking regulation.[13]

Secondly, the NDIC is the appropriate institution to manage banks. The BOFIA provides that the CBN *may* choose to share its responsibility with the NDIC; it is contended that NDIC should assume sole responsibility for managing banks. It is understandable that the CBN would not be willing to give up its powers, given that it endured a lengthy journey to autonomy, which is examined in the later chapters of the thesis. Given the makeup and objectives of the NDIC which are examined in the thesis, it is better equipped to play a greater role in the management of failed banks, and accordingly, this should be reflected in statutory provisions.

AMCON, an institution created to manage bad debts and loans, particularly if these are from banks, also plays a role when banks have 'failed.' Given that there is no sunset clause in the enabling provisions of this institution, it is possible for AMCON to continue absorbing bad debts, which encourages banks to continue accumulating non-performing loans. The roles of AMCON, NDIC and the CBN vis-à-vis discharging regulation are meticulously discussed in chapter 3.

[12] Ogowewo and Uche, 2006 (n 2) 165; Martin Brownbridge, 'Financial Distress in Local Banks in Kenya, Nigeria, Uganda and Zambia: Causes and Implications for Regulatory Policy.' [2002] 16 (2) Development Policy Review 176, 173-188.

[13] Austine Shekwogaza and Edith Nwosu, 'A Legal Interpretation of the Objects of the Asset Management Corporation of Nigeria', [2014] 29(4) Journal of International Banking Law and Regulation. 239-247

On bank licence revocation, the thesis argues that it is necessary to further clarify the statutory powers of the CBN. While the provisions of BOFIA permit the CBN to issue and revoke the licences of failing banks, it is argued that these provisions are systematic in nature. This is discussed in Chapter 5, but in summary, when it is clear the bank in question is unable to meet its responsibilities, the CBN *may* turn over its control and management to the NDIC. The NDIC may then ask the bank to implement a number of measures as provided for in s.37 of BOFIA. If NDIC is unable to rehabilitate the bank, it may recommend to the CBN that the bank licence be revoked. However, the systematic process above should not be circumvented with an outright bank licence revocation. The research critically examines the provisions of the law and compares this with the practice adopted by the CBN.

The findings of this thesis are based on an examination of the historical development of regulation in Nigeria, with a critique of the theoretical nomenclature relevant to the Nigerian regulatory model. The examination concludes that the regulatory framework and the underpinning law is in need of reform. Research into this area is necessary in order to add to the existing knowledge of banking regulation, and in light of the Court of Appeal's ruling that the revocation of the bank licence by the apex bank was in 'bad faith'.[14]

Part II

1.3 Background to Nigeria

Nigeria was a British Colony and gained independence in 1960. After a long period of military rule, Nigeria welcomed a new civilian government in 1999. The 1999 administration, and that of President Babangida, (1985-1993) have introduced reform exercises, intended to rouse and fuel growth within the economy. Such reform exercises under Babangida included

[14] *Savannah Bank of Nigeria v CBN* & Ors 2 [2009] 6 NWLR (Pt 1137) 237. Also reported as *Savannah Bank of Nigeria v CBN* & Ors [2012] 1 BFLR. For ease, it will be cited as (Savannah, 2012).

the structural Adjustment Programme (SAP, which was introduced in 1986). The Nigerian financial system was deregulated between 1986-1993.

The administration of President Olusegun Obasanjo, (1999-2007) was particularly noted for this.[15] Under this regime, the NEEDS programme was implemented. However, while promoting growth within the economy has been the primary aim, it is interesting to note that the core banking law Acts, i.e. BOFIA and the Company and Allied Matters Act, (CAMA),[16] have yet to be significantly reformed since their enactment in 1991 and 1990 respectively. Under BOFIA, discounting the fact that the Decree was promulgated into an 'Act', there is no difference between BOFIA 1991 and BOFIA 2004. Equally, under CAMA, the distinction is that Part XVIII of CAMA was repealed and implemented as the Investment Decree in 1999. Arguably, could be an indication that the legal framework is slow to develop. This is surprising given that Nigeria is not new to borrowing laws from the comparator countries.

To lay a foundation for the discussion of 'banks' in the later parts of this chapter, it should be noted that in Nigeria, banks are first recognised as *companies* before they are seen as deposit taking institutions. Thus, there are a number of other applicable regulatory instruments, including CAMA and Investments and Securities Act.[17] CAMA is applicable as the courts have defined the relationship between a banker/customer, as that of a debtor and creditor, founded on a simple contract. [18]

[15]'Meeting Everyone's NEEDS'. Available at: http://siteresources.worldbank.org/INTPRS1/Resources/Nigeria_PRSP(Dec2005).pdf Accessed 15th February 2017.
[16] Chapter C20, Laws of the Federation of Nigeria, 2004, now referred to as CAMA unless otherwise stated. CAMA is the core company law Act in Nigeria.
[17] Investment and Securities Act 2007 now referred to as ISA unless otherwise stated.
[18] *Yusuf v Cooperative Bank* [1994] 7 NWLR (Pt 359) 676.

There have been attempts to reform Nigeria's banking industry pre 1999. These include the Paton Report of 1948, a comprehensive report detailing Nigeria's banking system prior to the enactment of the first banking law; the implementation of Nigeria's first banking law; the creation of the CBN; and the development of the CBN's autonomy.

1.3.1 Nigerian Banking Regulatory Challenges

There is a dearth of knowledge vis-à-vis the legal framework of Nigerian banking regulation, and this is attributable to a robust understanding of banking regulation by the Nigerian Courts. This is supported by judicial decisions containing similar issues, leading to different judicial pronouncements.

Similarly, there is a dearth of banking regulatory decisions on bank licence revocation in Nigeria. This thesis analyses the decisions of, *Liberty Bank*,[19] *Savannah Bank*,[20] *Republic Bank v CBN & Anor*,[21] and *Governor Central Bank v Alpha Merchant Bank Plc*.[22] In deciphering these decisions, excluding for Savannah,[23] it is clear that the judicial approach has been to endorse the CBN's power to revoke banking licences, as part of its regulatory duties. However, in the case of *Savannah*, the Court of Appeal observed a different approach. The analysis of these cases has been pivotal in answering the research questions of the thesis.

1.3.2 The Banking Consolidation 2004 and Nigerian Banking Crisis 2008

In 2004, the apex bank carried out a special examination, which exposed the true financial health of Nigerian banks. This special examination was conducted during the first quarter of 2004 and revealed that 62 of the banks could be classified as sound/satisfactory, 14 as marginal and 11 as unsound. 2 banks did not render any returns during the period. Further

[19] *Liberty Bank Plc & Ors v CBN & Ors* (Unreported Case) Suit No FHC/L/CS/307/06 (Liberty Bank, 2006).
[20] Savannah 2012 (n 14).
[21] [1994-1996] 6 NBLR (Pt 1) 482 – 490.
[22] [1994-1996] 6 NBLR (Pt. 2) 348.
[23] Savannah 2012 (n 14).

analysis showed that 17.2% of the total deposit were liabilities while the industry non-performing assets accounted for 19.5%.[24]

Based on the outcome of this examination, the CBN initiated the banking consolidation, with two broad objectives. The first was to address the historically embedded trend of banking failures and crises,[25] and this was particularly hinged on the outcome of the above examination. The second objective was to strategically place Nigerian banks on a global platform to compete with other banks, given the recapitalisation.[26] The banking system, which previously contained 89 banks, was significantly reduced to 24 upon the completion of the programme.[27]

Following the implementation of the consolidation exercise in 2004, Nigeria suffered a banking crisis in 2008. A number of the banks affected were in fact a product of the recapitalization policy. This crisis, which primarily began with a stock market crash,[28] resulted in a loss of over $60 billion. The effects on the banking sector (which was due to loan exposures) compelled the CBN to make a liquidity injection to the systematically important banks affected.[29] As a regulatory response, AMCON was created 2 years later, with the objective of restoring confidence in the banking sector and avoiding further distress to the remaining banks.

[24] Charles C Soludo, 'Consolidating the Nigerian Banking Industry to Meet the Development Challenges of the 21st Century', Bank of International Settlement Review 43/2004 Basel, Switzerland BIS. (Soludo, 2004) Available at: http://www.bis.org/review/r040727g.pdf last accessed 02 June 2016.
[25] Appendix 1.
[26] Soludo, 2004 (n 24); Violet Aigbokhaevbo and Nelson Ojukwu, 'Banking Regulation in Nigeria: Imperative of a Shift from Consolidation to Repositioning', [2015] 30 (4) Journal of International Banking Law and Regulation 236-240. (Aigbokhaevbo and Ojukwu 2015).
[27] Aigbokhaevbo and Ojukwu, 2015 (n 26).
[28] Olumide Famuyiwa, 'The Nigerian Financial Crisis: A Reductionist Diagnosis', Afe Babalola [2013] 2 (1) Journal of Sustainable Development Law and Policy 36-64. (Famuiywa, 2013).
[29] Duncan Alford, 'Nigerian Banking Reform: Recent Actions and Future Prospects' 5, < http://ssrn.com/abstract=1592599 > last accessed on 20th February 2017; and, Iwa Salami, 'The Effect of the Financial Crisis on the Nigerian Capital Market: A Proper Regulatory Response' [2009] 24 (12) Journal of Banking and International Law 612- 618. (Salami, 2009).

While there have been discussions on the legal,[30] institutional[31] and regulatory framework,[32] the Nigerian crisis itself generated erudite observations, which have generally been efforts to submit reform proposals. These contributions have been instrumental in contributing to the academic discourse on banking regulation in Nigeria, and the debate on how best to improve the banking regulatory approach in Nigeria.[33] In *A Proper Regulatory Response*[34] the impact of the global financial crisis on Nigeria was examined and the weakness of regulatory framework came up for particular criticism. This 'weakness', it was argued, was an amalgamation of the agencies adopting a reactive, rather than proactive approach, and the absence of an 'effective' mechanism. [35]

1.4.1 The Nigerian Regulatory Framework

The Nigerian financial system is comprised of a number of regulatory agencies, including the Ministry of Finance; the National Insurance Commission; the National Pension Commission; the CBN; AMCON; NDIC; and the Securities Exchange Commission, (SEC). The foregoing sections will discuss these institutions except for the first three which have much broader oversight.

1.4.1 The Core Regulators

1.4.1.1 CBN

The apex regulator for the Nigerian banking system is the CBN, which is an independent institution.[36] The core objectives of the CBN are enshrined in the CBN Act,[37] and these

[30] Salami 2009 (n 29); Ogowewo and Uche, 2006 (n 2) 161.
[31] Seth Apati, *The Nigerian Banking Sector Reforms: Power and Politics*, (Basingstoke: Palgrave Macmillan, 2012) 125-127. (Apati, 2012).
[32] *ibid*.
[33] Olusesan Oliide, 'Banking Regulation in Nigeria Since the Revolution', [2013] 28 (6) Journal of International Banking Law and Regulation 221- 233.
[34] Salami, 2009 (n 29) 5.
[35] Nwude C. Emmanuel 'The Crash of the Nigerian Stock Market: What Went Wrong, the Consequences and the Panacea' [2012]. *Developing Country Studies*, 105 – 6 <http://www.iiste.org/Journals/index.php/DCS/article/view/2973> Accessed 20th February 2017
[36] CBN Act 2007, s.3.
[37] CBN Act 2007, s.2.

include the promotion of a sound financial system.[38] In addition, the CBN utilizes the provisions of BOFIA, allowing it to discharge its regulatory duties.

1.4.1.2 NDIC

As earlier stated, the NDIC is established by the NDIC Act, although it was first introduced as a Decree.[39] The objective of this institution is to provide deposit insurance which protects depositors' funds. In the case of banks that have 'failed', who have had their license revoked by the CBN,[40] the NDIC acts in its capacity as a liquidator.[41]

1.4.1.3 AMCON

AMCON was established by the AMCON Act[42] with the objective of reducing the number of toxic assets and non-performing loans in Nigerian banks. The creation of this institution was a response to the Nigerian banking crisis of 2008. AMCON is distinct from other asset management corporations because it does not have a sunset clause. The general perception is that asset management companies have a lifespan of 10 years. Examples include the Danaharta Asset Management Company of Malaysia, which has a lifespan of 7 years, and the Indonesia Bank Restructuring Agency which has an initial lifespan of 5 years. Interestingly, these are the two countries that were used as points of reference, and examples for Nigeria to emulate. [43]

1.4.1.4 SEC

The SEC is an institution charged with the responsibility to supervise the capitals market. SEC enforces its regulatory duties in accordance with the provisions of ISA,[44] which is the law that regulates the capital markets. This institution and especially the role it played to

[38] CBN Act 2007, s.2.
[39] NDIC Act 2006, s.1.
[40] BOFIA 2004, s. 31 and s.34.
[41] NDIC Act 2006, s.40.
[42] AMCON Act 2010, s.1.
[43] Soludo 2004 (n 24).
[44] ISA 2007, s.13.

facilitate the 2004 banking consolidation policy is discussed in detail in the penultimate chapter of this thesis.

In addition to the aforementioned regulatory bodies, the Federal High Court (FHC) [45] also plays a broad regulatory role. It intervenes when challenges arise from banking law matters and mandates court ordered meetings for business combinations under ISA. The FHC is conferred with exclusive jurisdiction to adjudicate on banking law matters;[46] insolvency and other corporate and company related matters.

1.5 Examining the Regulatory Models

Leading banking law practitioners have advocated for the banking law framework to be reformed.[47] This is in the light of Nigeria's entrenched historical trend of bank failures, the reactionary rather than proactive approach, and the dearth of determination of the CBN's regulatory powers for banking regulation. It is proposed that a holistic reform to BOFIA is necessary to bring the Act in line with other jurisdictions such as the UK and US.[48]

Leading banking law practitioners and academics[49] are unanimous on the need for reform of the Act itself and the banking regulatory approach, but are not unanimous on the most beneficial approach for Nigeria to adopt. It may be argued that a judicial approach like the US regulatory model may be more applicable, given the similarity of regulatory institutions.

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[45] Akin Ogundayisi, *Practical Approach to Corporate Law, Property Practice and Law in Practice* (Bosem Publishers, 2010) 210. See also: CAMA, s.567(1). The FHC was originally established as Revenue Court before becoming a court of Superior Record by virtue of the Federal Revenue Court Act No.23 of 1973.

[46] Constitution of the Federal Republic of Nigeria 1999, s.249 (1); CFRN, s. 251 (1) (d) - (e). This is a supreme document and is considered Nigeria's grundnorm. Hereinafter referred to as 'CFRN' unless otherwise stated. See also, the case of *Afribank Nigeria v Kotatex Commerce General (Nig) Ltd* [2001] 8 NWLR 87.

[47] Oladapo Olanipekun, 'Banking Regulation and Supervision: Concept, Theory & Rationale in Oladapo Olanipekun (ed) *Banking: Theory, Regulation, Law and Practice* (Au Courant, 2016) (Olanipekun, 2016)168; Salami, 2009 (n 29).

[48] Apati, 2012 (n 31); Nelson E Ojukwu-Ogba, 'Banking Reforms in Nigeria: Legal Implications for the Banker-Customer Relationship' [2009] 35 (4) Commonwealth Law Bulletin 675- 686.

[49] Famuyiwa, 2013 (n 28) 5; Ogowewo and Uche, 2006 (n 2).

On the other hand, the UK twin peak regulatory model may separate the CBN's regulatory and supervisory duties.[50]

The US banking regulatory model is similar to the Nigerian one. It comprises similar institutions, which include the Federal Reserve, an equivalent to Nigeria's CBN, Troubled Assets Relief Programme, (TARP) and the Federal Deposit Insurance Corporation, (FDIC). These last two institutions are similar to AMCON and the NDIC respectively. It has been argued that the US regulatory model, through its discharge, demonstrates its commitment to transparency and accountability.[51] This is particularly evident in the embedded checks and balance system and its commitment to providing finance to the lower earning part of the economy.[52]

In the UK, the banking regulatory model is a twin peak regulatory system. Prior to this, the makeup was of a tripartite model, where banking regulation was distributed between the Bank of England, HM Treasury, and the Financial Services Authority, (FSA). Following from the 2007 global financial crisis, and with the enactment of the Financial Services Act 2013. The duty of the FSA was to regulate the financial industry, which it did from its establishment in 2001, till it was relieved of these duties in 2013. The argument that regulatory failure was one of the core contributors to the global financial crisis of 2008 saw the restructuring of the financial regulatory infrastructure, with the creation of the Financial Conduct Authority and the Prudential Regulatory Authority. [53]

[50] Ogowewo and Uche, 2006 (n 2) 165.
[51] James R Barth, Tong Li and Welling Lu, 'Bank Regulation in the United States, CESifo Economic Studies, 2009; See also, James R Barth and Gerard Capiro 'Bank Regulation and Supervision: What Works Best?'[2013] 13 (2) Journal of Financial Intermediation 208, 205- 248.
[52] *ibid*.
[53] Roman Tomasic and Folarin Akinbami, 'Towards a New Corporate Governance after the Global Financial Crisis,' [2011] 22 (8) International Company and Commercial Law Review 240, 237-249. (Tomasic and Akinbami, 2011).

The creation of this banking regulatory model, similar to the composition of the US, has made it easier to integrate further checks and balances within banking regulation and the model itself. Advocates of this approach in Nigeria argue that the CBN does not currently demonstrate a commitment to prudent banking regulation, given the absence of regular bank examinations,[54] and its reactive regulatory approach.

Part III

1.6 The Research Questions

At its core, the objective of this research is to examine the powers of the CBN to regulate Nigerian banks, using case law and the Nigerian banking law Acts. The thesis examines the regulatory model and argues that it is ineffective to accommodate sustainable banking regulation.

The research generally focuses on two questions. The first is:

1. *To what extent are the powers of the CBN in the regulation of banks and within episodes of banking crises and failures clear?*

To answer this question, the research interrogates banking failures and crises in Nigeria, during the pre-colonial era, and from the implementation of Nigeria's first banking law. It is argued that given the banking failure culture, an examination into the powers of the CBN is necessary, in order to critique the previous regulatory responses.

To assist in answering the above, the research examines two sub questions, which are:

1. *What are the legal repercussions of the 2004 banking consolidation policy and how has this impacted on banking regulation in Nigeria?*
2. *To what extent does the apex banks' approach to bank licence revocation impact on banking regulation in Nigeria?*

[54] Ogowewo and Uche, 2006 (n 2) 165; Famuiywa, 2013 (n 28).

To answer the first question, the research undertakes a holistic examination of the 2004 banking consolidation. An examination of this area is necessary, given the number of banks unable to meet the deadline and the legal issues raised. Furthermore, there is the question of whether this regulatory move was necessary to improve banking regulation. Secondly, this question is necessary as it will allow the research to examine the impact of consolidation within the Nigerian banking sector.

The second question is helpful in ascertaining the role of the CBN vis-à-vis bank licence revocation. This is in the light of the Court of Appeal decision in the case of Savannah, which places the onus of 'bad faith' on the bank concerned. It is anticipated that the examination of the powers of the CBN and its Governor in this respect will assist in understanding the role it plays when a bank experiences failure, which subsequently leads to license revocation.

The provisions of BOFIA allow the CBN to revoke a licence if the bank goes into liquidation, has insufficient assets to meet its liabilities,[55] or is non-compliant with the capital ratio requirement.[56] Under s.14[57] the CBN *shall* give notice of its intention to the bank and the bank may within 30 days make representation (if any) to the CBN in respect thereof'.

However, when read together, there are processes prescribed by the provisions[58] which are to be followed when it has been identified that a bank is *failing*. These provisions should be seen as a stage by stage process for the revocation of a banking licence, and the measure appears to be corrective in nature.

[55] BOFIA 2004, s.12 (a) –(e).
[56] BOFIA 2004, s.14 (1) – (2).
[57] BOFIA 2004.
[58] BOFIA 2004, s.33-35.

The second research question is:

1. *What regulatory reforms are necessary in order to enhance Nigeria's regulatory environment?*

Given that the first question focuses on the powers of the CBN and that this thesis makes a strong case for reform, the thesis also interrogates the possible measures that can be implemented to enhance the Nigerian banking regulatory environment. To help answer this question, the thesis focuses on presenting sound principles and reform proposals which if implemented, will be beneficial to the regulatory framework.

1.7 Literature Review

There is ample literature on Nigerian banking law. The review has been constrained to general banking law, with an emphasis on regulation. On examining the literature, it is clear that scholars have placed emphasis on examining the *issues* plaguing the Nigerian banking industry. Okoye[59] critically analyses the creation of a competency framework for the Nigerian banking industry. Here, it is argued that while the creation of the above is welcomed, it falls short of being adequate, failing to consider the impact of an individual's personality in ensuring effectiveness for the management of banks. Lyndnon and Ego[60] observe the impact of non-performing loans on bank performance in Nigeria and what this means for the Nigerian banking industry. Other scholars argue for a more robust regulatory response to the Nigerian crisis of 2009.[61]

[59] Ngozi Okoye, 'The Central Bank of Nigeria Competency Framework for the Nigerian Banking Industry; A Case of 'Near' Adequacy?' [2016] 31 (1) Journal of International Banking Law 44-51.
[60] Lyndnon. M Etale and Peter Ego, 'The Impact of Non-Performing Loans and Bank Performance in Nigeria' [2016] 5 (4) International Journal of Humanities and Social Science Invention 1-5; Chibuke Uche 'Regulation and Financial System Stability in Africa', (2014) 29 (10) Journal of International Banking Law 650- 654.
[61] Salami 2009 (n 29); Yomi Makanjuola, *Banking Reform in Nigeria; The Aftermath of the 2009 Financial Crisis* (Palgrave Macmillan, 2015); Famuiywa, 2013 (n 28).

On the position of the CBN as the apex regulator, Uche and Ogowewo[62] have attempted to distil some of the legal issues arising from the 2004 banking consolidation. They argue that the CBN has placed greater emphasis on the task of banking supervision rather than its primary responsibility, the promotion of financial stability.[63]

As a result of this, Uche and Ogowewo further argued that the CBN should consider dividing its regulatory powers. They believe instead of exercising its powers of regulation, the CBN has used the increase of bank share capital as a regulatory tool.[64] By passing on the role of banking supervision to another independent regulatory body, the CBN will be better able to focus on its core responsibility, which is the promotion of financial stability. The separation would achieve better results vis-à-vis bank regulation.

While this research supports the arguments above, it should be noted that the objective here is different. Ogowewo and Uche have placed the emphasis on the issues arising from the policy, and have reviewed the method utilised to achieve these stellar results,[65] with a particular focus on arguing that the regulators core focus has shifted from the enumerated provisions of the Act. This research maintains the position that the CBN's regulatory approach *generally* poses a threat to banking regulation, and does not allow it to fulfil its core objective as prescribed by the CBN Act.[66]

[62] Ogowewo and Uche, 2006 (n 2) 165.
[63] CBN Act 2007, s.2.
[64] Ogowewo and Uche, 2006 (n 2) 167.
[65] Donwa Pat and Odia James 'Effects of the Consolidation of the Banking Industry on the Nigerian Capital Markets' [2011] 2 (1) J Economics, 57 -65 and; S.J Ningi and A.Y Dutse, 'Impact of Bank Consolidation Strategy on the Nigerian Economy', [2008] 6 (2) African Economic and Business Review 26-45.
[66] CBN Act 2007, s.2.

Ezeoha[67] argues that in addition to the over supervision of banks identified by Uche and Ogowewo, the consolidation policy had a significant impact on the structural arrangement of banks. Furthermore, the move lacked strong empirical backing. Ezeoha explores the structural position of Nigerian banks *prior* to the implementation of the consolidation policy. It does this by comparing the positions pre and post consolidation and reflecting on the justifications for the move.

Ezeoha makes four main arguments to support this position, namely:[68] the expansionist argument; reinvention of Nigeria's banking industry; the arguments based on the economies of scale; and the act of consolidation as a catalyst to improve corporate governance standards in banking.

On the first argument, Ezeoha believes that the expectation was that by virtue of consolidation, banks would be able to break into other economies in the West African region in order to expand their investments and take advantage of the capital that they amassed. The expansion would also give Nigerian banks sufficient capital to compete with banks on a global scale.

On the second argument, the writer believes the recapitalization programme changed the face of Nigerian banking, arguing that it is universally acknowledged that a move such as this would significantly alter the position of Nigerian banks both locally and globally. It is similar in tone to the expansionist argument although this position leans towards banking activities.

[67] Abel Ezeoha, 'Structural Effects of Banking Industry Consolidation in Nigeria: A Review', [2007] 8 (2) Journal of Banking 159 - 176. (Ezeoha, 2007); Abel Ezeoha, 'Banking Consolidation, Credit Crisis and Asset Quality in a Fragile Banking System: Some Evidence from Nigerian Data', [2011] 19 (1) Journal of Financial Regulation and Compliance 33-44.
[68] Ezeoha, 2007 (n 67).

The third position argues for the economies of scale, where a consideration is given to the overall aim of globalization and branching out to save costs, without reducing the quality of work or services. It is thus argued that potentially, the consolidation was a way to save money. The act of consolidating banks and creating mega banks reduces running and maintenance costs, staff and general expenditure. The final argument is the consideration of consolidation as a *tool* to improve corporate governance standards within banking.

There have been other arguments which contend that Nigeria's banking problems may be categorized as a single issue of 'supervisory failure.'[69] Teriba[70] argues that supervisory failure and capital ratio are *general* issues for the apex bank. While Teriba's argument accurately represent some challenges faced by the apex regulator, it fails to capture the core conundrums from a legal perspective, and from the perspective of the Nigerian courts. Rather, it hinges on the *impact* of the failure on the economy.

1.7.1 Gaps in Literature

Similar to Teriba, there have been contributions to the academic discourse of Nigerian banking regulation from scholars such as; Tugbiyele,[71] Apati,[72] and Goldface – Irokalibe. [73] However, the objectives have been to underscore the myriad of economic, social and political impact on Nigeria's banking industry. Recently, Famuyiwa[74] has moved forward the debate on banking regulation by proposing the creation of a triple peaks model. This proposition is based on the assumption that the regulatory structure is currently *ineffective*, and emphasizes

[69] Ayo Teriba, 'Clarification on Recent CBN Proposals', (2004) Economic Associates August 2 (Teriba, 2004).
[70]Clarifications, 2004, (n 88) 2; Ayo Teriba, 'A Closer Look at Nigeria's Economic Performance' *Economic Associates* August 2013. Available at: < http://ssrn.com/abstract=2443361> Accessed 25th February 2017.
[71] Timothy Tugbiyele, Banking *Laws and Practice*. (Lagos, T. A O Tugbiyele, 2012).
[72] Apati, 2012 (n 31).
[73] Joe Goldface-Irokalibe *Law of Banking in Nigeria* (Lagos Malthouse Press Limited, 2007).
[74] Olumide Famuyiwa, '*Towards a Nigerian Objectives Based Triple Peaks Financial Regulation*', (Unpublished DPhil, University of Oxford Doctoral Thesis, 2015) Abstract available at: <http://ora.ox.ac.uk/objects/uuid:13b75c45-f998-465f-b889-7638c6c8a1dd> last accessed 25th December 2015.

the need for Nigeria to rearrange its regulatory agencies, aligning their core objectives for greater *effectiveness,* given Nigerian circumstances.

Famuyiwa has placed a substantial emphasis on Nigeria realigning its regulatory agencies, closer to the UK, evident in the creation of a triple peak model. However, this proposal does not address the impact the change will have on the apex regulator, or consider how this will affect its regulatory powers. There is a need to reform the Nigerian regulatory structure, but any proposal to address this remains incomplete without a thorough discussion of the impact this will have on the CBN and its designated operation within this newly created framework. This may not have been addressed because further clarity is needed on the powers of the CBN.

However, Okafor[75] has examined the consolidation policy and its impact on banking generally. The research examined the shift in management practices of the senior staff members who were directly or closely involved in implementing the consolidation policy in Nigeria. The second area of examination is the impact of the consolidation vis-à-vis the availability of credit to the private sector.

The review of the literature demonstrates that there is a visible gap within the academic discourse which addresses the powers of the banking regulator, or considers profoundly, the CBN's role from a legal perspective. Ogowewo and Uche have argued that in order for the CBN to focus on its core responsibility of promoting financial stability, some of its powers should be reallocated to other organisations.[76] However, like Famuyiwa, they have neglected to present a thorough discussion on the potential impact this would have on banking

[75] Chuma E Okafor, '*Change and Consolidation in the Nigerian Banking Industry: An Exploration of Two Key Central Bank of Nigeria Objectives*', (Unpublished Doctoral Thesis, Robert Gordon University 2012).
[76] Ogowewo and Uche, 2006 (n 2) 165.

regulation, and the regulatory powers of the CBN. This suggests that there are challenges within the parameters of the CBN's regulatory powers, which first need to be addressed, or that the regulatory powers require further defining. This research attempts to bridge this gap.

1.8 Methodology

This research adopts a doctrinal, comparative and textual analysis to answer the research questions. These methodological approaches are justified for the reasons contained below. An empirical based research method was discounted primarily due to the time constraints. However, another consideration is that the examination of the law and judicial pronouncements will better answer the research questions than the collection of data and further observations.

The justification of doctrinal, comparative and textual analysis is that the thesis compares the powers of the regulator in Nigeria against the backdrop of the regulators in the comparator jurisdictions. The thesis adduces that an analysis of the regulatory responses may produce lessons from which Nigeria can draw. This is because of the impact of the global financial crisis on the comparator countries, as well as the fact that Nigeria already uses both countries as blueprints. There are still some UK laws in Nigeria, for example the core company Act in Nigeria, CAMA, which is modelled on the British Companies Act 1948. In the case of the US, Nigeria not only operates a presidential system similar to the US, but it has modelled its regulatory institutions similar to the US. These are explored in the next chapter.

1.8.1 The Doctrinal Methodology

This approach permits the examination of legal doctrines through a critical analysis of existing legal rules.[77] The use of doctrinal research should achieve four core objectives. The

[77] Paul Chynoweth, 'Chapter 3: Legal Research' in L. Rudduck and A. Knight, (eds) 'Advanced Methods in the Built Environment. (Wiley - Blackwell, Oxford, 2008) 29; Nigel J Duncan and Terry Hutchinson, 'Defining and

first, the analytical aspect of providing further clarity on multidimensional legal issues or areas that need to be further redefined.[78] The second is the examination and resolution of the pertinent laws relevant to a particular issue. The third is the ability to critically draw plausible conclusions from the presentation of the issue(s) and the consideration of the law on this.[79]

The doctrinal methodology allows the research to examine the existing literature on Nigerian banking law, in order to provide a historical account of Nigerian banking regulation. This has been helpful in constructing a picture of the historical aspect[80] of Nigerian banking. This research explores primary and secondary sources, including; banking statutes, judicial pronouncements; reports analyzed from the CBN, NDIC, and the Bank of England archives.

There have been specific references to particular documents such as the Paton Report of 1948, as previously indicated, working papers and materials from the International Monetary Fund and the World Bank. The IMF Country Report has been highly instrumental in identifying the regulatory gaps, from an economic perspective, within the infrastructure and in law.[81] The secondary sources allow this research to borrow from other fields such as economic and socio-legal theories, books, journal articles, scholars, newspapers and other available literature on the Nigerian banking sector.

1.8.2 The Comparative Approach

It is not uncommon for a country to borrow or transplant laws from another country. In addition to the above approaches therefore, the research adopts a comparative analysis.

Describing What We Do: Doctrinal Research' [2012] 17 (1) Deakin Law Review 83-119. (Duncan and Hutchinson, 2012)

[78] (Duncan and Hutchinson, 2012). (n 77)

[79] *ibid.*

[80] Martin Brownbridge and Charles Harvey, *Banking in Africa: The Impact of the Financial Sector Reform since Independence* (Africa World Press, 1988).

[81] IMF in Country Report, 2013 Available at: https://www.imf.org/external/pubs/ft/scr/2013/cr13140.pdf last accessed 19th July 2017.

Comparative analyses of the comparator countries and Nigeria have been conducted in order to achieve the following objectives:

1. *To compare the regulatory models of the comparator countries and Nigeria, in order to examine the effectiveness of their banking regulatory regimes;*

2. *To compare the regulatory responses of the comparator countries in the global financial crisis of 2007 and the Nigerian crisis of 2008, in order to assess which response was least effective;*

3. *To identify how Nigeria may critically draw lessons from the comparator regulatory framework on banking law matters.*

Comparative law aims to reconnoitre the practices of legal systems, with the objective of conveying the existing similarities and differences. This assists in providing a deeper understanding of specific areas. In simpler terms, the objective of comparative law is to provide an inclusive analysis of existing legal systems.[82]

In the field of comparative law, De Cruz[83] recommends the following:

1. *An assessment of the development of the law in different systems and periods of time;*
2. *An examination of similarities/differences between a local and foreign legal system;*
3. *An investigation of a legal issue/problem and the solutions as applied by different legal systems.*

It has also been asserted that the use of comparative analysis is 'indispensable to the progress of knowledge',[84] as it presents the opportunity to accumulate different information vis-à-vis drawing a concise conclusion, which may not have been possible with a single form of assessment or examination.

[82] Andrew Harding and Peter Layland, 'Comparative Law in Constitutional Context' in Esin Orucu and David Nelken (eds), *Comparative Law: A Handbook* (2nd edn, Routledge 2010) 314.
[83] Peter de Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge Cavendish 2007) 5; J. Michael Rainer, *Introduction to Comparative Law* (Manz, 2010) 2.
[84] Geoffrey Samuel, An *Introduction to Comparative Law Theory and Methods* (Hart Publishing 2014) 11. See also David Nelken, 'Comparatists and Transferability', in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 443.

The analysis used here has primarily been theoretical and conjectural, given the examination of the comparator countries and Nigeria.[85] Chapter 2 of this thesis presents the banking regulatory models of the comparator jurisdiction and Nigeria. This has been instrumental in identifying the key features which are both fundamental and integral to making the banking regulatory regime effective.

This research adopts a comparative approach for three reasons. The first, apart from historical/colonial links between both countries, the regulatory response to the global financial crisis has been swift and concise, in comparison to Nigeria. This research does not presume that the UK possesses a perfect banking system; however, based on its regulatory response to the crisis, it is evident that the regulatory regime has evolved significantly. This evolution of the system has primarily been through the development of the twin peaks regulatory system.

Secondly, discounting that comparator countries and Nigeria all apply common law, several Nigerian legislations are based on enactments from foreign laws. To illustrate, a substantial portion of CAMA comes from the British Companies Act 1968, with modifications to suit Nigerian circumstances. Similarly, ISA finds its roots in the Securities Exchange Act 1934 and the US Securities Act 1933. Given that Nigeria has used both the US and the UK as blueprints for its own applicable laws, it is contended that Nigeria may draw lessons from these countries.

[85] Ralf Michaels, 'Comparative Law' in Oxford Handbook of European Private Law (Basedow, Hopt, Zimmermann (eds) Oxford University Press, 2011). Available at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3014&context=faculty_scholarship> last accessed 12 September 2016; Andreas Rahmatian, 'Legal Domains and Comparative Law' [2013] 17 (3) The Edinburgh Law Review 420-424; Mark Hoecke, Francias Ost, (eds) *Epistemology and Methodology of Comparative Legal Research* (Hart Publishing, 2004) Also available at: http://cscs.res.in/dataarchive/textfiles/textfile.2009-08-20.4205541014/file last accessed 16th February 2017.

Nigeria has gone further to emulate regulatory composition of the US. Its core regulatory framework comprises of the Central Bank of Nigeria; the Nigerian Deposit Insurance Corporation; and the Securities and Exchange Commission. This replicates the core regulatory bodies of the US; the US Federal Reserve; and the Federal Deposit Insurance Corporation.

Additionally, Nigeria has also adopted the US presidential system of government. However, the US has a fragmented banking regulatory framework. There are two levels of banking regulation; regulation at State level and regulation at Federal level. Like the UK, the US response to the 2007 crisis was swift, the restructuring of its regulatory regime. The use of these two comparator countries allows for the identification of the inherent loopholes within the Nigerian system and present how best Nigeria can move forward.

It may be argued that consideration needs to be given to the differences vis-à-vis country status, local circumstances, political and economic development. However, this thesis contends that while Nigeria is indeed a developing country in comparison to the comparators, it is imperative to note that Nigeria has, in the past, chosen these same countries as blueprints for its *own* development.[86] Additionally, Nigeria is no stranger to borrowing laws which have been successfully utilized in other countries, such as the Australian mode of arbitration.[87]

It is further argued that using Nigeria against the backdrop of these two comparator countries will yield valuable lessons for the enhancement of Nigerian banking regulation. While it has been argued that Nigeria can learn the importance of creating a more effective regulatory

[86] Taslim Olawale Elias, *The Nigerian Legal System*, (Oxford University Press 1963) 11.
[87] Paul O Omaji, 'Legal Transplantation: A Case Study of the Migration of the Australian Collective Labor Law to Nigeria' [1993] 11 Law Context, A Socio-legal Journal 34 - 38

framework,[88] the country may also draw lessons on the importance and impact of effective laws, and the importance of strategic corrective reform policies. It is not enough to implement a regulatory response with no consideration to the long term impact.

In the US, the global financial crisis induced the decision to allow the Lehman Brothers Investment bank to fail, and address the other inherent regulatory weaknesses that the financial crisis uncovered. In the UK, the decision was taken to relieve the FSA of its regulatory duty and rebuild the regulatory structure as a whole. In Nigeria, the regulatory response was the creation of AMCON. The creation of AMCON is indeed welcomed, since this has been the first major step in addressing banking failures in Nigeria. It should be noted however, there have been no further attempts, (as in the US and UK) to make further changes to the legal framework, save for the implementation of the CBN's initiative to address weak corporate practices.[89]

It may also be argued that in making a comparison, the more objective approach may be to choose other countries, such as South Africa. This research discounts this choice for the following reasons. While South Africa was not significantly affected by the global financial crisis, substantial consideration must be given to the local, jurisdictional and banking structure. These factors are necessary in terms of determining if a particular country would be a suitable choice for comparison.

[88] Abayomi Adebanjo and Oluwaseye Ayinla, *Global Insights Banking Regulation: Nigeria* (Global Legal Group, 2010).
[89] CBN Guidelines for Exposure Drafts. See: < https://www.cbn.gov.ng/OUT/2012/CIRCULARS/FPR/EXPOSURE%20DRAFT%20-%20CORPORATE%20GOVERNANCE%20CODE%20&%20WHISTLE%20BLOWING%20GUIDELINES.PDF> Accessed 27th February 2017.

It should be noted that South Africa operates a completely different legal system, and this would be a challenge for some of the suggested reforms. Within the adverse legal system, the applicable doctrines are inspired by an amalgamation of the civil tradition, and the common law tradition, stemming from the British colonial rule. There is a choice in that indigenous people may choose customary law to be applicable in order to avoid with the Constitution.

Given that the legal system underpins banking regulation in Nigeria, it is submitted that South Africa would not be a good fit. Additionally, the temperament and organization of the South African banking framework is different from Nigeria. The comparator countries, save for the fragmented banking regulation in the US, (which has been duly considered) are in this respect closer to Nigeria. It is therefore submitted that for the purposes of achieving the research objectives, the comparator countries are more closely suited. The use of South Africa would not be helpful in answering the research questions, neither would it be helpful in identifying how the laws could be enhanced as seen in the UK and the US. The objective choice, in light of Nigeria drawing structural lessons from the comparator countries, would be to use a tried system in order to test the arguments.

In response to the global financial crisis, both the comparator countries substantially enhanced their banking regulatory frameworks. In the case of the US, in responding to the global financial crisis, the regulator implemented a number of programmes, including the Term Asset- Backed Securities Loan Facilities (TALF) and the creation of Troubled Asset Relief Programme. The UK redefined its regulatory structure, with the establishment of the Asset Protection Scheme, the passing of the Financial Services Act in 2012 and the creation of the Special Resolution Regime. These are further examined in Chapter 2.

The choice of these comparator countries is also based on the general acknowledgement that these two countries were at the fore of the global financial crisis.[90] Their responses however demonstrate that both countries have identified the challenges, and have implemented regulatory policies and reforms to address them.

Additionally, both countries have further defined their regulatory frameworks, respective to their local contexts. The question of whether the environments of these jurisdictions affect the findings has been considered and this thesis argues that it does not. These modifications could be implemented or at the very least, used as a guide, to induce similar reforms in Nigeria.

1.8.3 Textual Analysis

In order to cite rich materials to address the research objectives, a textual analytical approach is also used. This research differs from others carried out in this area in a number of ways. Foremost, the research has extracted information not readily available in the public domain, by examining documents from the Bank of England Archives. This has been helpful in presenting rich information which can be critically examined, in order to contribute to the academic discourse of pre-colonial era banking, and in understanding the development of Nigerian banking regulation. It has also been helpful in understanding the original rationale for the establishment of the CBN and exploring the impact on banking regulation.

1.8.4 The Theoretical Framework

In addition to the above, this thesis presents a theoretical framework to the research. This dimension assists in ensuring a complete and robust understanding of banking regulation and

[90] Gerard Caprio, Jr. 'Financial Regulation after the Crisis: How Did We Get Here, and How Do We Get Out?' Special Paper 226 LSE Financial Markets Group Special Paper Series; Corporate Governance, 2011 (n 53); Folarin Akinbami 'Is Meta-Regulation all it's Cracked up to be? The Case of UK Financial Regulation', [2013] 14 (1) Journal of Banking Regulation 16-32

the theoretical rationale.[91] The theoretical examination was necessary in order to ascertain the purpose of banking regulation.

Hutchinson[92] argues that adopting a theoretical approach is fundamental as it assists with 'fostering a more complete understanding of the conceptual bases of legal principles and the combined effects of rules and procedures that touch on a particular area of activity'. This is important as it also creates a conceptual background which, *inter alia,* is instrumental to providing a basic understanding of banking law and regulation.

To achieve this objective, the research has examined the two main theories in banking regulation, namely the public interest theory and private interest theory. It has engaged in a discussion on the theories, inclusive of the proponents, in order to draw out an objective conclusion as to which theory is discounted and which is more applicable to the Nigerian context.

The thesis discounts the private interest theory and concludes that regulation in the public interest is the more applicable nomenclature for Nigeria. This theory states that regulatory rules are modelled with the objective of propelling public interest. In the case of Nigeria, regulation is necessary in order to ensure that depositors' funds are adequately protected.

1.9 Thesis Structure

This thesis is divided into 6 chapters. The subsequent chapters' focus sub themes, which provide the thematic thrust required to achieve the research objective. Each chapter examines

[91] Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' [2008] 32 (2) Melbourne University Law Review, 1068, 1065 -1095 (Hutchinson, 2008)
[92] *ibid.* 1069.

the fundamental aspects, how these are connected to the problem presented, and the necessary reforms. These are discussed below.

1.9.1 Chapter One

Chapter one formulates the justification for this research, by presenting the issues to be examined. It presents an overview of the Nigerian banking industry, introducing benchmark events as linked to the research questions. The first part identifies the research objective, while the second part introduces the concept of 'banking', and identifies the Nigerian banking structure. It presents a discussion of the challenges highlighted by the definition of a bank under Nigerian law.

1.9.2 Chapter Two

This chapter presents an examination of the theoretical underpinnings of banking regulation. The research situates itself on the notion of regulation being in the public interest and examines the justification for this. Furthermore, it links the public interest theory with the Nigerian context and provides a nomenclature in order to demonstrate why this decision is supportable.

1.9.3 Chapter Three

Chapter three discusses the global financial crisis 2007 and Nigerian crisis 2008, and critiques the regulatory responses adopted by the comparator countries and Nigeria. On the premise that the regulatory infrastructure in Nigeria is not adequate and is in need of reform, the chapter makes a case for the creation of a specific court, as first suggested in the introductory chapter. The final section of the chapter provides a detailed overview of the regulatory institutions, namely AMCON, NDIC and the CBN and their operation within the Nigerian regulatory model.

1.9.4 Chapter Four

This chapter presents a detailed historical discussion of the development of banking regulation in Nigeria and the introduction of banking laws. This discussion is necessary as it continues the thread of providing a good understanding of events leading up to Nigeria's first banking law. The chapter moves on to examine these banking laws, and discusses the establishment of the CBN and its autonomy.

1.9.5 Chapter Five

The penultimate chapter interrogates the regulatory powers of the CBN. It examines regulatory decisions and policies as implemented by the CBN, coupled with endorsements of these powers by the Nigerian courts. Given that scholars have placed emphasis on the banking events themselves, further research is necessary in this area. To address this, the chapter presents a comprehensive analysis of the powers of the CBN, with a focus on answering the research questions.

1.9.6 Chapter Six

The final chapter concludes the advocacy for the need to redefine the role of the Nigerian regulator. It summarises the recommendations as canvassed in the previous chapters and offers concluding remarks on the research questions. It addresses areas which should be reformed in order to strengthen the banking regulatory framework. It also highlights other issues where further research may be undertaken.

1.10 Limitations

As with any research, there were a few limitations. A primary one was the inability to perform empirical analysis. This was largely because those who would have been better placed to provide information that is not easily accessible over the internet or in text were unavailable. Time constraints were considered in conducting empirical research. Given the chance to do so, it *may* have provided a deeper analysis of the Nigerian banking sector. The

inability to use empirical data does not in any way devalue its significance. There remain several salient points that support the core examination of the research.

The intention of the study therefore is to build and contribute to the existing literature on banking law and thus, offer recommendations towards the improvement of Nigerian banking and financial law.

1.11 Contribution to Knowledge

The key impetus of this research is to contribute to the academic discourse on banking regulation in Nigeria. Given the integration of banking theories as presented in chapter two and the examination of the regulatory responses to both the global financial crisis of 2007 and the Nigerian banking crisis of 2008, the thesis concludes that reform is necessary in order to ensure that the Nigerian regulatory model performs to its full potential. The examination of the development of Nigerian banking regulation in theory and practice is an opportunity to advance knowledge within this area. The introduction of sound principles, if followed, will be instrumental for Nigeria.

Part IV

1.12 Banking in Nigeria

Nigeria embraces a federal structure,[93] comprising the Federal, State and Local Government. There are thirty-six states and the Federal Capital Territory is situated in Abuja. Within the federal system, there are two legislative bodies which together form the National Assembly, the Senate and the House of Representatives.[94]

[93] CFRN 1999 s. 3 (1) and (4).
[94] CFRN 1999, s. 4 (1).

The historical development of Nigeria's banking system can be divided into four phases.[95] The first was the pre-colonial era of 1852-1952 which saw the development of Nigeria, to independence.[96] The second phase was the creation and implementation of Nigeria's first banking regulatory instrument, the Bank Ordinance in 1952.[97] The Company Ordinance regulated *partnerships* of ten persons or more, *engaging* in the business of banking.[98] The third phase was the deregulation of the Nigerian banking sector, under the then President Babangida, and finally, there was the 2004 banking consolidation policy, which represents a substantial development in Nigeria's banking system. This was the result of a special examination into the banking activities of Nigerian banks, which is examined in the later chapter of the thesis.

Pre-Colonial banking activity in Nigeria[99] was not regulated by any laws. The first attempt at enacting any law to regulate banking was through the Companies Ordinance.[100] During Colonial rule, Nigeria was divided into two: Southern and Northern Protectorates. In 1912, the then Governor of the Northern Protectorate began the process of amalgamating both Protectorates. This process was concluded in 1914, resulting in the formation of the Colony and Protectorate of Nigeria. During this period, native forms of currency such as 'millias', and brass and copper rods and wires, were used as mediums of exchange and accepted as legal tender.[101]

[95] Jumoke Oduwole, 'The Historical Development of Banking Law and Regulation in Nigeria' in Oladapo Olanipekun (ed) *Banking: Theory Regulation, Law and Practice*, (Au Courant, 2016) 59.
[96] Nigeria gained independence from the British in 1960.
[97] Bank Ordinance 1952.
[98] Company Ordinance 1922
[99] 1892.
[100] 1922.
[101] Bank of England Archive, Emmott Report 1912 3; Green O Nwankwo, *Prudential Regulation of Nigerian Banking* (Lagos, University of Lagos Press 1990).

During the Colonial era, two types of banks were established in Nigeria, namely Indigenous and Commercial banks. Indigenous banks refer to banks that are wholly owned by Nigerians and Commercial banks, are also known as Colonial banks and refer to banks that were created by the British during the Colonial era. Both banking systems experienced challenges, with Indigenous banks suffering a number of banking failures. The later chapters of the thesis examine the contents of the Paton Committee of Enquiry[102] which was established by the Colonial administration in 1948, to investigate banks and their operation.

The report revealed a number of problems with the banking system. This included the absence of a regulation of banking activities, which could have, curtailed some of the issues discovered;[103] a lack of *understanding of banking business,*[104] *'shady' directors',* a complete lack of adherence to banking ethics[105] *and inadequate capital base,*[106] which made *regulation* tasking.

1.12.1 Recommendations of the Paton Report

The content of the Paton report[107] is fundamental and critical to the understanding of the development of banking regulation in Nigeria. This report also played a significant role in creating Nigeria's first banking law.[108] The report contains a number of core recommendations which include the definition of a *bank* and *restrictions* on the use of the

[102] Paton Report, 1948
[103] The Federal Government welcomed the idea of implementation legislation to help regulate banking, as did those interviewed by Paton. Paton Report, 1948 (n 102) 9.
[104] Paton Report, 1948 (n 102) 2.
[105] Chibuke Uche, 'Ethics in Nigerian Banking', [2004] 8 (1) Journal of Money Laundering Control 66-74.
[106] *ibid.*
[107] Paton Report 1948. (n 102)
[108] Appendix 2.

word bank;[109] a recommendation to include a minimum capital base for banks;[110] and the *licensing*[111] of banks.

The recommendation of a minimum capital base was not well received by the legislature and it was argued that:

> *There could be no quarrel whatsoever with the minimum of £12,500, but I think to apply it generally to all African banks is not fair because there should be agricultural banks and we cannot expect each to raise a figure of £12,500. There could be a differentiation between commercial banks and farm banks because if we are going to develop agriculture in this country, we must have farm banks and the capital of £7,500 would be adequate..to law any other condition, I consider is an effort to stifle the honest activity of African Banks, that step is not progressive, but going backwards.*

1.13 Classification of Nigerian Banks

1.13.1Defining a 'Bank'

Banks are important institutions because of the significant position they occupy within the financial system and their role as catalysts to the success of economies. Betz[112] argues that:

> '*…in a financial system, banks are the central institutions, affecting both the supply of credit and supply of money in an economy'.* [113]

Olanipekun[114] argues that there are four distinct factors which make banks 'special'.[115] First, banks play a significant role in the financial system by virtue of their operations and functions; that 'bank runs' present systemic danger; that banks distinctiveness in temperament, makes them different from other financial institutions; and finally, their

[109] Paton Report, 1948 (n 102) 10. The report provides an outline of a draft Ordinance which specially addresses the issue of 'bank', in s 2.
[110] House Debates, 1952, 1119. Bank of England Archive.
[111] Patron Report, 1948 (n 102)
[112]Federick Betz, *Why Bank Panics Matter: Cross –Disciplinary Economic Theory*, (Springer Science & Business Media, 2013). (Betz, 2013)
[113] Betz, 2013 (n 112).
[114] Olanipekun, 2016 (n 47) 8; Anu Arora, *Banking Law*, (Person Education Limited 2014) 302. See also: Anil Kashyap et al 'Banks Liquidity Providers: An Explanation for the Co- Existence of Lending and Deposit Taking. (2002) 58 (1) Journal of Finance 1-41
[115] Andrew Campbell, 'Bank Insolvency and the Interest of Creditors', [2006] 7 (1) Journal of Banking Regulation 133 – 144.

imbedded safety net configuration, which becomes relevant in matters of bank failures and crises.

The Nigerian banking system is unique, in that it is comprised of both banks and non-banking institutions, which are regulated by a number of different regulatory bodies. Banks are important in financial systems, as they operate as financial intermediaries, providing financial services to both natural and artificial persons. In developing countries such as Nigeria, the expectation is that banks play a more fundamental role, vis-à-vis the economic development of the country. It has also been argued that:

> '*…a sound and efficient banking system is significant in achieving economic development. Thus, well-functioning banks accelerate economic growth, while poorly functioning banks are an obstacle to economic progress and aggravate poverty.*'[116]

Drigă and Dura go further to argue that:

> '*The efficiency of the banking system is a key determinant of sustainable growth. Thus, banks are essential for any modern economy, not only in terms of turnover, but also as the primary financier of the national economy.*'[117]

In the light of the above discussion, the subsequent sections consider the *types* of banks in Nigeria.

1.13.2 Categories of Banks in Nigeria

At present, there are three types of banks in Nigeria, as defined in the BOFIA.[118] These are Commercial Banks; Merchant Banks; and Specialized Banks.

1.13.2.1Commercial Banks

Under BOFIA, a commercial bank is described as:

> '*a bank in Nigeria whose business includes the acceptance of deposits withdrawable by cheques*'.[119]

[116] Imola Drigă and Codruța Dura, *The Financial Sector and the Role of Banks in Economic Development*, 2014 602 (online). Available at: http://www.upet.ro/simpro/2014/proceedings/09%20-%20ECONOMICS%20AND%20PUBLIC%20ADMINISTRATION/9.2.pdf Accessed 11th April 2017; Joseph Schumeter, *The Theory of Economic Development*, (Transaction Publishers 1934).
[117] *ibid.*
[118] BOFIA 2004, s.66

Commercial banks engage in retail banking activities (such as accepting deposits made by customers) and can be described as general banks, accessible to the general public. Presently, there are only 22 banks in Nigeria,[120] which are licenced under BOFIA to engage in the business of a commercial bank. There is currently no minimum deposit which can be accepted from a customer.

1.13.2.2Merchant Banks

The provisions of BOFIA describe a merchant bank as:

> *'a bank whose business includes receiving deposits on deposit account, provisions of finance, consultancy and advisory services relating to corporate and investment matters, making or managing investments on behalf of any person.'*[121]

Unlike commercial banks, merchant banks are not as accessible to the general public. The business of these banks is to engage with banking business on a large scale. Merchant banks are not permitted to accept deposits in an amount less than 100,000,000 naira,[122] or any such amount as may be prescribed by the CBN *from time to time*.[123]

A further peculiarity between the two types of is that merchant banks are expressly excluded from accepting deposits which are withdrawable by cheques, or engaging in retail banking

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[119] *ibid.* It should be noted that Regulation 3 incorporates by reference, the definitions used in BOFIA See also, s.10 of Regulation 3. Available at: Available online at: http://www.cbn.gov.ng/OUT/2010/CIRCULARS/BSD/CBN%20REGULATION%20ON%20%20NEW%20BANKING%20MODEL%20%20CLEAN%20091110%20FINAL.PDF Accessed 11th April 2017.

[120] The list of these banks can be found on the CBN's website. See: https://www.cbn.gov.ng/supervision/Inst-DM.asp Accessed 20th April 2017.

[121] BOFIA 2004, s.66.

[122] The equivalent of this is: £ 255,273.481. See: http://www.xe.com/currencyconverter/convert/?Amount=100%2C000%2C000&From=NGN&To=GBP Accessed 20th April 2016.

[123] See: s. 3(a) of the CBN Scope, Conditions & Minimum Standards for Merchant Banks Regulations 2010. Available at: https://www.cbn.gov.ng/OUT/2010/CIRCULARS/BSD/MERCHANT%20%20BANKING%20LICENSING%20REGULATIONS%20%2016%20JULY2010A.PDF Accessed 15th April 2017.

activities, which are endemic to commercial banks.[124] Currently, there are only five organisations likened under the Act to carry on the business of a merchant bank.[125]

1.13.2.3 Specialized Banks

The third category of banks is not as coherently defined as those above. Under the regulations,[126] specialized banks are stated as being:

> '*non-interest banks, microfinance banks, development banks and mortgage banks*'.[127]

While BOFIA provides a list of specific institutions under the umbrella of specialized banks, including Federal Mortgage Ban of Nigeria and Nigerian Export-Import Bank, the definition as provided in Regulation 3 is wider and, it is the definition which is to be followed. This expressly provides the definition set out therein, against the definitions of BOFIA. Such banks which fit under this category include Non-Interest Financial Institutions, (NIFI).[128]

Presently, banks, including foreign banks, wishing to 'carry on'[129] business in Nigeria are also subject to the provisions in CAMA,[130] in addition to BOFIA and the CBN Act. In order for a bank to carry on business[131] in Nigeria, it must be incorporated, as prescribed by the Act.[132] Post incorporation, it becomes a fully functional 'company', allowed to carry on business.[133] The definition currently provided in BOFIA is:[134]

> *'No person shall carry on any banking business in Nigeria, except it is a company duly incorporated in Nigeria and holds a valid banking licence issued under this Act'*

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[124] *Ibid*. s.4 (a) and (b)
[125] The list of Merchant Banks, *CBN*. Available at: https://www.cbn.gov.ng/Supervision/Inst-MB.asp Accessed 15th April 2017.
[126] Regulation 3, S.4 (1) (c).
[127] *ibid*.
[128] *Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria* (2011) 2. Available at: http://www.cbn.gov.ng/Out/2011/pressrelease/gvd/Non-Interest%20Banking%20Guidelines%20June%2020%202011.pdf Accessed 11th April
[129] '*Carry on*' has been defined in the case of *EIIA v CIE Ltd* [2006] 4 NWLR (Pt.969) 114 at Para 125-126.
[130] CAMA 2004, s.54 (1).
[131] Emeka Chianu, *Law of Banking: Text and Cases: Comments*, (New Press Ltd, 1995) 2; Simon Akaayar and Chritstine Sijuwade 'Regulatory and Supervisory Framework for Banking in Nigeria' in *Banking: Theory, Regulation, Law and Practice*. (Au Courant, 2016).
[132] CAMA 2004, s.18 and s.35.
[133] The formation of the company and company name can be found in the Memorandum of Association. CAMA, s.37 and s.38 (1).
[134] BOFIA 2004, s.2.

There is no universally accepted definition of a bank within the law and so it is necessary to look to case law to assist in arriving at common ground. This is also because the *accepted* definition of what constitutes a 'bank' differs from case to case and jurisdiction to jurisdiction.[135] In the case of *United Dominion Trust Limited v Kirkwood,*[136] it was accepted that banks have a wide range of functions, and this is not universal to all.

In the case of *Kirkwood,*[137] the court took the position that in identifying the physiognomies of a bank, three specific features are present, including; a) the acceptance of money from and collection of cheques for customers; b) the honoring of cheques drawn by customers; and c) the keeping of current account and the entering of debits and credits.[138]

In the case of *Ojikutu v Agbomagbe Bank (& 2 Others*),[139] the courts had to determine whether the Money Lending Act was applicable to a *licenced* bank, using the interest rate as determined by the CBN. In this case, the court drew a distinction between the '*banking businesses*' and '*money lending businesses.*' The court in this case held that in the case of money lending businesses, every person whose business is 'money lending', but excludes every person, bona fide, carrying on the business of banking. [140]

In the case of *Attorney General of the Federation v John Umoh Ekpa* [141] the court was faced with a similar challenge as in *Ojikutu.* It decided that the daily collection of money from market women, and the subsequent paying in of these monies into a bank, did *not* constitute

[135] Peter Oshio 'The Legal Meaning of 'Bank' In Modern Nigeria', [2001] 4 (1) Journal of International Banking Law 184- 189.
[136] (1966) 2 QB 431.
[137] *ibid*.
[138] *ibid*.
[139] [1966] ALL NLR 533. (Ojikutu 1966*)*.
[140] Olanipekun, 2016 (n 47).
[141] [1972] 2 FNR 206.

banking business. The decision of the two cases conclude that at this time at least, the courts had very different views of what could be considered as banking business.

The UK statutory provisions however take a different approach in defining the characteristics of a bank. Under s.2 (1) of the Banking Act, [142] a bank is defined as:

> *'..a UK institution which has permission under Part 4 of the Financial Services and Markets Act 2000 to carry on the regulated activity of accepting deposits (within the meaning of Section 22 of that Act, taken with Schedule 2 and any order under section 22.)'*

Under s.2, the Act defines what a bank is not: [143]

> *'But 'bank' does not include –*
> *(a) a building society (within the meaning of section 119 of the Building Societies Act 1986),*
> *(b) a credit union within the meaning of section 31 of the Credit Unions Act 1979, or*
> *(c) any other class of institution excluded by an order made by the Treasury.*

1.13.3 Defining 'Banks'/'Banker Under Nigerian Law

The absence of a concise definition of 'bank' and 'banker' has presented a paradox for the Nigerian courts.[144] The Paton Report recommended that it was desirable that any company engaging in the business of banking should automatically be subject to any banking ordinance, or regulation.[145] Thus, the recommendation to define 'bank' or at the very least any company purporting to engage in banking business under the act, is justified.

Although it appears that the rationale for defining a bank was objective, it was still not defined under the Bank Ordinance. It was however divided under two classes. The first Indigenous, the second 'Expatriate'. These are critically examined in the later chapters of the thesis.

[142] The Banking Act, 2009, s.2 (1).
[143] The Banking Act, 2009, s. 2 (2).
[144] *TU Akwule v Queen* [2012] 1 BFLR 90. (Queen, 2012).
[145] Paton Report (n 107).

Under the Stamping Ordinance; it was held that a 'banker' *could* be:

> *'any person carrying out the business of banking in the United Kingdom and Nigeria..'*[146]

The development of this definition can be observed in other statutory provisions such as BOFIA,[147] CBN,[148] Evidence Act,[149] NDIC Act,[150] The Bills of Exchange Act[151] and CAMA. Given that there is no actual statutory definition of a bank, case law is highly instrumental in filling this void. The courts have previously adopted the approach that the relationship between a banker/customer is that of a debtor and creditor, and it is founded on a simple contract.

However, although the statutory definitions have clearly developed over time, they still do not provide a 'simple' definition of a bank.[152] The vacuum created for interpretation in Nigerian banking law led to the repeal of the Banking Act[153] but many of these provisions can still be translated through BOFIA[154] and the CBN Act.[155]

S.2 of the BOFIA provides that:

> *'(1) No person shall carry on any banking business in Nigeria except if it is a company duly incorporated in Nigeria and holds a valid banking licence, issued under this Act.'*

[146] Stamp Duties Ordinance 1934, s.33; *Foley v Hill* (1848) 2 HLC 28; and *Joachimson v Swiss Bank Corp* [1921] 3 KB 110.
[147] BOFIA 2004, s.2 and s.66.
[148] CBN Act 2007 , s.60.
[149] Evidence Act 2011, s.258.
[150] NDIC Act 2006, s.59.
[151] The Bills of Exchange Act 2004.
[152] *Yusuf v Cooperative Bank* [1994] 7 NWLR [Pt 359] 676; *Ladbroke & CO v Todd* [1914] Comm Cas 256; and *Ademiluyi v African Cont. Bank* [1964] NCLR 10.
[153] Repealed Banking Act 1990, s.43
[154] BOFIA 2004, s.2 which this discusses 'banking businesses' but no 'bank definition'. BOFIA 2004, s.61 – 66.
[155] CBN Act, s.55 has the implications of the 'bank' definition in the Banking Act 1990. See also; *Trade Bank plc v. Barilux (Nig) Ltd* [2000] 13 NWLR (Pt 685)

The earlier sections have shown that banks are indeed companies in Nigeria. The provisions of BOFIA are the primary provisions used by the apex bank, and should therefore be the starting point for the purposes of Nigerian banking law discussions.

BOFIA defines a 'bank' as:

> *'[A] bank licenced under this Act'*[156]

The same section of the Act defines banking business as:

> *[T]he business of receiving deposits on current account, savings account or other similar account, paying or collecting cheques, drawn by or paid in by customers; provision of finance or such other business as the Governor may, by order published in the Gazette, designate as banking business'*[157]

In the case of *FMBN v NDIC,*[158] the Supreme Court of Nigeria pronounced:

> *'The word 'bank' is not defined in the Constitution or in the Interpretation Act. In its ordinary grammatical meaning, the word 'bank' means an organisation or place that provides financial service. Having regard to the provisions of the law setting up the plaintiff, particularly section 5 (1) (a) and section 6 (1) (a) & (b) of the Federal Mortgage Bank of Nigeria Decree meaning. Whatever difficulty one may have is dispelled by the definition of the word 'bank' in section 20 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 28 of 1994….*[159] *[I]n my respective view, therefore, the court below is right in holding that the plaintiff is a bank and comes within section 230 (1) (d) of the Constitution (as amended..')*[160]

The above definition was subsequently followed in *Associated Discount house Ltd v Amalgamated Trustees Ltd,*[161] and this position was further expanded in the case of *Lingo,*[162] where the court held a bank to be:

> *'A bank is a financial establishment for the deposit, loan, exchange or issue of money and for the transmission of funds.'*

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[156] BOFIA 2004, s.66.
[157] *ibid*.
[158] [2012] 1 BFLR 321,332. See also, Banking Theory (n 47) 172.
[159] This Decree defines 'bank' as meaning under BOFIA, as;

> *A financial institution as defined under that Decree or under the Nigerian Deposit Insurance Decree 1998 and A development bank and any other bank established by law*..'

[160] Queen, 2012 (n 175); CFRN, s.306 -307; s.230 (1) (d).
[161] [2006] ALL FWLR (Pt 320) 1008 (Associated, 2006)
[162] *Lingo Nigerian Ltd & Anor v Julius Nwodo* [2004] ALL FWLR (Pt209) 1094.

This definition is relevant here as discount houses and stock brokers, although financial establishments, do not necessarily qualify as banks. This was clear in the case of *Associated Discount Houses.*[163]

In the case of *Queen*[164] the Supreme Court highlighted the need to draw a distinction between a banker and a bank. In this case, an employee, in his official capacity as a banker, committed an offence as prescribed under the Penal Code which is applicable in Northern Nigeria.[165] The court, in drawing a distinction between his offences under the breach of trust as per the Penal Code, examined the definition in the Statute[166] and held that:

> *'For the meaning of banker, we turn to our own Law. The Banking Act (Cap 19) does not define banker as such but bank is defined thus, 'bank means any person who carries on banking business'. Banking business is defined as 'the business of receiving money on current account from the general public, of paying or collecting cheques drawn by or paid in by customers and of making advances to customers' (as amended by Act No 1962) Section 3 (1) of the Act enacts:*
>
> *'No banking business shall be transacted in Nigeria except by a company which is in possession of a valid licence which shall be granted by the Minister after consultation with the Central Bank, authorizing it to carry on banking business in Nigeria.*[167]

In determining who is a 'banker', the courts must therefore take into consideration the nature of the case itself, in order to decide whether such a person falls within this scope.[168] In the case of *Copland v Davies*, Lord Hatherly was particularly helpful as defining a banker as a person:

> *..Receiving people's money and giving them receipt –receipt not as transfer of for anything or land, but receipts acknowledging the receipt of money and issuing pass books and cheques books and dealing with them in the ordinary way of a banker'.*

[163] Associated 2006 (n 161).
[164] *ibid.*
[165] Penal Code, s.315.
[166] The Banking Act 2009
[167] The Banking Act 2009.
[168] *Copland v Davies* [1871 -72] HL 358, 375.

In the Bills of Exchange Act,[169] a bank is defined as:

> *'..A body of persons, incorporated or not, who carries out the business of banking...'*

The Evidence Act[170] holds a banker to mean:

> *'… [A] bank licenced under the Banks and Other Financial Institutions Act Cap B3 LRN 2004 and includes anybody authorised under an enactment to carry on banking business;*
> *Banking business' has the meaning assigned to it in the Banks and Other Financial Institutions Act 1991'*

The Nigerian Deposit and Insurance Act[171] defines a 'bank' as

> *'Any person, who carries on the business of banking which includes the acceptance of deposits,.'*

And finally, The Central Bank of Nigeria (Establishment) Act:[172]

> *'[A] Bank licenced under the Banks and Other Financial Institutions Act 1991 or under the repealed Banking Act or any other prior legislation'*

The development of the definition of bank within the law is important because it was highlighted as problematic in the Paton report itself. However, while the law itself has developed in this respect, by requiring that any institution needs to be duly incorporated as mandated by CAMA, the evolution and development of the 'bank' definition itself is mainly through the courts.

The plethora of definitions of a bank in Nigeria demonstrates that there is no accepted legal definition. However, in order to present a working definition for the thesis, the above illustrates that the definition of a bank generally has developed over a period of time. The thesis identifies two specific attributes as pertinent features of a bank. The first, it is accepted that it is an institution, which is duly incorporated, under the law, and capable of accepting deposits from customers. Secondly, it is an institution which is capable of carrying out

[169] Bills of Exchange Act, 2004.
[170] Evidence Act 2011, s.258.
[171] NDIC Act, 2006, s.59.
[172] Central Bank Establishment Act Cap C4 LFN 2004, s.60.

'banking business', although the scope of business is undefined and leaves room for further interpretation. Given the challenges as earlier presented in the case of *Ojikutu* and *John Umoh Ekpa*, the scope may extend to money lending business and, or other banking business.

Part IV

1.14 Conclusion

This chapter has introduced the research. It has provided a background study of Nigeria and of the issues to be explored, an overview of the research questions to be answered, the methodology to be adopted, and has adduced the contribution to literature. The subsequent chapters will provide a theoretical framework to support the arguments canvassed.

Chapter Two

Banking Regulation: Justification, Theory and Rationale

Part I

2.1 Introduction

This chapter examines theories of banking regulation which form the basis of the research. This theoretical framework provides the rationale for banking regulation. The objective is to examine the public and private interest theories and apply these to the Nigerian context.

Part II

2.2 Defining Regulation and Supervision

In the context of this research, it is important to draw a distinction between supervision and regulation, given that they are interchanged in the literature. Crockett[1] submits that

> *'one of the important trends has been, and continues to be, a move away from regulation and towards supervision – a move in other words, away from compliance with portfolio constrains, and toward an assessment of whether the overall management of financials firms' business is being prudently conducted.*

Scholars have defined regulation from different perspectives. Llewyn[2] defines it as:

> *'..a body of specific rules or agreed behaviour, either imposed by some government or other external agency or self-imposed by explicit or implicit agreement within the industry, that limits the activities and business operations of financial institution*'.

While Black[3] defined regulation as:

> *' ..the sustained and focused attempt to alter the behaviours of others according to defined standards and purposes with the intention of producing a broadly defined outcome or outcomes, which may involve mechanisms of standard setting, information gathering and behaviour modification.'*

A more specific definition is provided by Barth:[4]

[1] Andrew Crockett, 'Banking Supervision and Regulation: International Trends' Paper presented at the 64th Banking Convention of the Mexican Bankers Association', [2001] Acapulco, March 30. last accessed at :http://www.bis/org/speeches/sp010330.htm

[2] David Llewyn, *Regulation and Supervision of Financial Institutions* (London: The Institute of Bankers, 1986) 9.

[3] Julia Black, 'Critical Reflections on Regulation', Australian Journal of Legal Philosophy [2002] 27 (1) 26, 1-36 (Black, 2002)

'..regulation typically refers to the rules that govern the behaviour of banks.'

In light of the aforementioned, it can be deduced that regulation is associated with rules, behaviour and the general operation of banks and financial institutions.[5] It is concerned primarily with encompassing administrative and legal rules which are implemented by legal authorities, or stakeholders that have a substantial interest in the market, in order to regulate the activities of banks or other financial institutions. With respect to banks, the core aspect of financial regulation is ensuring that banks are healthy, sound, well managed and regulated through a set of rules or laws.

The objective of supervision act is to ensure *oversight* or *compliance* with the regulatory rules or behaviour as indicated above. The focus, separate to regulation is on ensuring that practices are adequately supervised in order to maintain public confidence within the sector.[6] There are a number of theories underpinning the concept of banking supervision. Such theories include, the 'official supervision view',[7] the 'private empowerment view',[8] the political or regulatory capture view',[9] and the 'independent supervision view'.[10] This thesis focuses on the public and private interest, as the others have similar overlapping attributes which are discussed in the remainder of the chapter.

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[4] James Barth, Gerard Capario and Ross Levine, *Rethinking Bank Regulation: Till Angels Govern* (Cambridge University Press, 2006) 4 (Barth, 2006); James Barth, Gerard Capario and Ross Levine, 'Bank Supervision and Regulation: What Works Best?' [2004] 13 (2) Journal of Financial Intermediation 205-248.

[5] Heide Schooner and Michael Taylor, *Global Bank Regulation: Principles and Policies* (Academic Press, 2009); Financial Services Act, 2012 s.2 (3); See also, Banking Act 1933 and Federal Deposit Insurance Act, (*1*2 U.S.C. 1831p--1(b), s.39).

[6] Edward Garner, *UK Banking Supervision: Evolution, Practice and* Issues (Allen & Unwin, London, 1986) 2; Abayomi Alowode 'Evaluating Banking Supervision in Africa' African Region Working Paper Series no 53 June 2003.

[7] Gary Becker, 'A Theory of Competition among Pressure Groups for Political Influence' [1983] 98 (3) Quarterly Journal of Economics 371- 400 (Becker, 1983) and Gary Becker and George Stigler, 'Law Enforcement, Malfeasance, and the Compensation of Enforcers', [1974] 3 (1) Journal of Legal Studies 1-18.

[8] Johnathan Hay and Andrei Shleifer, 'Private Enforcement of Public Laws, A Theory of Legal Reform', [1988] 88(2) American Economic Review Papers and Proceedings 398-403.

[9] Becker, 1983 (n 7) 371.

[10] Thorsten Beck, Asil Demirgüç-Kunt, and Ross Levine 'Law, Endowments and Finance,' [2003] 70 Journal of Financial Economics. 137-181.

Given their similarities, there is a correlation between regulation and supervision, and it is not uncommon for the two functions to be performed by the same agency. Such agencies are often conferred with the same power to make rules and implement policies, in addition to utilizing legislation, through the use of soft laws and guidelines.

These concepts, although different, must work together in order to achieve the common goal for the banking sector. In order for regulation to be *effective,* it is imperative that there is a competent supervisory system in place, which provides sound regulatory responses and early indications for banks (including systematically important banks) which may pose a threat to the sector. Likewise, it is important that there is an efficient and effective crisis resolution system in place.[14]

2.3 Theoretical Facets of Regulation

The concept of regulation has developed as a reactive response to bank failures and crises. In recent years, and particularly in the aftermath of the global financial crisis, countries have endeavored to actualize the concept of economic liberalization and one component required to achieve this goal is the efficient regulation of financial markets; inclusive of banks.

'Banking regulation' comprises of legal rules, administrative and prudential requirements which are put in place by financial authorities or market participants, with the objective of limiting or absorbing the risks assumed by banks.[15] It is an evolving subject and its objectives tend to vary according to context.[16] The concept of banking regulation has spawned public[17] and academic[18] discussions in recent years.[19]

[14] Fedrick S Mishkin, *Prudential Supervision: What Works and What Doesn't* (University of Chicago Press, 2001) 13.
[15]Oladapo Olanipekun, 'Banking Regulation and Supervision: Concept, Theory & Rationale in Oladapo Olanipekun (ed) *Banking: Theory, Regulation, Law and Practice* (Au Courant, 2016) 4 (Olanipekun, 2016)
[16] Wei P. He, *Banking Regulation in China: The Role of Public & Private Sectors,* (Palgrave Macmillan, 2014) 27.

An important point to note is that regulation is recognized as a set of static rules as well as an on-going process.[20] When viewed as such, it embodies the enforceable rules prescribed by regulatory authorities that govern the activities of individual banks, with a view to achieving the objectives of legislation and policies.[21] On-going regulation ensures that banks comply with the static rules.[22] Put simply, banking regulations encompass the formulation and enforcement of rules and standard governing banking behavior, as well as the on-going supervision of individual banks.

The justifications for banking regulation are predominantly economically oriented.[23] Unregulated markets are subject to failure, abuse of monopoly power, externalities and exploitations of information asymmetry. Regulation endeavors to prevent the exploitation of monopoly, minimize the impact of externalities and improve information disclosure rules. Thus, regulatory intervention has the objective of avoiding or at least mitigating the adverse outcomes of market imperfection and seeks to provide a remedy for market failures of private enterprises.

Different justifications have been provided for the regulation of banks. One of the core reasons that accentuated the need for regulation was the global concern generated by the

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[17] Adair Turner, 'The Turner Review: A Regulatory Response to the Global Banking Crisis', 2009. Available at: http://cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/2751 Accessed 13th June 2017 (Turner Review, 2009) last accessed 15th March 2017.
[18] Simon Ashby, 'The Turner Review on the Global Banking Crisis: A Response from the Financial Services Research Forum' Available at: https://www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper61.pdf (Turner Response, 2010) Accessed 15th March 2017.
[19] Olanipekun, 2016 (n 15).
[20] George Gilligan, 'Prospects for the Global Regulation of Markets', in G.A. Hodge, *Privatization & Market Development; Global Movements in Public Policy Ideas,* (Edward Elgar Publishing Limited, 2006) 150.
[21] *ibid.*
[22] *ibid.*
[23] Black, 2002 (n 3).

collapse and eventual failure of banking systems in some countries.[24] These were attributed partially and in some instances primarily to incoherent information, as well as weak incentive structures and management systems. It is further argued that the need for banking regulation is associated with technological innovations and the development of international financial markets and banking services.[25] This becomes necessary by virtue of the fact that the failure of some banks inadvertently placed the role of regulators into question, for example, whether they are able to promote and maintain market stability?

Broadly, there are two theories of regulation in banking.[26] One of the objectives of bank regulation is that it serves the public interest, particularly the interest of consumers of banking services.[27] This is because during periods of panic, one failure makes many and the best way to prevent the derivative failures is to arrest the primary failure that causes them.[28] This serves as a rationale that paves way for the supervision of banks and other financial institutions.[29] It is thus generally accepted that a mechanism for ensuring adherence to appropriate prudential standards is a necessary component of a developed banking sector.[30]

The *need* to regulate banks has however generated substantial arguments amongst academics and different theories have emerged as to the rationale behind this need. Amongst these

[24] Black, 2002 (n 3) 5.
[25] *ibid.*
[26] Sarah Harnay and Laurence Scialom, 'The Influence of the Economic Approaches to Regulation on Banking Regulations: A Short History of Banking Regulations' [2016] 40 (2) Cambridge Journal of Economics 401 -426. (Harnay and Scialom, 2016) and Johan der Hertog, 'Review of Economic Theories of Regulation' (2010) Discussion paper/series, Tjalling C. Koopmans Research Institute 10 2 (Hertog, 2010).
[27] Penny Ciancanerre and Jose A. Reeye Gonzalez, 'Corporate Governance in Banking: A Conceptual Framework', [2000]. Available at: http://papers.ssrn.com/paper.taf?abstract_id=253714. last accessed 15th March 2017.
[28] Walter Bagehot, *Lombard Street: A Description of the Money Market*, (Henry S King & Co 1873) 51
[29] Joan Wadsley and Graeme A. Penn, *The Law Relating to Domestic Banking* (2nd Edition, Sweet & Maxwell, 2000) 3 (Wadsley and Pen, 2000).
[30] See generally, Barry Quinn, *Bank Regulation and Supervision in the 1990's*, (Norton Edition, 1991) 2; Sam Tidball, 'The Development of Banking Regulation' in E J Swan (ed) *The Development of the Law of Financial Services* (Cavendish, London, 1993) 100; and Dalvinder Singh, *Banking Regulation of UK and US Financial Markets* (Business & Economics, 2016).

theories are the 'public interest theory' and the 'private interest theory' which are analysed below.

2.3.1 The Public Interest Theory

Defining 'public interest' can be contingent on the values which are embraced at any given time.[31] In the case of *Richardson v Mellish*,[32] Burrough J commented that

> '*Public policy is a very unruly horse and when you get astride it you never know where it may carry you*'

Clearly, this demonstrates that public interest itself cannot be easily or readily defined. The public interest theory states that regulatory authorities are guided by the 'public interest' thus indicating that regulatory rules and processes are modelled to satisfy and propel public interest.[33] This theory proceeds from the assumptions of full information, perfect enforcement and benevolent regulators.[34] The public interest theory is considered to be an evolving concept, subject to continuous redefinition and identification of its components to reflect evolving economic, social and cultural changes. It is described as a positive theory[35] about appropriate regulatory processes and the ultimate goal of such regulations.[36] It should be noted that the coverage of the public interest theory range from individual depositors and extends to wholesale customers.

It has been suggested that the public interest theory has two components; 'objectives and outcomes' and 'process and procedure'.[37] The former is that aspect of the public interest referred to as shared opinion, common good, common interest and shared value by the public.

[31] Stephen King et al, 'Reflections on Defining the Public Interest' [2010] 41(8) Administration and Society 954-978
[32] [1824] 2 BING 252.
[33] Arthur Pigou, *The Economics of Welfare*, (4th ed. London: Macmillan, 1938); Sheila C. Dow, Why the Banking System Should be Regulated [1996] 106 The Economic Journal, 698; Chibuke Uche, The Theory of Regulation: A Review Article, [2000] 9 (1) Journal of Financial Regulation and Compliance 68, 67-80; Olanipekun, 2016 (n 15).
[34] Hertog, 2010 (n 26).
[35] Milton Friedman, *Essays in Positive Economics*, Chicago: (University of Chicago Press 1953).
[36] Olanipekun, 2016 (n 15).
[37] *ibid* 16.

Process and procedure represents a compromise in achieving a delicate balance amongst conflicting interests.[38] The latter refers to the objectives and outcomes that are served through fair, inclusive and transparent procedures, thus indicating that the regulation embodies both applicable processes and appropriate outputs as well as standards of due process that include notions of fairness, transparency and equity.

This theory has been linked with welfare economics.[39] It is aimed at fostering economic development as well as protecting wealth, and has been described as a method of preserving the public good.[40] The theory holds that regulation exists to maximize social welfare for the benefit of the public at large, and that this is further escalated by the desire to achieve collective goals. Furthermore, it posits that governments will implement rules that are aimed at improving the welfare of consumers, because it provides corrective measures against various market failures, including natural monopolies and increasing returns of scale under provision of collective goods and externalities. From this perspective, state regulation is considered to promote public interest and promote social welfare.[41]

It is important to note that what constitutes public interest is largely dependent on the peculiarity of the societal system at the time. The upsurge of financial crimes and terrorism has led to bank regulation with the objective of catering for public interest. Examples include the Financial Services Market Act (FSMA) 2000 in the UK, and The Nigerian Money Laundering (Prohibition) Act 2011.

[38] Olanipekun, 2016 (n 15)
[39] Harnay and Scialom, 2016 (n 26) 403.
[40] *ibid*.
[41] Robert Baldwin, et al *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2012). (Baldwin, 2012).

Regulating banks is in the public interest because it distributes financial resources to the rest of the economy, thus enhancing the living condition of its inhabitants as well as serving as a repository for savings.[42] This argument spawns from the viewpoint that banks are susceptible to instability and collapse due to the nature of their business. This necessitates relatively high financial gearing and involves extensive maturity transformation, which is extensively fuelled by the risk factor in the business they undertake. This is what necessitates regulation.[43]

Furthermore, the banking 'business' thrives on the continuing confidence of depositors. Once this confidence is diminished, disaster is almost inevitable and the effect is highly contagious throughout the financial system. It has been argued that most recessions were preceded by loss in public confidence in the banking system, leading to bank panic.[44] Countries develop regulations to avoid this because turbulence in the banking system invariably has an unfavorable impact on the economy. Banks operate largely on investing funds deposited with them by the public. In view of this, the collapse of a bank is likely to have a disastrous effect on customers, regardless of whether they are individual account holders or business enterprises. This has the propensity to induce a financial panic, as a run on any bank by its customers sends a ripple effect throughout the banking system.[45] In the UK, the collapse of the Fringe London and County Securities Ltd in November 1973 started the secondary crisis.[46]

A further justification for the public interest theory that is closely linked to the notion of social welfare, is use of regulations to counter money laundering. The regulation of banks

[42] Wadsley and Penn, 2000, (n 29) 14.
[43] *ibid* 15.
[44] Xavier Freixas and Jean- Charles Rochet, *Microeconomics of Banking*, (2nd Edition, MIT Press, 2008) 5.
[45] Peter Ellinger et al, *Ellinger's Modern Banking Law*, (4th Edition, Oxford University Press 2006); and Ross Cranston, *Principles of Banking Law*, (Oxford University Press, 2006) 63.
[46] Catherine R. Schenk, 'Summer in the City: Banking failures of 1974 & the Development of International Banking Supervision', [2014] 129 (540) English Historical Review 1130, 1129-1156.

caters for the public interest through its links to the prohibition of money laundering. This argument is based on the fact that in developing countries, individuals occupying government positions sometimes utilize public funds for their own personal benefit.

The consequence of this is that the economies in such countries do not develop because the money is used for the selfish benefits of a corrupt set of individuals. Taking an example from Nigeria, two former governors of oil rich states allegedly laundered billions of pounds meant for their state[47] through different banks and financial institutions, appropriating the money for their personal benefit. Although both governors were convicted and subsequently incarcerated, the persistent laundering of funds by Nigerian government officials necessitated the enactment of the Money Laundering (prohibition) Act 2011.[48] The public interest theory holds that there are four economic grounds for government intervention. These are discussed below.

2.3.1.1 Economic Grounds

i) Open and Fair Competition

The first ground is ensuring fair and open competition. Although it may be argued that there is no tendency towards monopoly in banking, the regulatory focus has shifted to the promotion of fair and open competition. The fundamental function of banks is to allocate credit supply in a sound manner to creditworthy borrowers. Regulators recognize that in

[47] Former Governor Diepreye Alamieyeseigha, Bayelsa State Nigeria; and former Governor of Delta State, James Ibori (Ibori). See also, *The New York Times Online* (United States, 14 October 2015) https://www.nytimes.com/2015/10/15/world/diepreye-alamieyeseigha-nigerian-ex-governor-dies-at-62.html last accessed 24 April 2017

[48] Mark Tran, 'Former Nigeria State Governor James Ibori receives 13 year sentence' *The Guardian* (United Kingdom 17 April 2012) https://www.theguardian.com/global-development/2012/apr/17/nigeria-governor-james-ibori-sentenced - last accessed 24 April 2017

Rory Carroll, 'Nigerian State Governor Dresses Up to Escape £1.8m Charges in UK', *The Guardian* (United Kingdom, 23 November 2005) https://www.theguardian.com/world/2005/nov/23/hearafrica05.development - last accessed 24 April 2017.

pursuing these objectives, it is necessary to preserve a level playing field amongst existing banks for the benefit of customers.[49]

ii) Protection of Deposits

The second is the necessity to protect the interest of individual depositors. This can also be used to foil information asymmetry within the banking system. This happens when one party has more information than s/he discloses during a business transaction.[50] In most instances, the information that is not disclosed may have a material effect on the transaction.

Information asymmetry refers to situations where one party has privilege to more information than the other. It may then have an effect on market failure. This is usually more evident in capital market transactions, but can also be applicable to banking, especially where customers' deposits are invested or given out as loans.[51] Information asymmetry creates a situation where the banks are more knowledgeable than depositors, who seldom have relevant information about how the banks work, or lack the acumen to comprehend the importance of such information. It leads to adverse selection, where banks possess and apply opportunistic information about loan customers, as well as moral hazard, where the bank managers engage in activities to divert economic resources for personal gains.

The subsequent issuance of bad loans and insider trading in banks, have been identified as a major reason for banking distress in Nigeria.[52] Insider trading is defined as the use of inside information which is price sensitive and has not been made available to the public, with the

[49] David Llewellyn, 'The Economic Rationale for Financial Regulation' (FSA Occasional Paper, April 1999) 32, 1-60
[50] Rudiger Veil, *European Capital Markets Law*, (Hart Publishing, 2012) 211.
[51] Renarto C. Barbosa, and Emerson F. Marcal, 'The Impacts of Information Asymmetry in Determining Bank Spreads', [2011] 1 (2) Revisa Gestao Politicas Publicas, 115, 113-130.
[52] Eferakeya Idowu, 'Is Increasing Bank Capital the Solution to Improving Bank Liquidity & Preventing Bank Distress in Nigeria?' [2014] 2 (4) Universal Journal of Applied Science 83-91.

objective of making a profit or avoiding a loss through trading activity. Both insider trading and the issuance of bad loans was presumed to be rampant among retail depositors because they do not make frequent repeat orders of contracts and do not have the capacity to acquire information. Furthermore, they are considered to lack the necessary skills and experience, which further exposes their vulnerability when compared to wholesale customers. In view of this, it is imperative that retain banking is regulated vigorously.

iii) Regulating the System

Thirdly, because bank deposits largely constitute a primary source of the national credit supply, it is important that they are regulated. Otherwise, a breakdown in the banking system would affect the credit supply and the role of banks is central to the functioning of monetary policy.[53] Ensuring a well-functioning banking system is pivotal to the national economy.

iv) Mitigating a Crisis

Fourthly, regulation is used to prevent or mitigate crisis that might cause systemic collapse of banks and in some instances, the economy. The dominance of the banking system exposes it to widespread bank failure that may cause severe economic disruption and even bank panic. Furthermore, there is the fear of financial contagion spreading from one bank to another, leading to the eventual collapse of the entire financial system. A good example is the collapse of Lehman brothers, which caused market panic and led to a frozen interbank market.[54] Moreover, financial risks have become increasingly multifaceted, and arduous to understand. In view of the foregoing, it is important that bank regulatory measures are designed to restore market stability and confidence.

[53] Black, 2002 (n 3).
[54] Andrew Clark, 'How the Collapse of Lehman Brothers Pushed Capitalism to the Brink' *The Guardian* (United States, 4 September 2009) https://www.theguardian.com/business/2009/sep/04/lehman-brothers-aftershocks-28-days last accessed 24th April 2017.

2.3.2 Examining the Proponents of the Public Interest Theory

Until the 1960's, analysis of banking regulation largely focused on the public interest motive. However, from the 1960's, the prevailing view was challenged, resulting in a plethora of criticisms. Some of these are discussed below.

First, it was argued that the public interest theory suggests that regulations affecting the structure of the banking industry and banks conduct prevented financial intermediaries from functioning to their full capacity, thereby generating inefficiencies and welfare losses.[55] Secondly, the public interest theory has been criticized on the basis that the argument that government regulation is effective and efficient has been invalidated by empirical research.[56]

Thirdly, it was argued that the controls imposed on banking by the public interest theory fail to achieve their purpose and impose costs that exceed the problem they are designed to eliminate. In view of these, some academics have called for alternative regulation, replacing most of the existing controls with a new set of institutional arrangements.[57]

Fourthly, it was argued that entry restrictions protect banks from competition and portfolio restrictions hinder diversification. Moreover, deposit insurance systems exacerbated moral hazard problems and geographic restrictions prevented expansion within a country or across national borders. In view of these, banking regulations in many countries were associated with financial repression.[58]

[55] Harnay and Scialom, 2016 (n 26) 405.
[56] Sam Peltzman, et al 'The Economic Theory of Regulation After a Decade of Deregulation', [1989] Brookings Papers on Economic Activity: Microeconomics 1. (Peltzman, 1989).
[57] Allan H. Meltzer, 'Major Issues in the Regulation of Financial Institutions', [1967] 75 (4) Journal of Political Economy 482-501.
[58] Ronald I McKinnon, *Money & Capital in Economic Development*, (Brookings Institution Press, 1973).

Finally, it was argued that there is a difficulty in defining *what* public interest really is, suggesting that regulations end up being used for the protection of narrow or group interests.[59] Stigler's argument is that regulation arises to further public interest and correct market failure. However, it has been argued that he failed to rule out the public interest theory of regulation and relied on the assumption vis-a-vis the political economy of regulation.[60] The public interest theory suffered severe criticism, frequently associated with the Chicago School of Law and Economics. The criticisms can be categorised in three brackets.

The first is that markets are capable of taking care of failures, and as such, there is no need for government intervention or regulation.[61] The second is that in the few instances that the market may not work as expected, private litigation is an option which may be used to address any challenges that market participants may encounter. Thirdly, even if it is held that the markets cannot address the problems, government regulators are not in the best position, since they are corrupt .[62]

The critique of the public interest regulatory theory introduced new theories for discerning the role of the government, particularly in the instance of regulatory failure. However, it has been submitted that though a movement in advancing the academic debate on regulation, this critique is not without defects. Addressing the Chicago School's position, it is submitted that undue confidence has been placed in private orderings and on the courts. Coase[63] emphasizes

[59] George Stigler, 'The Theory of Economic Regulation', [1971] 2 (1) Bell Journal of Economics and Management Science 3-21; John G Francis, *The Politics of Regulation: A Comparative Perspective,* (Oxford University Press, 1993) 8; Baldwin, 2012 (n 41) 41.
[60] Christopher Carrigan and Cary Coglianese, 'Capturing Regulatory Reality: Stigler's' The Theory of Economic Regulation' Faculty Scholarship Paper 160. Available at: http://scholarship.law.upenn.edu/faculty_scholarship/1650. last accessed 24th April 2017
[61] Andrei Shliefer, 'Understanding Regulation', [2005] 11 (4) European Financial Management 439-451. (Shliefer, 2005)
[62] Robert C. Ellickson, 'The Aim of Order without Law', [1994] 150 (1) Journal of Institutional and Theoretical Economics 97-100.
[63] Ronald H Coase, 'The Problem of Social Cost', [1960] 3 Journal of Law and Economics 10, 1-44

the role of courts, regarding them as unbiased and incorruptible. Even if this theory were to be accepted as the best form of regulation, it should be noted that judges and regulators still stem from a government family, in that they are 'agents' and as a result, they may still succumb to political pressure.

Shliefer[64] argues that at the empirical level, the Chicago school has not assimilated the fact that society is more regulated and the public, generally appear to be more content with regulators. For example, consumers[65] are more reassured knowing that food that is consumed as gone through a process where the ingredients have been subject to testing and further regulation. In the same way, trains are regulated and tested before the public is allowed to use them. Whereas within the context of banking, there is evidence to support the position that public participation is vital for financial markets to grow and develop.[66] These criticisms marked the advent of 'market or capture theory', otherwise described as the grabbing hand or the private interest theory.[67]

2.4 Private Interest Theory

This theory is premised on the view that certain stakeholders have a vested interest in regulation. The market participants are described as trying to monopolize and exterminate competition, thus propelling the idea that regulation is a means of achieving monopoly.[68] Posner[69] states:

> *'Viewing regulation as a product allocated in accordance with basic principles of supply and demand directs attention to factors bearing on the value of regulation to*

[64] Shliefer, 2005 (n 61) 440.
[65] Edward Glaser et al, 'Coase versus the Coasians [2001] 116 (3) Quarterly Journal of Economics 853 -899
[66] Rafeael La Porter and others, 'The Regulation of Labor', [2004] 119 (4) Quarterly Journal of Economics 1339-1382.
[67] Andrei Shleifer and Robert W.Vishny, *The Grabbing Hand: Government Pathologies & Their Cures,* (Harvard University Press, 1998); (Shleifer, 1998); Chibuke Uche, The Theory of Regulation: A Review Article, [2000] 9(1) Journal of Financial Regulation and Compliance, 68, 67-80
[68] Anthony I. Ogus, *Regulation: Legal Form and Economic Theory,* (Hart Publishing, 2004) 1; Olanipekun, 2016 (n 15).
[69] Richard A. Posner, 'Theories of Economic Regulation', [1974] 5(2) Bell Journal of Economics and Management Science 336, 335-358.

particular individuals or groups, since, others things being equal, we can expect a product to be supplied to those who value it the most'.

The private interest theory of regulation postulates that regulation is driven by the private interest of the government, the regulators and the regulated.[70] Therefore, the more the government tries to intervene and regulate, the more it will fall under the control of specific and self-seeking groups in society.[71] This theory emerged from the close relationship between the regulators and the regulated, with the result that authorities could not exercise fair and independent judgment in making policies.[72] The proponents of this theory assert that it considers the regulatory process as one consisting of competing, organized interest groups that make use of the legislative powers of the state to capture rents at the expense of more dispersed groups.[73]

The private interest theory comes in two guises.[74] First, it focuses specifically on the interests of politicians and political parties, contending that through regulation, they make their own demands to which private industry must respond. Political interests pursue their own agendas as against that of the public good. Regulation is captured by private industries and designed to operate primarily for the benefit of those industries. This theory suggests that the respective private interests of the government, regulators and regulated entities shape banking regulation.

The second guise of the private interest theory posits that bank regulation is pursued for the benefit of the regulated i.e. for the banks themselves because they aim to enhance

[70] Olanipekun, 2016 (n 15) 33.
[71] James Q Wilson, *The Politics of Regulation*, (Basic Books, New York, 1980).
[72] Barth, 2006 (n 4) 5.
[73] Mancur Olson, *The Logic of Collective Action*, (Harvard University Press, 1965).
[74] Shleifer, 1998 (n 67) 8.

profitability and increase their returns. Thus, banking regulations that fail to take account of the incentives and private interest of banks is potentially counterproductive.[75]

One important theme to highlight is that the banks interests in operating in a safe and sound banking environment overlaps the public interest theory in achieving the objective of regulation which is not acknowledged by the private interest theory. This has been described as a weak point vis-à-vis the advocacy position of the private interest theory.[76] Furthermore, it has been postulated that restricting the scope of business operations, maintaining a high level of government ownership and retaining arbitrary regulatory discretion may contribute to corruption that can undermine the efficiency of the banking system. In view of this, it is suggested that policymakers should focus on the effectiveness of banking systems instead of directly steering banking regulations.[77]

Examples of the application of the private interest theory to banking regulation have been, for the most part, related to the regulatory experience of the US. It was argued that the interest of losers and winners from deregulation of financial institutions, branch restrictions help explain the timing of regulatory charge in various states in the US.[78]

[75] Shleifer, 1998 (n 67) 10.
[76] *ibid.*
[77] *ibid.*
[78] Randall S. Kroszner and Phillip E. Strahan, 'What Drives Deregulation? Economics & Politics of the Relaxation of Bank Branching Restrictions', [1999] 114 (4) Quarterly Journal of Economics 1437-1467. (Kroszner and Strahan, 1999)

2.4.1 Examining the Proponents of the Private Interest Theory

This theory has also been criticized, leading to a number of pedantic arguments. It has been argued that the problem associated with the private interest theory is four fold.[79] These four are discussed below.

First, for an interest group to obtain its preferred regulatory policy, it must be certain that voters elect legislators who support such policies. In addition, other executive, regulators and legislators should not deviate from the preferred policy outcomes. This criticism suggests that the private interest theory ignores various steps in the regulatory process, which are crucial to policy outcomes.

Secondly, because the approach assumes that regulators are solely concerned with private gains, it does not allow room for regulators to respond to incentives other than campaign finance votes and promises of employment in the private sector. Furthermore, it is argued that this theory has evolved in such a way that makes rejection of the null hypothesis impossible. This is because the empirical information that is available to identify the influential interest group is also used to test the theory. For a non-tautological test of the theory, political influence should be measured before the regulatory policy is implemented and these should be correlated with post measures of benefits derived from regulation. The collection of these measures has however presented a major challenge to researchers.

Finally, some scholars believe that the private interest theory of regulation cannot account for the worldwide movement towards deregulation and less government intervention in the

[79] Marina Sosua, 'Patterns of Commercial Bank Regulatory Regimes: A Theoretical Framework', CEPI Working Paper No. 14. Available at: http://interamericanos.itam.mx/working_papers/14SOUSA.pdf last accessed 24th April 2017.

economy since the late 1980s. With the purview of the private interest theory;[80] deregulation would only occur if there was a decrease in the available rents originated from regulation. In banking, it is not particularly clear that major changes in the availability of rents in the balance of power of interest groups led to a common process of state retrenchment. It is important to note that although the foregoing suggests some explanation for why governments intervene in the economy, they do not offer a theory of how and why governments regulate commercial banks.[81]

It should be noted that like the public interest theory, private interest theory raises the important issue to be resolved, i.e. determining what constitutes private interest. This is because there is usually a rivalry of interests and the balance of power has the propensity to shift between the various groups. In view of this, it has been argued that the variations in the size, influence and organization of interest groups provide the rationale for the policy changes. Thus, banking regulation is more or less inclined towards the interests of the dominant group.[82]

It may be argued that banking regulation accommodates both public interest and private interest dimensions. On the one hand, it is important to regulate with the notion that the interests of the public need to be protected and regulated. Further, it is necessary to ensure that the activities of banks are closely monitored to ensure that there is no monopoly of power. The larger picture needs closer consideration because poor regulation will have an

[80] Peltzman, 1989; (n 56); Kroszner and Strahan, 1999; (n 78).
[81] Marina Sosua,'Patterns of Commercial Bank Regulatory Regimes: A Theoretical Framework', CEPI Working Paper No. 14. Available at: http://interamericanos.itam.mx/working_papers/14SOUSA.pdf Accessed 01 November 2017.
[82] Randal Krszner & Phillip Strahan, 'Obstacles to Optimal Policy: The Interplay of Politics & Economics in Shaping Bank Supervision & Reforms', in Fedrick Mishkin (ed), *Prudential Supervision: What Works and What Doesn't*, (University of Chicago Press, 2001).

impact on the economy. At the same time, it is important that the market should be left to regulate itself without state interference.

This thesis situates itself on the side of the public interest regulation. With Nigeria's historical trend of banking failures, there will inevitably be further bank crises if the market is left to regulate itself. The public interest theory addresses some of the administrative and governmental elements of regulation and provides a cohesive explanation for failures and crises.

The public interest induced the implementation of Nigeria's first banking law. There was a need to implement laws which would regulate banks within the banking sector and create a sustainable environment to monitor and regulate banking activities. The importance and relevance of public interest in Nigerian banking is examined in the next two chapters.

Part III

2.5 The Objective of a Regulatory Regime

Having examined both the public and private interest theories, it may be deduced that the objective of regulation is to ensure that institutions, agencies and organizations are controlled by a set of rules which endeavors to 'regulate'. The very essence of regulation within banking is to ensure that the behavior and activity of a bank may be managed appropriately through rules and laws. The goal of a regulatory regime is not simply to prevent an impending crisis, but in fact to ensure that the regulatory infrastructure itself is capable of ensuring that banks adhere to set rules.

2.5.1 Examining the Regulatory Regime in Nigeria

This thesis introduces the Nigerian banking regulatory framework first to create a narrative of the Nigerian regulatory structure and to identify the inherent regulatory gaps and weaknesses.

It highlights the areas of concern and compares this against the backdrop of the UK and US regulatory models.

2.5.2 The Structure of the Nigerian Financial System

The Nigerian financial system is a unique structure, which for the purposes of this thesis is referred to as *sui generis*. The core factor of what makes the Nigerian financial system of this nature, is the way the CBN discharges of both regulation and supervision. It is comprised of both banks and non-banking institutions, which is different from other structures as previously indicated. The financial system is made up of three main components: Banking, Securities and Insurance. The CBN which is the apex regulator and comes under 'banking' is extensively discussed in chapter four.

The SEC is a government agency, regulating Nigeria's capital market. The statutory support for this is ISA.[83] The third branch of the financial system is insurance, which is supervised by the Nigerian Insurance Commission, ('NAICOM'). The regulatory laws are the NAICOM Acts[84] and Insurance Act.[85]

Nigeria's regulatory and supervisory branches can be broken down into seven main regulatory bodies. These are the Federal Ministry of Finance, CBN,[86] NDIC,[87] AMCON,[88] SEC, NAICOM, The Federal Mortgage Bank of Nigeria and the National Board of Community Banks. This chapter focuses on the first five since they form the crux of the proceeding discussion.

[83] 2007.
[84] National Insurance Commission Act 1997.
[85] Insurance Act 2003.
[86] This is explored in chapter 3
[87] *ibid*.
[88] *ibid*.

The CBN has already been introduced as the apex regulator for banks and non-banking financial institutions in Nigeria. Within the CBN, the CBN Act[89] establishes the Financial Services Regulation Reporting Committee (FSRCC) which is an interagency committee[90] specifically created to provide response strategies for banking sector failures and crises. In essence, the FSRCC operates a platform which comprises of the key players of the other important institutions within the banking system, thus bringing together the significant proxies of the financial system. [91]

(i) *Federal Ministry of Finance*

The Federal Ministry of Finance (FMF) was established in 1958 by the Finance (Control and Management) Ordinance, which' replaced the Finance Department.[92] The functions of the FMF include, but are not limited to creating policies for fiscal/ monetary matters in Nigeria, ensuring the stability of the Nigerian currency and supervising revenue matters. The FMF is responsible for advising the Federal Government on monetary matters, with the assistance of the CBN. Prior to 1991, CBN and FMF shared the responsibility of supervision and licensing of banks, but the sole responsibility is now with the CBN.

(ii) *SEC*

As earlier noted, SEC is the apex regulator for the Nigerian capital markets.[93] This is done under the supervision of the FMF. SEC uses the provisions of the ISA,[94] to ensure regulation of the capital markets and safeguard investors' funds. Consumer protection forms the

[89] CBN Act 2007, s. 43 (2).
[90] CBN Act 2007, s.43 (2).
[91] The FSRCC has a memorandum of understanding with other groups that allow exchange of information. The constitution of the group itself in its members is highly significant and the formation of the committee is a good platform for the exchange of these ideas.
[92]FMF. Available at: <http://www.fmf.gov.ng/about-us.html> last accessed 19th April 2017. The FMF was created in the same year as the CBN Ordinance, 1958.
[93] SEC was established by the SEC Decree No 71 of 1979. It repealed the Capital Issues Commission Act 1973. SEC's powers were separated from CAMA by way of the 1990 Decree as a form of reform.
[94]ISA 2007, s.13. This protection is extended to insider trading.

cornerstone of SEC activities, as illustrated when an investigation was conducted into the corporate governance of one of the largest financial service providers.[95] The objective of this investigation was to ensure adequate compliance with corporate governance regulations and that investor protection remains the core aim.[96]

(iii) *NAICOM*

NAICOM supervises Nigeria's insurance industry and is an agency of the Federal Government (FG). It is committed to ensuring transparency and integrity within the insurance industry. A landmark step towards regulation of insurance was the report produced in 1961 by J.C Obande.[97] This led to the creation of the Department of Insurance, which subsequently established the Insurance Act of 1961.

(iv) *NDIC*

The Nigerian Deposit Insurance Corporation ('NDIC') is an independent institution. It was created in 1988 and operates as an independent agency of the Nigerian Federal Government. The objective of this institution was to create a deposit 'insurance' system which guards and shields depositors' funds. This is important when a financial institution is clearly incapable of repaying deposits on demand. Thus, this system is to assist with the overall objective of maintaining financial stability.

[95]Ecobank Transnational Incorporated (ETI) is a financial service provider with subsidiaries in over 30 African Countries. It is the parent company of the African bank, Eco Bank. The aforementioned investigation was in 2014.

[96]This Day. Available at: <http://www.thisdaylive.com/articles/eti-and-the-sec-nigeria-s-pathfinder-role/177755/ > last accessed 19th April 2017.

[97]This milestone, outside the scope of interest of this thesis, was a huge step in terms of the development of insurance in Nigeria. See also, Nigerian Insurance Commission, Available at: <http://naicom.gov.ng/content?id=37> last accessed 19th April 2017.

2.6 The Influence of the CBN Governor in Banking Regulation

While Chapter 5 addresses the enumerated powers of the CBN Governor, and distinguishes this role from that of the CBN as an institution, the office of Governor has a significant impact vis-à-vis the direction of banking regulation in Nigeria.

Over the last three tenures', there have been three sitting governors, who have each espoused a distinctive banking regulatory approach. During the last tenure, the former governor, Sanusi, induced the creation of AMCON as a response to the Nigerian banking crisis, which at the time, proved to be a commendable approach.[98]

The CBN Act[99] provides that CBN Governors may only run two tenures. There is no formal application process and in this absence the caliber of possible candidates remains unavailable for further examination.[100] and the proposed Governor is recommended by the President.[101] Although there is the argument of CBN autonomy[102] and this is explored in chapter four, this argument maintains that the CBN is able to make decisions *without interference*. The statutory provisions of the CBN Act[103] also provide that:

> *'The Governor shall, from time to time –*
> *(a) Keep the President informed of the affairs of the Bank including a report on its budget; and*
> *(b) Make a formal report and presentation on the activities of the bank and the performance of the economy to the relevant committees of the National Assembly.*

The CBN Governor, arguably, should keep the Government abreast of developments within the economy, given that it invariably may have an effect on decisions of that administration.

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[98] Ikani Agabi and Adetola Onayemi, 'Troubled Assets Resolution' in Oladapo Olanipekun (ed) *Banking: Theory, Regulation, Law and Practice* (Au Courant, 2016) 486.
[99] CBN Act 2007, s.8 (2).
[100] The CBN Act does not provide for a selection process. What is provided is a generally broad description.
[101] Folashade Adeyemo, 'The Achilles Heel of Whistleblowing: The Position of Nigerian Legislation', [2016] 31 (2) Journal of International Banking Law and Regulation 105-109 (Adeyemo, 2016).
[102] CBN Act 2007, s.1 (3).
[103] CBN Act 2007, s.8 (5) (a) - (b).

However, while trying to maintain independence, and given the selection process of the Governor, it should be noted that there are both governmental and political influences, which may impact the regulatory approach and policy implementation adopted by the CBN Governor.[104] This argument is based on the fact that the CBN governor is appointed by the government. The last three Governors have not been able to exceed one tenure. The last three Governors have been Joseph Sanusi (1999-2004); Professor Charles Soludo, (2004-2009); and Sanusi Lamido Sanusi, (2009-2014). However, the absence of a cogent application process to determine the suitability of the proposed governor, coupled with the background of the selected governor, gives an indication of the likely regulatory approach to be adopted during this tenure. The three tenures are examined below.

Joseph Sanusi, originally a chartered accountant, was previously the Deputy Governor of the CBN. Prior to this appointment, he was the Managing Director of First Bank of Nigeria. During his tenure, it was observed that there were times when he was faced with challenging issues concerning the economy. He would 'rely' on the input of one of the Deputy Governors for support in public meetings.[105] This Deputy was appointed by the CBN between 2004-2007.

Under the Sanusi regime, *Savannah Bank*[106] had their licence revoked, and presented a significant opportunity for the Nigerian courts to adjudicate on the regulatory powers of the CBN. Although this case is examined in the later chapters, the Court of Appeal held that the CBN had revoked the banks' licence in bad faith. In addition, Joseph Sanusi instituted the

[104] BOFIA 2004, s.57 (1).
[105] Ayo Teriba, Recent Changes of Guards at the Central Bank of Nigeria' 2014 Available at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786527&download=yes> last accessed 19th April 2017. (Teriba, 2014').
[106] *Savannah Bank of Nigeria v CBN* & Ors [2012] 1 BFLR

lifeboat arrangement, where the CBN requested that 'healthy banks provided loans to the weaker banks in the system.'[107]

Joseph Sanusi lasted one term and was subsequently replaced by Professor Charles Soludo. He had previously taken up the position of Chief Economic Advisor to the then President,[108] and during this tenure, the consolidation policy was announced. Soludo placed a substantial emphasis on the capital base of banks, arguing that Nigeria was lagging behind, in comparison to other countries.[109] He initiated the banking consolidation, but those unable to meet the mandate approached the court.

Under the Soludo regime, there were evident changes, namely the appreciation of the naira.[110] However, in addition to these results, banks and other financial institutions used depositors' funds, including their own funds to purchase shares. These shares were eventually overpriced and caused banks to suffer significant losses, which lead to the Nigerian banking crisis in 2008. It was during this period that the global financial crisis occurred, which affected the Nigerian capital market and financial system in 2008.[111]

Following the departure of Professor Soludo, the then President Yar'adua confirmed the appointment of Sanusi Lamido Sanusi in 2009. The new Governor had to deal with the many problems left by the previous Governor, including the cases before the courts concerning the legal issues raised by the 2004 banking consolidation; the banks and other institutions use of

[107] Teriba, 2014 (n 105) 1.
[108] President Obasanjo also named Soludo CBN Governor in 2004.
[109] Charles C Soludo, 'Consolidating the Nigerian Banking Industry to Meet the Development Challenges of the 21st Century', *Bank of International Settlement Review* 43/2004 Basel, Switzerland BIS. Available at: http://www.bis.org/review/r040727g.pdf last accessed 12 May 2017; Teriba, 2014 (n 106)
[110] Teriba, 2014 (n 105) 1
[111] *ibid*.

depositor's funds, including alleged misuse of power by the bank CEO's; and the Nigerian banking crisis of 2008. Under the Sanusi regime, AMCON was created.

Sanusi was suspended from duty in 2009 by the then sitting President Johnathan Goodluck. Sanusi publically alleged that over $20bn of oil revenue funds was unaccounted for and had 'gone missing'. Goodluck cited the grounds for Sanusi's suspension as 'financial recklessness, fraud and fiscal misconduct'.[112]

Given that the CBN does not provide grounds for suspension, this was challenged under the CBN Act,[113] and the then President Goodluck argued that it was a temporary measure in order to carry out a full investigation. Given the nature of appointment of the Governor, and Sanusi, acting as a whistleblower over the unaccounted funds, it is argued that the Governor of the CBN has an influence on banking regulation as a whole. The nature of the appointment arguably, undermines the independence of the CBN as a central bank, and will invariably interfere with the ability of the institution to realize its core objectives.

2.6.1 Deciphering the Tenures

It may be argued that the previous CBN Governors have had to face significant financial issues. This thesis submits that while giving consideration to this, the experiences of the last Governors as illustrated above suggest otherwise. The appointment is not only contingent on the direction of banking regulation for Nigeria, it does not ensure prudent regulation, proffer an effective regulatory regime or permit the CBN to focus on its core objective of financial stability.

[112] *BBC News*, '*Nigerian Central Bank Head Lamido Sanusi Ousted*' (United Kingdom, 2014) Available at: http://www.bbc.co.uk/news/world-africa-26270561 last accessed 13th June 2017.
[113] CBN Act 2007, s.11 (2) (f).

The CBN Act[114] provides a broad description of the qualifications of a Governor and Deputy Governor:

> *'The Governor and Deputy Governor shall be persons of recognized financial experience and shall be appointed by the president subject to the confirmation by the Senate on such terms and conditions as may be set out in their respective letters of appointment'*

This description is too expansive and generic. This selection process presents itself as proof of the weak regulatory framework the CBN provides. There is no indication of what may inform the President's decision to recommend a candidate for this position. Given the delicate nature of the role of the Governor, this deficiency is fundamental in the responsibility for the Nigerian financial system. In light of this, qualifications of the candidate are integral to determining suitability.

The current Governor of the CBN[115] has taken the burden of the aftermath of the recapitalisation programme and the position of the Nigerian banking sector, after the implementation of AMCON. There have not been any significant changes to the regulatory framework, despite the significant impact of the 2008 financial crisis on the banking industry.[116]

It has been argued that under the Emefele regime,[117] the Nigerian economy has worsened. This is apparent in the worsening currency exchange rate in Nigeria,[118] which has affected the economy and cost of living. Additionally, the CBN recently stepped in to remove and

[114] CBN Act 2007, s.8 (1).
[115] Godwin Emefele (2015- till date).
[116] Olumide Famuyiwa, 'The Nigerian Financial Crisis: A Reductionist Diagnosis', [2013] 2 (1) Journal of Sustainable Development Law and Policy 36-64.
[117] As at the time of this research, this information is accurate. 05 August 2016. It has been announced that Nigeria is experiencing a recession. In 2015, a new Administration headed by President Mohammadu Bhuari was sworn in.
[118] *This Day Newspaper*, IMF Warns Nigeria Heading Towards Recession, (Nigeria, Available at: <http://www.thisdaylive.com/index.php/2016/07/20/imf-warns-nigeria-heading-towards-recession/ > last accessed 05 August 2016.

replace the board of directors for Skye Bank Plc, a product of the banking consolidation process.[119] For this reasons, the question is whether the previous tenures have indeed coincidentally been periods where the financial system simply faced these pressures, or whether there should be a closer inspection and focus on the selection process for the appointment of CBN Governors? The thesis argues in favour of the latter.

2.7 An Examination of the Comparator Jurisdiction Models

2.7.1 The UK Banking Regulatory Framework

Prior to the creation of the new regulatory framework in the UK, the Financial Services Authority, (now defunct) was the core regulatory body for the UK banking system. In 2012, the Financial Services Act[120] was passed, which relieved the FSA of its duty to ensure financial stability. This responsibility now lies with the Bank of England. The Financial Policy Committee was also established through the Bank of England. The objective of this committee is to oversee potential risks to the UK financial system and provide a well thought out plan and scheme to approach this. This committee is fundamental to the overall financial regulatory system.

The Financial Services Act makes substantial changes to the way in which financial institutions, namely banks, are regulated. The regulatory infrastructure is now a twin peak model, which comprises the Prudential Regulatory Authority and the Financial Conduct Authority. The former, which is a subsidiary of the Bank of England is supported by the

[119] Skye bank was created through Prudent Bank, Bond Bank, Coop Bank, Reliance Bank and EIB Bank. See Appendix 3.

[120] Andreas Kokkinis, 'The Financial Services Act 2012: The Recent Overhaul of the UK's Financial Regulatory Structure', [2013] 24 (9) International Company and Commercial Law Review 325-328; and Jeremy Hill and Edite Ligere, 'The UK's New Financial Services Regulatory Structure- The Shape of Things to Come, [2013] 28 (4) Journal of International Bank Law and Regulation 156-159.

Financial Services and Markets Act[122] and its core objective is to promote the soundness of banks and other financial institutions.

These objectives can be categorized into two. The first is to ensure that safety and soundness is promoted throughout the financial system, and particularly in financial institutions that are considered to be systemically important. The second, to ensure that stakeholders are protected should such an institution experience a failure.

In order to meet these objectives, the PRA assesses the institutions within the system to determine whether they are 'safe and sound'.[123] The PRA uses three distinctive approaches to regulation and supervision, namely; the 'judgment based approach' where the PRA uses its judgment to determine whether these financial institutions meet the threshold conditions[124] and if they are safe; the 'forward looking approach,' in which the PRA uses its judgment to determine whether an intervention is necessary; and the 'focused approach', which sees the PRA prioritizing the issues of financial institutions which appear to pose a risk to the financial stability of the UK system.

The FCA currently has three core objectives. The first is to ensure a suitable level of consumer protection. The second is to ensure effective competition, and particularly in the interest of consumers. The third objective is to ensure that it maintains the core integrity of the financial system.[125]

[122] 2000.
[123] Policy Briefing; The UK's New Financial Services Regulatory Landscape. Available at: http://www.cii.co.uk/media/4372607/regulatory_landscape_update_april_2013_vfonline.pdf> last accessed 17th October 2016 (Policy Briefing, 2013) 9.
[124] *ibid* 10.
[125] David Kenmir and David Hislop, 'FCA Conduct Regulation' [2013] Compliance Officer Bullion.

2.7.2 Examining the UK Regulatory Model

The UK regulatory model operates a system of checks and balances. The creation of this twin peak regulatory model, amplifies this in two ways. When a deposit taking institution wishes to carry on business in the UK, it is first required to seek approval from the PRA. The PRA must then seek permission from the FCA before it grants this request. Contrasted with Nigeria, the application for deposit taking institutions is made to the CBN only and the decision is final.

Secondly, the FPC maintains a supervisory role over both the PRA and the FCA. In this role, it is able to direct the PRA and the FCA on macro-prudential matters.[126] However, the FPC cannot exercise its powers over banks or other financial institutions.[127]

The system operates in such a way that no single body maintains unlimited power at any given time. This new system is in the public interest, demonstrating a commitment to the integrated checks and balance system. Additionally, there is a commitment to ensuring effective regulation, while not giving sole power to a single institution.

As noted earlier, the UK did not operate this twin peak regulatory structure before the global financial crisis. Shortly after the crisis, a review paper, *the Turner Review*[128] was published by Lord Turner, who was the chairman of the Financial Services Authority until 2013 when it was abolished. The objective was to review the level of reforms necessary as a result of the global financial crisis. This paper also reviewed the contributing factors to the global

[126] Policy Briefing, 2013 (n 123) 9.
[127] Sarah Wilson and Gary Wilson, 'Banking and Regulation Post- Crisis: The Significance of Culture in the UK and Experiences from Australia' [2016] 31 (7) Journal of International Banking Law and Regulation 385-395; and Nafis Alam and Kevin S Ngo, 'Regulatory Compliance and Cost of Banking Operation: A Survey of US Banking Sector', [2014] 29 (11) Journal of International Banking Law and Regulation 657-665
[128] The Turner Review, 'Regulatory Response to Global Banking Crisis' 2009 1-126 Available at: <http://www.fsa.gov.uk/pubs/other/turner_review.pdf > last accessed 17th June 2017. (Turner Review, 2009)

financial crisis, and how the reforms could affect the financial system. While the review makes a significant contribution to literature, many of the suggestions required further discussion,[129] for example, the causes of the crisis as presented by Turner, and the regulatory responses which would be effective.

The Turner Review was an attempt to analyse the causes of the global financial crisis, and assess the regulatory infrastructure in place. It also suggested recommendations within the regulatory and supervisory approach adopted, in order to create a more vigorous banking system. The review found that a number of actions were necessary to create stable and *effective* banking. There was a need to pay attention to capital adequacy, as well as institutional and geographical coverage of regulation. It was also necessary to consider a number of other areas including the FSA's supervisory approach.

A range of modifications were proposed vis-à-vis improving banking regulation and the supervisory practice. Among these, Turner assesses the FSAs approach adopted towards supervision, which is defined as 'light touch'.[130] The FSA's regulatory and supervisory approach pre- crisis was that the markets generally were self-correcting and that market discipline was a more effective tool than regulation or supervisory oversight. This lead to a focus on the supervision of individual institutions rather than the entire system. It was further submitted that this focus was a common feature in banking regulation and supervisory systems globally.[131]

[129] Simon Ashby, 'The Turner Review on the Global Banking Crisis: A Response from the Financial Services Research Forum 2009 1 -37. < https://www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper61.pdf > last accessed 17th June 2017.
[130] Folarin Akinbami, 'Is Meta-Regulation all it's Cracked up to be? The Case of UK Financial Regulation', [2013] 14 (1) Journal of Banking Regulation 16- 32.
[131] Turner Review, 2009 (n 128) 87.

Turner proposed a more systemic approach, which was described as being entrenched in the risks invoked in performing bank or bank like functions. Other necessary changes included a new approach to supervision, such as a more intrusive and systemic approach. After the global financial crisis, the FSA's approach was considerably different from that previously adopted vis-à-vis regulation. Substantial changes to the system included the introduction of the Supervisory Enhancement Programme, which was launched to address some of the internal processes and support the modification of the FSA's approach towards regulating and supervising banks and other financial institutions.

The UK regulatory response was effected through the Financial Services Act. This legislation introduced the new regulatory system. This has allowed the UK banking regulatory model to further develop, attributing more responsibility to these bodies and through the creation of FPC which has more general oversight responsibility.

2.7.3 The US Banking Regulatory Framework

The US banking regulatory framework is comprised of a number of institutions. The Federal Reserve is the United States of America's (US)'s central bank, created in 1913.[133] This institution was created by the Congress,[134] to regulate and supervise the financial system.

The system comprises of a number of other institutions, which in comparison to the UK, is more complex. These include the Federal Open Markets Committee;[135] The US Department of Treasure;[136] The Office of the Comptroller of the Currency;[137] The Office of the Thrift

[133] Federal Reserve Act 12 USC 226.
[134] This is Nigeria's equivalent of the National Assembly, and the UK's equivalent of Parliament.
[135] The Federal Open Market Committee was created by the Banking Act of 1933 (codified at 12 U.S.C. § 263)
[136] US Department of the Treasury. Available at :< https://www.treasury.gov/about/role-of-treasury/Pages/default.aspx> last accessed 13 June 2017.
[137] This office is the medium used to regulate banks in the US, similar to the NDIC in Nigeria.

Supervision;[138] The Federal Deposit Insurance; SEC;[140] and the Troubled Asset Relief Programme;[141] which was applied through the Economic Stabilization Programme in 2008. This programme was the US governmental response to the global financial crisis.

2.7.4 Examining the US Regulatory Model

Similar to the UK, the US regulatory model is developed on a system of checks and balances. The system has benefited from a comprehensive and well thought out legal framework[142] to facilitate the act of banking regulation. In addition, the regulatory model has developed through the creation of several agencies, each with a distinct role within the regulatory framework.

The model has developed substantially and this is to be attributed to the proactive approach to regulation, as a result of a crisis. Given the different agencies and bodies which encompass a rigorous system of checks and balances, this has not only developed the regulatory framework in the US, but has designed this to reach an equilibrium between financial stability and consumer protection.[143]

The US banking regulatory model functions under a unique system, which permits deposit taking institutions to decide if they will be regulated by the State or by the Federal Charter. Banks that opt for the state charter are regulated by their state governments and one federal banking agency. Banking institutions which select the federal charter are regulated by their state government chartering agencies.

[138] This office is charged with the task of financial regulation in that it oversees savings and loan unions (also known as thrifts).
[140] Similar to SEC in Nigeria, it is an independent institution with the responsibility of supervising the securities market; ensuring the enforcement of the securities law in the US.
[141] Similar to AMCON in Nigeria.
[142] Some of these include the National Banking Act, The Federal Reserve Act, The Federal Deposit Loan Act, The Gramm – Leach –Bailey Act and The Dodd Frank Act.
[143]Brian McCormally and James Thomas, *Global Legal Insights: Banking Regulation* (Global Legal Group, 2013) 258. Howell Jackson, 'An American Perspective on the UK Financial Services Authority, Goals and Regulatory Intensity [2005] Harvard Law and Economics Discussion Paper No.522. 1-46.

2.7.5 Comparing the Models

It is clear that no regulatory model is perfect. However, there are a number of features/or attributes which may make 'good' regulation. Given the examination of the comparator jurisdictions, it is clear that there are a number of practices that Nigeria may critically draw from. However, before focusing on these, there are some final observations to be considered.

In the UK, the coalition government[144] was of the opinion that there was a need to intervene and completely revamp the system. In order to effect this change, the Financial Services Act[145] was passed, which substantially changed the regulatory structure. The creation of this twin peak regulatory model, with clearly defined roles and duties, are, arguably, clearer, concise and coherent.

The creation of this new UK regulatory model also demonstrates that there is a movement between the discussion of the UK regulatory framework and the implementation of the proposed. The UK did not only *discuss* the best way to move the regulatory framework forward, these changes were *enforced*. This moving past the deliberation stage to implementation of an action is a key problem with the current Nigerian system.

The US model is closest to the Nigerian one. Similarly, it has previously been argued that the development of both regulatory systems has been the result of historical or political events. Spong[146] argued that:

> *Much of the US regulatory system has developed in response to financial crisis and other historical and political events. No central architect was assigned to design the overall system or lay out a single set of principles…as a consequence, bank*

[144]Colin Hay, 'Britain and the Global Financial Crisis: The Return of Boom and Bust' Available: https://www.sheffield.ac.uk/polopoly_fs/1.97389!/file/DBP9_Return_of_Boom_and_Bust.pdf last accessed 13 June 2017.
[145] 2013.
[146] Kenneth Spong, 'Banking Regulation: Its Purposes, Implementation and Effects', (5th (edn) Division of Supervision and Risk Management Federal Reserve Bank of Kansas City, 2000).

regulation has evolved to serve numerous goals – goals which have changed over time and on occasions have been in conflict with one another.

In the case of Nigeria's sui generis model, it encompasses the right institutions needed for 'good regulation'. However, arguably, there is a gap between those institutions and effective enforcement of the law. For example, during the Nigerian banking crisis of 2008, the FRSCC did not meet to discuss the management of the crisis. A meeting would have been necessary, particularly because the CBN Act established this body with the objective of addressing such events.[148] The absence of this meeting left the management of the crisis solely to the apex bank.

Part V

2.8 Proposing a Model for Nigeria

Having examined the comparator jurisdiction models and Nigeria, and given the examination of the rationale for regulation, this thesis concludes that there are no perfect models and that 'regulation' is a development in itself. This development tends to occur when there is a change in local or economic circumstances. The regulatory models must mature to keep abreast. A perfect model is an amalgamation of different attributes, which are borrowed from other models to suit the relevant context.

The deficits in the Nigerian model cannot be alleviated or corrected by simply adopting the comparator jurisdiction models. Invariably, there is a need to consider the local context, the economic variations and the conundrums of transplanting and modifying laws to suit local circumstances. Neither the UK nor the US models can meritoriously resolve some of the regulatory issues identified.

[148] CBN Act 2007, s.44 (a) – (f).

However, Nigeria can critically draw from the comparator jurisdictions to identify 1) the important features of effective regulatory models, as this will help in identifying what such a model should resemble; and 2) to identify what is applicable to ensure prudent regulation, considering the Nigerian context. This is in light of the improvement of the banking models, in the face of crisis. This examined in the next chapter.

2.8.1 Essential Features for the 'Near Perfect' Nigerian Model

There are distinctive qualities which may be broadly categorised as being *'effective'* features in a regulatory model. One of the core factors that Nigeria needs to pay closer attention to is having a proactive approach, rather than implementing a reactive measure for when a crisis or banking failure occurs. Nigerian regulators should cultivate a commitment to the *ongoing* improvement of the regulatory framework itself.

In putting forward what may be considered an effective regulatory model, which the Nigerian regulator should pay closer attention to, there are six broad features, namely; (i) Effective Laws; (ii) Enforcement of Laws; (iii) Regulating the Regulator; (iv) The Sharing of Powers; (v) Clarity of the Roles of the Regulator; (vi) the Creation of a Specialist Court.

(i) *Effective Laws*

The first layer to an effective model is that there are effective laws. Although this is to be examined in the next chapter, the global financial crisis has resulted in a renewed interest in regulation and supervision. This is in light of the exposure of the inherently weak regulatory frameworks and the laws underpinning it. In order to move towards effective regulation, it is necessary that the laws underpinning the framework are effective.

In Nigeria, the laws are slow to develop. This is interesting, given that Nigeria tends to borrow heavily from the comparator countries. In the case of the UK, this may be due to the colonial relationship which exists, and the influence it had on Nigeria's first banking law. The slow development of the law is reflected in BOFIA, which was used to exercise the consolidation policy of 2004 and to manage the 2008 banking crisis.

It is apparent that the CBN is aware of the work necessary to make banking and financial laws more effective. This appears to be the case in terms of addressing banker customer relationships.[150] In 2016, the CBN issued a framework[151] which was aimed at mitigating the number of issues encountered by customers. This was a response to the clear recognition that further protective measures needed to be put in place to protect customers.

Despite the detailed nature of this framework, it is ineffective, particularly with Article 2.7 which addresses the mode of making a complaint with the consumer protection department of the CBN. To engage in the process, the customer either sends an email to the electronic mail address,[152] or sends a letter to the Director of the Consumer Protection Department.[153] This process fails to consider consumers who cannot read or write, have literacy or numeracy challenges, or simply do not have access to internet facilities.Accessibility is one of the most important aspects of consumer redress. The Directive fails to take into consideration consumers who are resident in remote parts of Nigeria.

[150] *Purification Techniques (Nig) Ltd vs A.G Lagos State* [2012] 1 BFLR 544 (CA); *I.T.P.P vs Union Bank of Nigeria PLC* [2012] 1 BFLR 544 (CA); *WEMA Bank Plc vs Osikwe* [2012] 1 BFLR 693 (CA), *Union Bank of Nigeria Plc v Chiaeze* [2014] 1 BFLR 393 (SC) and *Fidelity Bank v Jimmy Rose Co Ltd* [2013] 1 BFLR 139 (CA).
[151] The Consumer Protection Framework for Banks and Other Financial Institutions.
[152] cpd@cbn.gov.ng.
[153] This is available at: https://www.cbn.gov.ng/Supervision/cpdcomgt.asp. last accessed 11th July, 2017.

Further, the CBN does not have a provision for Alternative Dispute Resolution (ADR).[155] Cartwright[156] contends that 'consumer redress in the financial services has been transformed by the use of alternative dispute resolution methods, in particular, financial ombudsman'. Nigeria does not currently have one.[157] This may explain why the FCA's use of the ombudsman has proven to be successful in the UK.

Concerning the efficacy of laws on banking, and given the special nature of banks, banking issues are better dealt with by a quasi-judicial body. This is explored in the next chapter, but it is worth noting that it is a practice adopted with the SEC,[158] and the Federal Inland Revenue Services.[159] These quasi-judicial bodies, may be defined as entities deriving from a public administrative agency, such as the CBN. These bodies are established by an Act of the Federal Republic of Nigeria as part of their parent/principal Act. The decisions of these tribunals are binding as the decisions of the Courts, in this case the Federal High Court, and are enforced like court judgments.[160] This method will complement the efficacy of the law, while avoiding the tardy judicial process.

The third example is the absence of a whistleblower framework within Nigerian banking law.[161] In the comparator jurisdictions, this has been highlighted as present[162] and effective,

[155] There is the Lagos State Multi Door Court House, but this mechanism needs to be within the CBN itself. ADR itself is becoming a fast developing area in Africa. See also, Emilia Onyema, 'The New Ghana ADR Act 2010: A Critical Overview', [2012] 28 (1) Arbitration International 101-124; and Kamal Shah, John Miles and Tunde Fagbohunlu, 'Arbitration in Africa', (Sweet & Maxwell, 2016)

[156] Peter Cartwright, *Bank, Consumer and Regulation*, (Oxford and Portland Oregon, 2004), 152; Iain MacNeil, Consumer Dispute Resolution in the UK Financial Sector the Experience of the Financial Ombudsman Service, [2007] (1) 6 *Law and Financial Markets Review*, 515-524.

[157] Nelson Ojukwu, 'Towards Effective Bank Customer Protection In Nigeria: The Legal Imperative of the Banking Ombudsman System' [2015] 30 (8) Journal of International Banking Law and Regulation 454-459

[158] The Investments and Securities Tribunal.

[159] Tax Appeal Tribunal.

[160] There are a number of ways to enforce judgements in Nigeria, including using a court appointed bailiff.

[161] Folashade Adeyemo, '50 Shades of Intrusion: A Critical Analysis of the Whistleblower Protection Bill 2011 [2017] Journal of International Banking and Regulation (Accepted for publication)

[162] Public Disclosure Act 1998, s.43 (b); Enterprise and Regulatory Reform Act 2013, s.19; Sarbanes- Oxley Act 2002.

particularly with the US adoption of additional measures for corporate whistleblowers.[163] Nigeria does not have a strong whistleblowing framework, although there are provisions which can be found in the Economic and Financial Crimes Commission Establishment Act,[164] and the Independent Corrupt Practices and Other Related Offences Act.[165]

However, these provisions are not *effective*, since there is no enforcement system in place, in the absence of a system within the law should the identity of the whistleblower become exposed. A whistleblowing Act will help the regulatory regime because if a bank employee or shareholder wishes to 'whistleblow' on bad practices, there are currently no provisions for protecting the identity of the whistleblower. Thus effective laws, coupled with enforcement of the law work together.

(ii) *Enforcement of Laws*

The problem is not that Nigeria does not have laws, but rather, it has not yet cultivated the necessary habit of enforcing them.[166] Given the reverberations of the Nigerian crisis of 2008 and the absence of improvements to regulatory laws, this second principle is an important factor in the regulatory model. Furthermore, it is imperative that Nigeria embraces effective laws and enforces them.

The Nigerian banking regulatory model is weak on this front. Furthermore, the Nigerian banking system is not clearly understood and not coherent. This was highlighted in the 2013

[163] Adeyemo, 2016 (n 101) 105
[164] Economic and Financial Crimes Commission (Establishment) Act 2004, s.39 (1).
[165] Corrupt Practices and Other Related Offences Act 2000, s.64 (1).
[166] Nelson Ojukwu-Ogba 'In Search of Financial Stability in Nigeria; from Legislation to Effective Regulation of Banks' [2017] 25 (1) African Journal of International and Comparative Law 22, 20-46.

IMF Report.[167] In particular, the CBN's use of directives, mandates and guidelines are an opportunity to utilize 'soft law', rather than update the law. Thus, unless the law itself is updated, the argument for a reform in the enforcement of the law would remain weak.

(iii) *Regulating the Regulator*

Another important feature is regulating the regulator. It has been previously suggested that regulators and supervisors should submit themselves to monitoring by an international body.,[168] This would allow such a body to rate the regulatory institutions and act as a form of self and market discipline. Given the global financial crisis and the renewed interest in financial regulation, this is an important feature of regulation.

In the UK and the US, there is a clear paradigm of one institution 'checking in' with the other. In the UK, the FPC and the PRA work together and are subject to public scrutiny. This helps the regulatory model work effectively. In the US, the regulatory model is more comprehensive, with a number of different institutions working together to ensure effective regulation.[169] This is despite the fact that the US has a central bank, similar to Nigeria. The issue of independence is a fundamental aspect, which may impede the idea of regulating the regulator. Nonetheless, it is still identified as an important aspect and will be explored more specifically in the next chapter.

[167] International Monetary Fund, IMF Country Report No.13/143, May 2013. Available at: < https://www.imf.org/external/pubs/ft/scr/2013/cr13143.pdf> last accessed 07 September 2015(IMF Report 2013)
[168] Charles Goodhart, 'Regulating the Regulator – An Economist's Perspective on Accountability and Control', in Ferran and Goodhart *Regulating Financial Services in the Twenty First Century* (Hart Publishing 2001) 164.
[169] *ibid*.

While countries which have apex banks should be free to discharge their regulatory and supervisory duties independently, such institutions should have another body which at the very least checks its administrative functions. An example of this is the quasi-judicial power of the CBN in regards to the revocation of banking licences. Although this is examined in subsequent chapters,[170] this particular function allows the CBN to vary the conditions of a banking licence.[171] Under the quasi-judicial role,[172] before this condition can be varied or revoked, the CBN is duty bound to give notice to the affected bank. In such an instance, the CBN may receive representations from the bank, be the judge in such a dispute, and decide if these representations are indeed pertinent. Under this current provision, there are no means of regulating the power of the regulator.[173]

The Nigerian courts, arguably, do not have the required knowledge necessary to deal with banking law cases effectively. This appears to be especially so, given that similar cases, have resulted in different judicial pronouncements. It is proposed that the courts could rely on the expertise of an *Amicus Curiae*, who is also referred to as 'a friend of the court'. This individual, who has no interest in the case, is able to assist the court by distilling complex legal issues. In some instances, an *Amicus Curiae* may draw the courts attention to specific matters which have not been addressed by the parties of the court. In defining the role of an *Amicus Curiae*, Salmon LJ[174] commented:

> *' I had always understood that the role of an amicus curiae was to help the court by expounding the law impartially, or if any one of the parties were underrepresented, by advancing the legal arguments on his behalf.'*

[170] Chapter 5.
[171] CBN Act 2007, s.5 (1).
[172] BOFIA 2004, s.5 (4)
[173] Abimbola Olowfoyeku, 'Bias in Collegiate Courts', [2016] 65 (4) International & Comparative Law Quarterly 895-926.
[174] *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at p 266 F-G

It should be noted that the decision to permit the analysis of the *Amicus Curiae* remains at the discretion of the court. [175]

(iv) *The Sharing of Powers*

The examination of the comparator models shows that the regulatory bodies share their powers with other agencies. This is particularly important in an effective model, presenting another layer to achieve effective regulation.

In the case of Nigeria, the thesis argues that the CBN should share its regulatory and supervisory powers for the regulation of banks. In the case of a failing bank, the statutory provisions provide that this is at the CBN's discretion.[176] Similar to the idea of regulating the regulator, the CBN should consider sharing its power with a new regulator, which would be charged with the responsibility of exclusive banking supervision.[177]

The CBN had previously admitted that on average, the inspection cycle for banks is once a year[178] even if banks were regarded to be at risk. Given that the CBN clearly does not see inspection as an important regulatory/supervisory task, sharing its powers with another body would yield better results for banking regulation. In addition, this separation of powers would permit the CBN to focus on its core responsibility, which is the promotion of financial stability.[179]

[175] See also, George C Piper, 'Amicus Curie Participation – At the Court's Discretion' [1967] 55 (4) Kentucky Law Journal 863- 909
[176] BOFIA 2004, s.36.
[177] Tunde Ogowewo, and Chibuke Uche, '(Mis) Using Bank Share Capital as a Regulatory Tool to Force Bank Share Capital in Nigeria', [2006] 50 (2) Journal of African Law 165, 161-186. The CBN had previously also admitted that the inspection cycle of banks was once a year, regardless of their perceived risks.
[178] 'Exposure Draft Frame Work-For-Risk-Based Supervision of Banks in Nigeria', para.1.1, issued 15 September, 2005, available at: <http://www.cenbank.org/out/circulars/bsd/2005/bsd-17- 2005.pdf> last accessed 13th June 2017
[179] CBN Act 2007, s.2.

(v) *Clarity of Roles*

'Clarity of role' is the next layer, given the above categories discussed. It is also important that the regulatory model can clearly identify which body is accorded a particular responsibility, and to ascertain its impact on the larger regulatory picture.

The roles of regulatory bodies in the comparator jurisdictions are clear. Each body works together with their responsibilities clearly defined. In Nigeria, regulation is not defined in either BOFIA or the CBN Act. At present, the CBN carries out a regulatory role, without a clear statement as to what this role entails. This assumption of regulation is in fact inferred by the regulatory decisions as implemented by the CBN. The earlier position of the CBN encompassing a sui generis model is further supported by the fact that the regulatory role requires further defining.

Although the Nigerian banking crisis 2008 is examined in the next chapter, it is worth suggesting here that the FSRCC would have been the more appropriate body to manage the crisis. A clearly defined system or process would have been a more pragmatic approach. In managing the crisis, the first step would have been the creation of an agenda, with a specific project plan to address the banking crisis. This would have been followed by the creation of a committee to look into the banking crisis itself. Naturally, the next objective task would be to create a strategic plan to deal with the crisis, followed by recommendations to be implemented by the CBN. This would have been the more appropriate route for the apex bank to follow, and would have complimented the goal of effective regulation.

(vi) *The Creation of a Specialist Tribunal for Nigerian Banking Law Issues*

The above has touched on the creation of a specialist court to deal with Nigerian banking law matters. Considering Nigeria's local setting and the historically entrenched culture of banking failure, Nigeria would benefit from the creation of a special court/tribunal, charged with the responsibility of addressing banking law matters.

Prior to the democratic regime which commenced in 1999, the country had previously embraced such a court, established by the Failed Banks (Recovery of Debts) and Financial Malpractices Decree.[180] This court, which had jurisdiction over banking law matters specifically, proved to be an effective measure and is examined in the next chapter.

(i) *Operation of the Court*

Given that there is a specific court to deal with labor and employment issues in Nigeria,[181] there is no reason why a specialist court should not be established to address banking law matters. The creation of this court would reduce the backlog of cases and avoid unnecessarily lengthy periods of time for the conclusion of a case. The operation of the court would be instrumental in creating a consistent approach to banking law issues, further strengthening the banking law model.

The proposed court should adopt similar procedures to that of the NDIC. In order to further facilitate the success of these courts and differentiate it from other specialist courts, it is proposed that judges of this court undergo further training, which should address the unique nature of these banks.

[180] 1994.
[181] National Industrial Court is established by the CFRN, s.25C (2).

(ii) *Necessity of the Court*

The need for a specific court is examined in the next chapter and it forms a substantial argument vis-à-vis the thesis' advocacy for reform. Nevertheless, it is important to state here that this court is necessary, given the special nature of banks. Furthermore, there is a need for a tribunal to address some of the very specific and complex issues which arise out of banking. This type of court is similar to the tribunal of the Failed Banks Decree in 1994.

Part VI

2.9 Conclusion

This chapter has examined regulatory theories and the application of banking regulation. It has also examined the regulatory models of comparator jurisdictions against the backdrop of Nigeria. It concludes that the regulatory models of comparator jurisdictions are more dynamic and possess relevant institutions which are necessary for an effective regulatory model. The next chapter places this into the context of the global and Nigerian banking crisis. It then assesses the regulatory responses from the UK and the US and pays close attention to the regulatory infrastructure in Nigeria.

Chapter Three

Regulatory Responses to Financial Crises'

Part I

3.1 Introduction

In light of the discussion in the previous chapter vis-à-vis banking regulation and the rationale, this chapter examines the global financial crisis of 2007 and the Nigerian crisis of 2008. The chapter also provides an objective critique of the regulatory responses by the comparator jurisdictions and Nigeria. Given that the focus is on the regulatory infrastructure in Nigeria, and the thesis argument for reform, the final section examines the Nigerian regulatory infrastructure in greater detail to compliment the last chapter's discussion. It clearly sets out how the regulatory institutions work together, particularly the effect of the creation of AMCON on the CBN's regulatory response.

Part II

3.2 The Global Financial Crisis

The global financial crisis is well documented.[1] It was caused by a crash in subprime mortgages in the US, leading to the downfall of the fourth largest investment bank, the Lehman Brothers.[2] This bank, which was heavily involved in sub- prime mortgages, which can be described as a loan was regarded as Too Big to Fail (TBTF).[3] This concept is based on institutions having such a heavy presence within the financial system, or any system as the case may be, that it becomes so systemically important.

The term TBTF is used to describe banks or financial institutions which are large and interconnected with other banks within the sector, that should they fail; the impact would

[1] Gary Gorton, *Slapped by the Invisible Hand: The Panic of 2007* (Oxford University Press, 2010) (Gorton, 2010'); Roman Tomasic and Folarin Akinbami, 'Towards a New Corporate Governance after the Global Financial Crisis', [2011] International Company and Commercial Law Review. 237-249.
[2] Mike Adu-Gyamfi, 'The Bankruptcy of Brothers: Causes, Effects and Lessons Learnt,' [2016]1 (4) Journal of Insurance and Financial Management 132- 149.
[3] Gorton, 2010 (n 1).

have catastrophic effect on the remainder of the system. The failure would have an impact on the sector, as well as on the economy as a whole. Such a bank would rely on governmental sustenance and backing to avoid the ripple effect of its failure. However, in the case of Lehman Brothers, the US Government allowed this bank to fail.

The term TBTF was first used for one of the largest banks during the 1970's, Continental Illinois Corporation.[4] This bank was the largest bank requiring financial assistance from the Federal Deposit Insurance Corporation. Like Lehman Brothers, this bank was one of the largest banks in the US, but started to experience difficulties which had an impact on its position within the banking sector. In 1982, when Penn Square Bank, another large bank at the time was closed, the bank sold its assets to Continental loans for a record $1billion.[5]

The closure of Penn Square Bank instilled a panic and depositors started to withdraw funds, resulting in a liquidity crisis. The position of this bank within the sector was a cause of concern for regulators and the economic system, and in 1984, a proposal which labeled Continental bank and 10 others as too big to fail because of their importance to the system and particularly as their failure could have a ripple effect.

However, the TBTF concept can be detrimental to the banking sector. First, such banks need to be heavily supervised in order to ensure that they do not fail. This means that the central regulator must ensure that bank examinations are carried out regularly.[6]

[4] Irvine H Sprage, *Bailout* (New York Basic Books, 1986) 232.
[5] This is true, but it was later discovered that a large number of this was already defaulted.
[6] Imad A Moosa, *The Myth of too Big to Fail*, (New York Palgrave MacMillan, 2010); George G Kaufman 'Too Big to Fail in Banking: What Does it Mean?' LSE Financial Markets Group Special Paper Series 2013.

In an attempt to limit the effects of the global financial crisis, a number of governments acquired large stakes in commercial banks. European countries such as France and Germany already had government owned banks, but this was new territory for the UK and the US.[7]

The global financial crisis brought a number of concerns to the fore, including the fact that the *status* of a country did not affect its immunity to failure. This was evident when the US, a developed country which, by virtue of its economic status *could* be presumed to have a strong financial and regulatory system, experienced a banking crisis. Additionally, the crisis itself exposed a plethora of regulatory weaknesses within the global banking structure, which caused regulators across the globe to reconsider their regulatory approaches.[8] Other factors which caused the global financial crisis were interdependency and the fact that banks were labelled as TBTF.

Minsky had argued in the case of the wall street crash of 1930, which destroyed confidence in the markets and was later known as the great depression, that there was generally a need for tighter financial regulation.[9] On the other hand it was generally accepted that the economy could be regulated by the forces of demand and supply without the need for strict laws. However, it has been demonstrated that deregulation promotes opportunism and greed.[10]

[7] Svetlana Andrianaova et al 'Is Government Ownership of Banks Really Harmful to Growth?' Department of Economics, University of Leicester 2009 1; La Porta et al, 'Government Ownership of Banks,' [2002] 8 (1) Journal of Finance 265-301. (Andrianaova, 2009).

[8] Andrianaova, 2009 (n 7).

[9] Hyman Minskey, 'The Financial Instability Hypothesis', *The Jerome Levy Economics Institute of Bard College*, 1992. Available at: http://www.levy.org/pubs/wp74.pdf; Martin H Wolfson, 'Minsky's Theory of Financial Crisis in a Global Context', (2002) *Journal of Economic Issues* 399; and James Crotty, 'Structural Causes of the Global Financial Crisis: A Critical Assessment of the New Financial Architecture', [2009] 33 (4) Cambridge Journal of Economics, 564, 563-580

[10] Mark A Covaleski, Mark Dirsmith and Sjay Samuel, 'Changes in the Institutional Environment and the Institutions of Governance: Extending the contributions of the Transaction Cost Economics within the Management Control Literature', [2003] 28 (5) Journal of Accounting, Organizations and Society, 431, 417-441.

3.3 Causes of Banking Crises

Olanipekun[11] argues that the denominators for banking crises can be broadly categorized into three factors, including weak information and incentive structures; weak management and control systems within banks and poor regulation and monitoring supervision.[12] However, while these factors are indeed important factors, regulation and monitoring supervision are also intrinsically linked to crisis. In addition, there is a need to place emphasis on the regulatory regime itself, since this is what accommodates the factors mentioned previously.

3.3.1 Banking Failures in Nigeria

The earlier chapters have distinguished between a bank crisis and a bank failure. However, before discussing the Nigerian crisis, it is important to first interrogate the previous regulatory responses as adopted by Nigeria. This will adduce a better understanding as to the development or change in direction.

A total of 185 banks[13] were registered between 1929- 1960. The first documented bank failure was the Nigerian Industrial and Commercial Bank in 1929.These are explored in the subsequent chapter, but it should be noted that during the period between 1929-1952, it is often referred to as the *laissez faire era or free banking era because there were no laws to regulate banking*. There were indeed a number of banks; however they did not survive for long.[14]

The proliferation of failing banks led to a number of reforms, starting with the Bank Ordinance. In 1986, the Structural Adjustment Programme[15] saw the deregulation of the

[11] Oladapo Olanipekun, 'Banking Regulation and Deposit Insurance: Legal and Comparative Perspective', (Unpublished Doctoral Thesis, Queen Mary, 2008) (Olanipekun, 2008)
[12] Olanipekun, 2008 (n 11) 29.
[13] The Patron Report, 1948.
[14] Appendix 1.
[15] Olukayode A Adeeko, 'The Law and Policy of Financial Regulation and the Deregulation of Nigerian Banking System', (Unpublished Doctoral Thesis, University of Warwick, 1998)

financial system, a process that continued up till 1993.[16] This programme deregulated the banking system which contained a number of indigenous banks, with a substantial number of their stakeholders as government parastatals. This was including, but not limited to federal and state governments. During this period, the NDIC was established[17] as a curative mechanism for failing banks.

3.3.1.1Addressing the Failures

3.3.1.2 The Introduction of the Structural Adjustment Programme

In order to address the inherent bank failures in Nigeria, the Federal Government introduced the Structural Adjustment Programme (SAP) in 1986. The financial system was deregulated and a more liberal approach to bank licensing was introduced. Although the IMF played a substantial role in this,[18] it was an attempt at improving the economy and increasing competition within the financial sector.[19]

The SAP led to an expansion of banks, as they were now able to manage their own institutions. This was not without challenges, and resulted in the enactment of new laws[20] to prevent further bank failures and their attendant consequences.[21] The NDIC Decree, which was one of the new legislations, had the objective of creating a deposit insurance system. In

[16] Chibuke Uche, 'Banking Regulation in an era of Structural Adjustment the Case of Nigeria', [2000] 8 (2) Journal of Financial Regulation and Compliance 157- 159. (Uche, 2000)
[17] NDIC was established in 1998 through the promulgation of Decree No.22. It is referred to as the NDIC Act going forward.
[18]International Monetary Fund Annual Report 1986. Available at: http://www.imf.org/external/pubs/ft/ar/archive/pdf/ar1986.pdf Accessed 10th July 2017.
[19] R Adeyemo and Akin Iwayemi, Nigeria's Macroeconomic Crisis 1970-1986: An Overview' in A Iwayemi (ed) Macroeconomic Policy Issues in an Open Economy: A Case Study of Nigeria (NCEMA Publications, Ibadan, 1995); John C Anayanwu, 'President Babangida's Structural Adjustment Programme and Inflation in Nigeria' [1992] 7 (1) Journal of Social Development in Africa 5-24
[20] The laws implemented included the NDIC Decree 1998; (2006) The CBN Act 1991; and BOFIA 1991.
[21] Joseph O Sanusi, *Developments in the Banking and Finance Industry: Institutional Framework 1970 To Date* (Financial Institutions Training Centre Lagos 1992) 14; Oserheimen A Osunbor *Trends in Regulatory Framework in Banking Legislation: 1970 to 1992* (Financial Institutions Training Centre Lagos 1992) 21

1991, CBN and BOFIA Acts were promulgated to fortify and support the regulatory and supervisory functions of the CBN and NDIC.[22]

Kenya was the first African country to create a deposit insurance scheme in 1985, [23] and Nigeria followed in 1988. The creation of the NDIC was indeed welcome, since the government could no longer play an active role in providing assistance to banks that had failed. This inability had an effect on depositors' funds.

The NDIC was introduced at a time where banking crisis in Nigeria was at a peak. Thus, the management of failed or distressed banks is not new to the corporation. After the NDIC was introduced, it was instrumental in providing assistance to ten distressed banks[24] and this played a substantial role in restoring confidence in the banking system.[25] However, it did not prevent further failure as NDIC was required to provide further assistance to banks in 1992.[26]

It appears that liquidation was the more utilized method of addressing distressed banks. However, it should be noted that the liquidation process is actioned only *after* the CBN has revoked the bank licence.[27] The previous position of the law required an application to the Federal High Court for the winding up of the affairs of the bank. The bank would then

[22] Olufolahan S Oduyemi, 'The Challenges of the New Banking Legislations' in *The Nigerian Banking and Finance Industry in Transition: Shaping the Future: Papers and Proceedings of the Bank Directors Seminar 1992* (Financial Institutions Training Centre Lagos, 1992)
[23] Albert Bwire 'Deposit Insurance and Bank Failure in Kenya: What Lessons Can Be Learned by Supervisors', [2001] 9 (2) African Journal of Finance and Management 78-90
[24] Peter N Umoh (ed) Bank Deposit Insurance in Nigeria (NDIC Abuja, 1997) (Umoh, 1997): John U Ebhodaghe, 'The Changes and Challenges in the Nigerian Economy –The Banking and Finance Sector and the Regulatory Environment [1993] 3 NDIC Quarterly 4.
[25] Umoh, 1997 (n 24)
[26] Uche, 2000 (n 16).
[27] BOFIA 2004, s 39.

appoint the NDIC as the liquidator. Following the NDIC Act,[28] the position now is that the NDIC automatically becomes liquidator once the licence has been revoked. [29]

A review of the period when the NDIC was introduced into Nigeria and its objectives at the time, coupled with the experience that it has attained on the management of failed banks, suggests that it should be the institution to continue the management of banks and play a more substantial role within the current framework. It is argued that this would strengthen the banking environment in Nigeria and develop the regulation of banks themselves.

3.3.1.3 The Introduction of the Failed Bank Decree

Although the NDIC was a welcome reform, it did not entirely solve the problem of Nigerian banking failures. The promulgation of the Failed Banks (Recovery of Debts) and Financial Malpractices Decree in 1994 was a further attempt to address banking failure and holding accountable, those responsible.

The Federal Government introduced the Decree with the objective of creating a medium to recover debts which were owed to banks. Although there were pre-existing laws at the time, they were inadequate to deal with the distinct and unique nature of bank failures.[30]

The Decree provided for a special court, known as the Failed Banks Tribunal.[31]This Tribunal was empowered to; recuperate debts which were owed to a failed bank, at the time it closed or that the CBN declared it as failed; [32] try offences which are prescribed under Part III;[33] try the offences as specified under BOFIA or the NDIC Decree. Under Part III, the decree

[28] 2006
[29] NDIC Act 2006, s.40.
[30] Chibuke Uche, 'The Nigerian Failed Banks Decree: A Critique' [1996] 11 (10) Journal of International Banking Law 436-441
[31] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994, s.1
[32] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994 s.15(1)
[33] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994

provided that a manager, director, officer or employee of the bank is guilty of an offence if he grants or approves a loan without adequate of collateral: or if he grants a loan in contravention of any of the laws or regulations; or if the person receives any gratification (bribe) for granting a loan.

The tribunal comprised one judge and operated within the judicial system in Nigeria. In order to speed up judgments, the tribunal was required to hear and decide matters within 21 days of the first sitting.[34] An important feature of the tribunal included the power to restrict the High Court from exercising its jurisdiction.[35] This is known as an 'ouster clause' and this was a prominent feature during the military regime in Nigeria. Other important features included the power to decide ancillary matters, including bail.[36]

The creation of the Tribunal helped facilitate the NDIC's efforts to address bank failures and proffer resolutions. Both institutions complimented each other, striving to achieve a common goal. The tribunal was a means of avoiding technical loopholes within the law. It was also a more assertive approach to recovering funds which had been wrongly obtained by insiders who used their position to obtain information and usurp funds for their own personal gain.

One notable case, which concerns ousting the court's jurisdiction, was the *Adekanye* case,[37] in which the defendants were charged before the Tribunal for various financial offences which played a substantial role in the banking crisis. The defendants went to the High Court,

[34] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994, s.4.
[35] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994, s.1 (5). Epiphany Azinge, *Law Making Under Military Regime: The Nigerian Experience* (Oliz, Benin City, 1994) 48; A A Oba, The African Charter on Human and Peoples' Rights and ouster clauses under the military regimes in Nigeria: Before and after September 11 [2016] 4 (2) *African Human Rights Law Journal* 276, 275-302
[36] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994, s.3.
[37] *Comptroller Nigerian Prisons v Dr Femi Adekanye and Others* [1999] 10 NWLR 400 (Comptroller, 1999); *Awaye and Others v Controller General of Prisons and Others*, suit FHC/L/CS/1113/97 (4th June 1999 unreported).

praying the court to order their release from detention. The appellants challenged the High Court's jurisdiction to accommodate the suit, or order the release of the defendants on the grounds that the Decree ousted the court's jurisdiction to review any matter before the Tribunal. The court rejected the challenge on its jurisdiction and ordered their release. Per JCA Oguntade, Galadinma and Aderemi, the lower court's refusal to accede the ouster clause was upheld. It was held that:

> *'If I had to consider the issue of jurisdiction of the High Court in this matter, without reference to the African Charter on Human [and Peoples]. Rights.. I would not have had the slightest hesitation in concluding that the High Court had not supervisory jurisdiction this matter'*[38]

Although the success of the *Adekanye* case and Mmamman[39] proved to be a way forward, it was dissolved in 1999, when the democratically elected government took office. As this tribunal attained a fundamental and integral role in the resolution of bad debts and holding those connected liable, the method of which the tribunals conducted their matters gave rise to possible violations of human rights and evasion of due process, evident in its power to *oust* the courts jurisdiction. This was particularly so, since the tribunal had both civil and criminal jurisdiction, which was not subject to review by the High Court. The absence of judicial review, where it was possible to oust the jurisdiction of the High Court and the tribunal had powers to determine bail conditions, as well as the right of an appeal to the High Court clearly raised questions of human rights. [40]

When the Tribunal was dissolved, jurisdiction was transferred to the FHC. The impact of the tribunal itself and the progress that it made with banking matters further underlines the need

[38] (Comptroller, 1999) (n 37)
[39] *Mmamman* v. *Federal Republic of Nigeria* [2013] All FWLR (Part 697) 702
[40] Emeka Iheme, *Military and Due Process in Nigeria* (Constitutional Rights Project CRP, Lagos 1999); and Green Irokalibe 'The Failed Banks and Failed Institutions Tribunals and Their Impact on the Rule of Law' in Festus Okoye (ed) Special and Military Tribunals and the Administration of Justice in Nigeria (Human rights Monitor HRM Kaduna 1997).

for a specialist court to deal with such matters. Furthermore, the thesis argues that a specialist court is required because of the very uniqueness of banks, and the sluggish regulatory culture adopted by the CBN. It would promote financial stability and bring about an effective regulatory regime to prevent and not simply manage failures. In addition, it would further develop the current system of bank resolution, bringing about speedier trials and ensuring that depositors funds are returned where necessary and in good time.

3.3.1.4 Towards Resolving the Challenges Faced with Failed Banks

The creation of a specific tribunal would allow the CBN to focus on its core objective, which is the promotion of financial stability. There are presently a number of challenges which have made the resolution of bank failures counterproductive, including the absence of long term curative, remedial or bank failure correction plans.

At present the system in place is argued to be unsatisfactory. Primarily, this is due to the legal framework in place for liquidation. Previously the NDIC needed to apply to the FHC, which could be a lengthy procedure, and stakeholders could challenge both the appointment of liquidator and the licence itself. This has changed per the NDIC Act.

The challenge may be described as the lethargic judicial procedure in Nigeria, which may result in a lengthy wait before depositors are reimbursed their funds. A good example is the case of Rims Merchant bank which had its licence revoked in 2000 and the shareholders of the bank challenged this revocation at the Federal High Court. After three years of delay, the action was dismissed. In addition, nine banks had their licences revoked by the CBN in 2006 and appeals have been delayed due to pending cases at the Federal High Court. [41] The NDIC endeavors to address this issue by prescribing that where an action contains an application for

[41] www.ndic.com/failed_institutions/ htm. Accessed 11 July 2017.

an interim interlocutory injunction, which are applications that can be made at any stage of an action.[42] The objective of the injunction is to restrain the NDIC from paying depositors of a failed bank, the court shall refer this to the Court of Appeal.[43]

This is laudable, but the provisions only address applications which have the objective of restraining the NDIC from paying depositors funds. There is no indication that the Court of Appeal is in any better position vis-à-vis having a more comprehensive or elaborative understanding of banking law than the FHC. Furthermore, there is no indication that the Court of Appeal would deal with an application in a more *specific* way than the FHC. Thus, the referral of the application may not have any beneficial effect.

3.4 The Nigerian Banking Crisis 2008

The Nigerian banking crisis occurred in 2008, 4 years after the banking consolidation programme. The impact of the global financial crisis was not initially felt in Nigeria, as the banking sector was not fully integrated with the global market. However, the crisis meant that foreign direct investment was substantially reduced,[44] and systematically important banks were affected.

In addition to the fact that the Nigerian banking sector was not fully integrated into the global market, Nigeria did not engage in sub-prime mortgage lending, which was one of the major factors leading to the global financial crisis.

[42] Order 8 Rule 2 Abuja High Court Rule. See also Chudi N. Ojukwu, and Ernest Ojukwu, *Introduction to Civil Procedure* (3rd Edn Helen Roberts Limited, 2009) 205.
[43] NDIC Act 2006, s.40. The Court of Appeal is mandated to determine the application within 60 days.
[44] Yomi Makanjuola, *Banking Reform in Nigeria; The Aftermath of the 2009 Financial Crisis* (Palgrave Macmillan, 2015) 138 (Makanjuola, 2015)

However, most economies would experience the impact of the financial crisis, due to the interconnectedness of banks. The global financial community is interconnected and the key link is investors. The effect on one bank would inevitably spread to another.

Famuiywa[45] argues that perspectives of the Nigerian crisis can be divided into three broad categories, namely, (1) g*lobal financial crisis;* (2) *legislative infidelity,* and (3) *interdependent factors*. First, the interconnectedness of other economies made it inevitable that Nigeria would be affected. Nwude[46] focused on the impact of the stock market crash of 2008[47] and its relationship with the global financial crisis, but it is argued that there is an absence of examination of the role the regulators played in the stock market prior to the crisis.[48]

Another cause of the crisis was the legal framework; the provisions, i.e. the ISA[49] created opportunities to accommodate regulatory failure.[50] The interdependent factors, as identified by Sanusi,[51] include macro-economic instability caused by large and sudden capital inflows; critical gaps in regulatory framework and regulations; uneven supervision and enforcement; unstructured governance and management processes at the CBN/weaknesses within the CBN. Other factors included lack of investor and consumer sophistication; inadequate disclosure

[45] Olumide Famuyiwa, 'The Nigerian Financial Crisis: A Reductionist Diagnosis', [2013] 2 (1) Journal of Sustainable Development Law and Policy 36-64. (Famuiywa, 2013).
[46] Chuke Nwude, 'The Crash of the Nigerian Stock Market: What Went Wrong, the Consequences and the Panacea', [2012] 2 (9) Developing Country Studies 112, 105-117.
[47] Olaoye F Oladipupo, 'The Crash of Nigerian Capital Market: Explanations Beyond the Global Meltdown', [2010] 4 (2) International Business Management 35-40.
[48] Iwa Salami, 'The Effect of the Financial Crisis on the Nigerian Capital Market: A Proper Regulatory Response,' [2009] 24 (12) Journal of International Banking Law and Regulation 618-618. (Salami, 2009).
[49] ISA 2007, s.3 (1) (a)-(f).
[50], Collins Ikebudu, 'Mismanagement of Emerging Stock Markets: Analysis of the Role Played by "Legislative Infidelity" – a Norm of Int'l Economic Jurisprudence – in the N 8.1trilion ($60bn) Crash of Nigerian Stock Market', (Unpublished Doctoral Thesis, Golden Gate University, 2011) 19.
[51] Lamido Sanusi, 'The Nigerian Banking Industry: What Went Wrong and the Way Forward,'
[2010] 5, < http://www.bis.org/review/r100419c.pdf?frames=0 > accessed 15 May 2017. (Sanusi, 2010)

and transparency about financial position of banks; major failures in corporate governance at banks; and weaknesses in the business environment.[52]

While these factors appear to be comprehensive, Famuyiwa categorized seven of these factors under a single umbrella, supervisory failure.[53] Given the distinction between supervision and regulation as discussed earlier, supervision is absent as this is discretionary and regulation is also absent because of a weak regulatory structure. This is responsible for the reactive approach adopted by the apex bank.

3.4.1 Causes of Nigeria's 2008 Crisis

There are a number of commentaries on the Nigerian crisis. While some hold to the more general viewpoint that the Nigerian crisis was induced by the global financial crisis,[54] others have looked at the institutional framework itself.[55] These have focused on the large number of non-performing loans,[56] poor management, the general running of the financial system, [57] and the absence of sound corporate governance practices.[58]

Famuyiwa argues that the Nigerian financial laws were capable, with adequate enforcement, of negating any macroeconomic instability. However, this would only have been possible if CBN, NDIC and SEC had enforced the laws as required.[59] This became evident where signs

[52] Sanusi, 2010 (n 51) 6
[53] Famuyiwa, 2013 (n 45) 39.
[54] Famuyiwa, 2013 (n 45) 40.
[55] Salami, 2009 (n 61) 4; Folashade Adeyemo and Chinenyeze J Amechi, 'A Comparative Analysis of the Asset Management Corporation and the US Troubled Asset Relief Programme', Banking Law Review (Accepted for publication) (Adeyemo and Amechi, 2017)
[56] Umanhonlen O. Felix and Lawani I Rebecca, 'Effect of Global Financial Meltdown on the Nigerian Banking Industry and Economy', [2015] 5 (3) Scientific and Academic Publishing 64, 63-89; Onyeka Osuji, 'Asset Management Companies, Non- Performing Loans and Systemic Crisis: A Developing Country Perspective' [2012] 13 (2) Journal of Banking Regulation 147-170.
[57] *ibid*.
[58] Oyebola Akande, 'Corporate Governance Issues in the Nigerian Banking System', (Unpublished Doctoral Thesis, Walden University, 2016)
[59] Famuyiwa, 2013 (n 45) 37.

of the crisis were present, but the regulators failed to act diligently to forestall the crisis.[60] However, if this position is to be accepted, then other issues need to be considered, including the reasons for an absence in enforcement and *how* this enforcement is to be addressed.

In addition to the analysis of Famuyiwa on the lax approach of the CBN, NDIC and SEC to the enforcement of laws, the Nigeria crisis may have been averted if there was a robust supervisory framework, with *clearly* delegated roles to ensure active engagement with supervision and banking regulation. The CBN was slow to play the required active role in bank examinations. The request of special examination should not arise out of necessity. [61]

Part III

3.5 Critiquing the Regulatory Responses to the Banking Crisis' 2008

In light of the discussion of both the global and Nigerian crisis and the analysis of the literature, the subsequent sections provide an overview of the regulatory responses adopted by the comparator countries and Nigeria. It concludes with an evaluation of how Nigeria may draw lessons from these two country experiences.

3.5.1 Nigeria's Response to the Banking Crisis 2008

The regulatory response of the CBN can be categorized into two. The first was the creation of a special joint audit, which included the NDIC, with the objective of ascertaining the true financial health of banks after the global financial crisis. The outcome of this audit was that 8 bank managers were removed from their positions. These banks included Afribank, Platinum Habib Bank (PHB) Plc, Equatorial Trust Bank Plc, Finland Plc, Intercontinental Bank Plc, Oceanic Bank Plc, Spring Bank Plc and Union Bank Plc. The absence of corporate

[60] Famuyiwa, 2013 (n 45) 55.
[61] BOFIA 2004, s.32.

governance practices may have been a factor which allowed the illegal activities leading up to the crisis to have gone undetected.

In examining Famuyiwa's argument that the CBN, NDIC and SEC were lax in enforcing laws, the objective issue is how such managers were able to continue these illegal activities unsuspected. The role of the apex regulator is to ensure that it is kept abreast of the activities of the bank, and not just to instruct an examination of the banks' financial health and general soundness when it is on the brink of collapse. Thus, the question is whether the role of the apex regulator was being executed satisfactorily at the time of the crisis.

The examination conducted by the special audit team was a *reactive* approach, rather than the practical and ongoing process required. It demonstrated that 9 of these banks were technically insolvent[62] and the factors responsible were capital, liquidity and failure to adhere to corporate governance practices.[63]

This report found the concurrent themes throughout the banks including

- *A high number of non-performing loans within the banks, attributable to poor corporate governance practices, and lax adherence to the banks credit risk management;*
- *All the banks accounted for a disproportionate component of the total expose to the capital market and Oil & Gas;*
- *The result of the above has led to a significant capital impairment, which has affected their capital adequacy ratios;*
- *The banks were either perennial net takers of funds in the interbank market or enjoyed liquidity support from the CBN over long periods of time with clear evidence of illiquidity*.

[62] Sanusi L. Sanusi, "Press Address by the Governor of Central Bank of Nigeria on Developments in the Banking System in Nigeria" [2009] http://www.cenbank.org/OUT/SPEECHES/2009/GOVADD-14-8-09.PDF **(**Sanusi, 2009) 4

[63] *ibid.*

Alarmingly, three of these banks had been identified as systemically important. Based on the outcome of this report, the CBN, as per the provisions of 33 and 35[64] removed the bank directors of Afribank Plc; Intercontinental Bank Plc; Union Bank Plc; Oceanic Bank International Plc; and Finbank Plc respectively.[65]

The directors in the above banks challenged their removal on the grounds that the CBN did not have the statutory power to appoint or remove any bank executive or director. However the Court ruled that the provisions of 35 sub section (2) (d),[66] permit the CBN Governor to remove or appoint, notwithstanding anything contained in the law, or that is contained in the memorandum and articles of association of the bank.

As per Justice Idris, it was held that:

> *'in my view by virtue of the combined effect of the provision of section 33 and 35 of BOFIA, the CBN Governor is empowered to order a special examination into the books and affairs of a bank. He can also intervene in the operation of a bank by removing and replacing the directors of a bank found to be in a grave situation; to hold otherwise is to impair the legislative intent underpinning the provisions, which is the ability of the CBN Governor to provide a failing bank with necessary managerial and operational support to facilitate the bank's turn around'.*[67]

In this instance, the court held that the two provisions permit the CBN Governor to remove such officers or appoint any person or persons, or directors as the case may be, and also that the person or persons so appointed be remunerated by the bank as set out. The court also held that the Governor was permitted to appoint any person to advise the CBN in relation to the

[64] BOFIA, 2004
[65] Address by the Governor of the Central Bank of Nigeria, Mallam Sanusi on Developments in the Nigerian Banking System August 14 2009. Available at: http://www.cbn.gov.ng/OUT/SPEECHES/2009/GOVADD-14-8-09.PDF (Mallam Sanusi, 2009)
[66] Mallam Sanusi, 2009 (n 65).
[67] *Danzon Izedowen & Ors v Union Bank Plc & Ors* (Unreported Case, 2010).

proper conduct of its businesses and further provided that the person or persons so appointed should be paid by the bank.[68]

However, in 2010, the Supreme Court reversed this in the case of *Longe*.[69] This landmark decision has not only settled the legal doubt on the matter of appointment and removal, it has departed from the decision of earlier cases such as *Dairo*.[70] The impact of this case is discussed in the penultimate chapter of the thesis.

The second regulatory response adopted by the CBN was the creation of AMCON in 2010. The creation of the asset management company may be in fact be the stouter response to the crisis, as the institutions objective is to liberate banks of their non-performing loans. In 2011, three banks that faced financial difficulties were recreated as bridge banks and recapitalized by AMCON. These banks were Bank PHB, which later became Keystone Bank; Spring Bank which became Enterprise Bank; and Afribank which later became Mainstreet Bank. The efficient operation of AMCON was encapsulated in the IMF Report:[71]

> *'By September 2011, AMCON had purchased all the NPL's of the intervened bank and the recapitalization of the intervened banks was completed. The health of the banking sector significantly improved at the end of 2011. The industry average CAR was 17.9% with the lowest CAR at 10% and highest t at 31% at the end of December 2011. The industry's ratio of NPL's total declined to 5%, from 15.5% at the end of December 2010. All banks met the minimum liquidity ratio of 30% at the end of December 2011.*

The creation of AMCON is to be commended, as it was able to obviate a banking crisis at the time. However, there is no date for which the institution ceases to exist. In addition, AMCON seems to promote a culture of absorbing loans. There are other challenges which make

[68] *ibid*.
[69] *Longe v FBN Plc* [2010] 6 NWLR (Pt 1189) SC 1.
[70] *Dairo v Western Nig Technical Co Ltd* [1979] NCLR.
[71] IMF Country Report No.13/143, May 2013. Available at: <https://www.imf.org/external/pubs/ft/scr/2013/cr13143.pdf> 12. (IMF Report, 2013)

AMCON problematic for Nigerian banking regulation. The presumption would be that the institution absorbs these bad debts as acquired from banks and then gradually dispense of them. However, if there is no date when AMCON ceases to exist, it can continue absorbing such loans.[72]

3.5.2 Towards a More Effective Regulatory Response

These two responses are not downgraded, since of course, the apex bank was under a duty to respond to the crisis. Nonetheless, these responses could have been substantially enhanced, and it remains imperative that the apex regulator embraces a prompter and efficient regulatory response to banking crisis'. Nigeria would have benefitted from a more strategic response, in addition to the steps taken in response to the crisis. There *was* indeed a need to conduct a special audit report, but this could have been avoided with regular examinations into the affairs of the banks, as a general responsibility of central banks. At present, this is not mandatory for the CBN, but discretionary.

In addition to the special examination, Nigeria would have done well to utilize the creation of the FSRCC, discussed in the last chapter. The FSRCC should play a greater role in banking regulation on three grounds. First, the core objective of this sub agency is to devise response strategies for banking crises and failures. During the 2008 crisis, this interagency did not meet, leaving the management of the crisis solely to the CBN. The IMF country report[73] identified this failure to meet as a challenge and suggested that the FSRCC should further strengthen its objectives by making provisions for important aspects of regulation such as systemic risk,[74] which is currently not dealt with by any agency. This is to be further

[72] Ikani Agabi and Adetola Onayemi, 'Troubled Assets' in Oladapo Olanipekun (eds), Banking: Theory, Regulation, Law and Practice (Au Courant 2016) (Agabi and Onayemi, 2016)
[73] IMF Report, 2013 (n 71) 12.
[74] Kenneth I Ajibo, 'Risk-based Regulation: The Future of Nigerian Banking Industry, [2015] 57 (3) International Journal of Law and Management 201-216

explored in the subsequent sections, but it is submitted that before the agency can do so, there needs to be a reevaluation of the core objective[75] of the sub agency itself.

The failure of the FSRCC to meet is a challenge because in addition to the submission that the apex regulator should embrace a reactive approach, Nigeria needs to be better prepared for a crisis. Indeed, the goal of a good regulatory system should be to effectively prevent and not just manage a crisis. However, it should be noted that it is not a foreign concept for banks to fail or collapse, particularly in Nigeria.[76] The challenge can be depicted as the degree of insider abuse[77] It is thus submitted that it is imperative to have a resolution regime which can be used if necessary.

Secondly, this agency should play a more integral role in the regulation of Nigerian banks, especially as it is established by the CBN Act. As earlier identified, there is presently no agency or specific system in place which deals with the management of systemic risk. The FSRCC would be the best forum to address this. The creation and development of a robust system will make banking regulation more manageable, and allow banks which can be identified as systematically important to be better managed. This sub agency would naturally feed in to the larger regulatory framework and assist the CBN in achieving its core responsibility of financial stability. Moreover, the development of this system, coupled with regular meetings to provide feedback, presents a good opportunity to identify banks which are TBTF, if any.

[75] CBN Act 2007, s.44 (a) – (f).
[76] Vivien Beattie et al, *Banks and Bad Debts*: *Accounting for Loans Losses in International Banking* (John Wiley, 1995) 1.
[77] Lev Bromberg, et al, 'The Extent & Intensity of Insider Trading Enforcement: An International Comparison', [2016] 17 (1) Journal of Corporate Law Studies 74, 73-110.

Thirdly, and in light of the above, the Nigerian banking system does not operate a regulatory system which is coherent or easily understood. The role of the CBN in the management of bank crisis appears to be unclear. During the first round of banking failures and crises, the regulatory response adopted was the introduction of SAP and the NDIC by the then Federal Government, leaving the CBN without a role to play. Given the banking events during this era, it is fair to suggest that there was no apparent long term plan in place, and SAP and the NDIC were the regulatory responses themselves.

In the same light, the examination into the banks which revealed that Nigeria was heading for a near banking crisis *prompted* the introduction of the consolidation policy by the CBN, and the creation of AMCON. These responses not only confirm the knee-jerk reaction of the regulator, but further supports the need to revisit banking regulation.

The need for FSRCC to play a larger role is justified, given the discussion above. What is required is an appropriate forum to discuss the direction of regulatory approach to be adopted and a well thought out plan to prevent and manage any future failures. If the FSRCC had met and developed a clear and coherent agenda to address the crisis, the hasty creation of AMCON may not have been necessary.

3.5.3 Critiquing the US's Response to the Global Financial Crisis 2007

The fall of Lehman Brothers[78] caused by its dealings, including the high level of interconnectedness with other banks, triggered the global financial crisis. This affected other economies, including those not involved in subprime mortgages. The US Government chose to bail out some banks, such as AIG and Bear Sterns, but let Lehman Brothers fail. In 2008,

[78] Lehman brothers will also be referred to in this segment as the 'Institution'.

the institution filed for Chapter 11 Bankruptcy.[79] In responding to the crisis, the US[80] implemented several strategies to help the financial sector recoup and reposition. These programmes include the Term Asset-Backed Securities Loan Facility, (TALF) as earlier introduced in the thesis.

To ameliorate the effects of the global financial crisis, the Emergency Economic Act (EESA) established the Troubled Asset Relief Programme (TARP) in 2008. The objective was to restore 'liquidity and stability in the financial system', by purchasing troubled assets from banks and other financial institutions.[81] TARP has a specific focus on citizens as the EESA was designed to assist US citizens affected by the crisis. The UK did the same, with the focus being on the citizens, which include homeowners, taxpayers and workers.[82]

This objective appears to be in direct contrast to AMCON's core objective. In order to achieve the arduous task of stabilizing the US economy, s.115[83] provides for $700 billion to enhance the implementation of the institution. Subsequent to the establishment of TARP, the Secretary of Treasure[84] gained access to $250 billion, with further funding available upon submission of a written certification to the Congress through the President.[85]

The enforcement powers of the secretary are indeed wide, and this permits him to exercise any right over purchased assets, take over management of troubled assets, and to make sure

[79] Lehman Brothers had a total of $640 billion of assets, yet were in debt of over $619 billion.
[80] In this case, the Federal Reserve.
[81] United State Department of Treasury, 'Agency Financial Report', (2009), 3-117, at 3, online: <http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency_reports/Documents/OFS%20AFR%2009.pdf> Accessed 13th July 2017.
[82] Emergency Economic Stabilization Act 2008, s.2.
[83] Emergency Economic Stabilization Act 2008.
[84] Also referred to in this section as 'The Secretary'.
[85] Emergency Economic Stabilization Act 2008, s.115 (a).

that revenue from the sale of such is transferred to the US treasury.[86] In contrast, the sharing of funding responsibilities between the CBN and capitalized banks is of a macro prudential nature, since it induces capitalized banks to contribute to the soundness of distressed banks, in order to ensure that stability on a wide scale is achieved. This method of funding ensures that banks act prudently, since they are aware that they will contribute to any bailout if things should go wrong.

It is therefore submitted that mandating sound banks, under the Joseph Sanusi regime, to bailout distressed banks encourages a further financial hazard and banking environment.[87] In order to satisfy this mandate, bank managers may take extreme risks, hinged on the belief that sound banks will not allow their weak banks to fail.

3.5.3 Critiquing the UK's Response to the Global Financial Crisis 2007

Although the crisis started from the US, a number of UK banks were affected. A number of scholars[88] have commented on the crisis. It is commonly accepted that there are three core reasons for the crisis. The first is the concept of TBTF which has already been discussed, the second, interdependency; and the third, a weak regulatory and supervisory system.

Both the US and the UK took drastic and strategic measures to ensure that future crises would have less impact. The UK set out a sharp three stage process.[89] The first was to recapitalize banks, using a measure called the Recapitalisation Fund. Through this fund, the UK

[86] Emergency Economic Stabilization Act 2008, s.106.
[87] Ben Bernke, 'Some Reflections on the Crisis and the Policy Response', 2010 Remarks at the Conference on 'Rethinking Finance: Perspectives on the Crisis', organised by the Russell Safe Foundation and the Century Foundation, New York, 13th April 2012.
[88] Gerard Caprio, 'Financial Regulation after the Crisis: How Did We Get Here, and How Do We Get Out? Special Paper 226 *LSE Financial Markets Group Special Paper* Series November 2013, Available at: < http://www.lse.ac.uk/fmg/workingPapers/specialPapers/PDF/sp226.pdf> Accessed 15th July 2017.
[89] Agabi and Onayemi, 2016 (n 72) 460

Government bought shares in banks that were affected by the crisis. The banks affected included the Royal bank of Scotland, HSBOS and Lloyds Bank TSB.

The second was to provide a Credit Guarantee Scheme which allowed the government to offer guarantees on short-to medium term debts that were issued by banks, in exchange for a commercial fee. The third was the creation of a Special Liquidity Scheme which was introduced in 2008, with the objective of improving liquidity within the banking system by allowing banks to exchange illiquid assets for up to three years.[90]

The UK also introduced three additional measures. The first was the establishment of the Asset Protection Scheme,[91] which was created to provide banks with protection against losses on loans, mortgages and financial assets. The second was the passing of the Banking (Special Provisions) Act 2008,[92] which empowered the UK Treasury to transfer securities liabilities of a failed authorised deposit taker. This Act was only in operation for a year and was instrumental in assisting the UK to carry out direct transfer for failed deposit taking institution.[93]

The third measure was the introduction of the Special Resolution Regime which was introduced under the Banking Act 2009. Banking and financial institutions, particularly those which maintained heavy presence globally, were not discharged or resolved in an orderly fashion. For example, in the Lehman Brothers failure, the incompetence in dealing with this

[90] Bank of England, Available at: https://www.bankofengland.co.uk/markets/Documents/marketsnotice090203c.pdf> Accessed 15 July 2017.
[91] Asset Protection Scheme, Available at: https://www.nao.org.uk/report/hm-treasury-the-asset-protection-scheme/ Accessed 15th July 2017.
[92] Banking (Special Provisions) Act, 2008.
[93] Agabi and Onayemi, 2016 (n 72) 463.

institution significantly contributed to heightening the crisis. As there was no specific system in place, the US authorities were left in a dilemma, either bailing it out or allowing it to fail.

Either of the above choices would have been costly, and while the authorities opted for the latter, it was not anticipated that its failure would have such a profound effect. The need to implement a sound resolution regime was therefore of greatest importance, not only in dealing with this specific matter, but to ensure that authorities were not left with only two costly choices in deciding the fate of such an important institution.[94]

3.5.5 Analyzing the UK, US and Nigerian Banking Regulatory Responses to the Crisis'

A careful analysis of the regulatory responses in each of these countries suggests that the Nigerian approach was the least effective. This conclusion is based on two grounds. The first, is that Nigeria's regulatory system was *reactive* rather than *proactive*. While this argument has been made previously,[95] a reflective examination based on the previous discussions conveys that the Nigerian regulatory response has historically only reacted to problems within the banking sector, when they have presented themselves. Examples include SAP, NDIC, the Failed Banks Tribunal and AMCON. The Nigerian regulator ought to have contingency plans firmly in place. This will not only ensure that an effective system is in place to address a crisis, but it will be helpful in facilitating the regulatory regime in preventing crisis from occurring.

Both comparator jurisdictions addressed the management of bad debt, and went further to reevaluate the regulatory frameworks and the way regulation is conducted. More importantly,

[94] Martin Chihak 'The Need for Special Resolution Regimes for Financial Institutions, 2010', Available at:www.vozeu.org/article/need-sepcial-resolution-regimes-financial-institutions Accessed 15th July 2017.
[95] Salami, 2009 (n 48).

the regulators recognized that there was also a need to address the law which underpins the framework as a whole.

In addressing the correlation between all three, the local context and country status should be given consideration. However, as Nigeria is considered Africa's giant, there is more reason for the apex regulator to ensure that the banking system and regulatory regime is not only suitable to withstand crisis and failure, but also that the laws underpinning it remain relevant and fit for purpose. It has been previously stated that Nigerian banking law is outdated and even after the crisis, there has been no improvements to law or structure, in comparison to the UK and US. Given that Nigeria has a historically entrenched experience of failed banks, and has chosen to use the comparator countries as templates for creating its regulatory framework, it would do well to critically draw lessons, redefine its model and the law underpinning it.[96]

The last section provides a thorough and comprehensive examination of the roles and powers of the CBN, NDIC and AMCON. This examination is necessary as it complements the above discussion, by providing a sound understanding of how these regulatory institutions work together.

Part IV

3.6 Examining the Roles of the CBN, NDIC and AMCON

3.6.1 CBN

The Central Bank of Nigeria is the apex bank in Nigeria, which began operations on the 1st of July 1959. The mandate of the bank is to regulate the banking sector and monetary activities in Nigeria. The laws which allow the CBN to discharge its regulatory and supervisory

[96] Stijn Claessens and Laura Kodres, The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions, IMF Working Paper 2013.

responsibility can be found in the CBN Act, BOFIA and the Pre-Shipment Inspection of Imports Act.[97]

As per the provisions of the establishing Act, the objectives of the bank include:[98]

a) *ensure monetary and price stability;*
b) *issue legal tender currency in Nigeria;*
c) *maintain external reserves to safeguard the international value of the legal tender currency;*
d) *promote a sound financial system in Nigeria; and*
e) *Act as banker and provide economic and financial advice to the Federal Government.*

An objects clause is a provision which is usually located at the beginning of the legislation, and it usually outlines the core objectives of the Act, with the aim of addressing any uncertainty and ambiguity within the Act itself. The objects clauses have previously been described as a 'modern day variant on the use of a preamble to indicate the intended purpose of legislation.'[99] Object clauses are usually reverted to by the court when using the extant rules[100] to interpret a statute and in determination of which provision to be used.

Per the provisions of BOFIA,[101] a deduction can be made that the power vis-à-vis the the functions, powers and duties of the bank are expressly enlisted within the provisions of both the CBN Act and BOFIA, and are: that such powers, functions and duties, can be exercised by any officer or employee of the apex bank; and that these power, duties and functions can be exercised by other persons aside from an officer or employee of the bank, if such person has been duly appointed by the bank.

3.6.1.1 Examining the Functions of the CBN

As previously indicated, the CBN operates a dual function, in that it is a regulator *and* supervisor for the Nigerian banking system. These two functions and a general overview of

[97] Pre Shipment Inspection Important Act, 2004.
[98] CBN Act 2007, s.2.
[99] Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (6th ed, 2006), 154.
[100] These extant principles of interpretation are Literal, Golden and Mischief rules.
[101] BOFIA 2004, s.1.

their differences have already been discussed earlier. The subsequent sections in this part of the chapter will go further to distinguish these two roles.

The CBN Act[102] provides that:

> *'The exchange rate of the Naira shall be determined, from time to time, by a suitable mechanism devised by the Bank for that purpose.'*

From the above, it is clear that the mechanism to be utilised in determining the exchange rate is at the discretion of the bank. The CBN also has the responsibility to issue, produce, and destroy legal tender. S.17 of the CBN Act provides that

> *The Bank shall have the sole right of issuing currency notes and coins throughout Nigeria and neither the Federal Government nor any State Government, Local Government, other person or authority shall issue currency notes, bank notes or coins or any documents or tokens payable to bearer on demand being document or token which are likely to pass as legal tender.*

It is important to note that this section prohibits the three tiers of government, as well as any person or constituted authority from issuing any other thing as legal tender. In addition, s.18[103] also permits the bank to print,[104] arrange for the safe custody of the unissued stocks of currency notes, and arrange for the destruction of plates/discs for printing/minting of the currency/coins.[105] The CBN also has the duty to ensure that external reserves are maintained,[106] at levels which are considered to be appropriate for the economy and the monetary system in Nigeria.[107]

[102] BOFIA 2004, s.16.
[103] CBN Act 2007.
[104] CBN Act 2007, s.18 (a).
[105] CBN Act 2007, s.18 (c).
[106] CBN Act, s. 23 (a) – (i).
[107] CBN Act 2007, s.25.

3.6.1.1.2 Act as Bank to The Government, other Constituted State Authorities.

The apex bank is also given the prerogative to open and accept deposits from the Federal, State and Local Governments, and funds from institutions and corporations of all such Governments, banks and other credit or financial institutions.[108] It should be noted that this duty is *discretionary* as the word 'may' is used. [109] Additionally, the CBN Act allows the apex bank to conduct business as a bank.[110] The provisions state that:

> *The Bank may, subject as is expressly provided in this Act generally conduct business as a bank, and do all such things as are incidental to or consequential upon the exercise of its power or the discharge of its duties under this Act.*

S.36 of the act gives further responsibilities to the bank, to act as the official federal government bank;

> *(1) The Bank shall be entrusted with Federal Government banking and foreign exchange transactions*
> *(2) The Bank shall receive and disburse Federal Government money and keep account thereof;*
> *(3) In any place where the Bank has no branch, it may appoint another bank to act as its agent for the collection and payment of Federal Government moneys.*

It should be noted that this section,[111] expressly equips the apex bank to delegate this duty to any other bank in jurisdictions where it has no branch. Despite its responsibility as the federal government's bank, the federal government is not prohibited from maintaining accounts with any other bank, or using the services of the state treasuries for the collection and payment of monies. However, this is subject to any conditions laid down by the apex bank.[112]

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[108] CBN Act 2007, s.27 (b).
[109] *Animashaun & Ors vs Ogundimu & Ors* [2015] LPELR-25979 (CA) the Court, through Justice Chinwe Eugenia Iyizoba delivering the lead judgement, said:

> *'it has long been settled that **may** is a permissive or enabling expression.'*

[110] CBN Act 2007, s.32.
[111] CBN Act 2007, s.32 (3).
[112] CBN Act 2007, s.37.

It is worth noting that s.46 of the Act also empowers the CBN to appoint *other* banks as agents to carry out any of the functions of the Act. This is inclusive of the power to act as the federal government's bank and excludes that which is embedded in s.40.

3.6.1.1.3 Act as Agents to the Federal, State and Local Government.

The CBN, in addition to the above, also acts as financial agents to any of the three tiers of government. The Act provides:[113]

> *'The Bank may act generally as agent for the Federal Government, State Governments, or Local Governments.'*

With this in mind, it is important to note that according to the extant principles of principal and agent relationship, which has been upheld in various decisions,[114] the bank can only carry out this responsibility if appointed by any of these tiers of government and is therefore restricted to the power, duties and responsibilities that is contained in the appointment instrument.

For the purpose of discharging its regulatory responsibility, the CBN also acts as a bank to other commercial banks and financial institutions in Nigeria. The CBN Act provides:

> *'The Bank shall act as banker to other banks in Nigeria and may also provide banking services to banks outside Nigeria.'*

The words of the aforementioned provisions are direct and express so as to mean that the bank is allowed to act as a bank to other banks, i.e. to carry out all things deemed as falling under the purview of banking business.

Finally, the CBN is permitted to grant loans and financial advances to banks s.29 (1) (c) states that:

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[113] CBN Act 2007, s.40.
[114] *SDV (Nig) Ltd v. Ojo & Anor* [2016] LPELR-40323 (CA).

> *'notwithstanding the provisions of section 34(d) of this Act, grant temporary advances to banks within the meaning of the Banks and Other Financial Institutions Act which participate in bank clearing in respect of temporary debit balances on their accounts at such rate of interest and under such terms as the Bank may, from time to time determine.'*

S.42 (2) of the CBN Act provides as follows

> *'Notwithstanding the provisions of section 29 (1) (c) and 34 (d) of this Act, the Bank may grant loans and other accommodation facilities at such rate of interest and on such terms as the Bank may determine to any bank which may be having liquidity problems.'*

With regards to the first provision, the BOFIA[115] defines a bank as 'a bank licensed under this Act', while s.2 (1) of the BOFIA states:

> *'No person shall carry on any banking business in Nigeria except it is a comp any*
> *duly incorporated in Nigeria and holds a valid banking licence issued under th is Act.'*

Thus, if a bank is holding a valid licence, the apex bank *may* grant a loan to it. On the second provision,[116] particularly on the ability to assist banks with liquidity issues, it is interesting to consider whether this loan privilege is limited to only a bank in liquidity. On the face of it, the use of '*may*' denotes that the Act stipulates that such loans can be given to a bank in liquidity at the CBN's discretion. However, it is very important to note that the principle of *exclusio ulnarius presumption* means that when a statute or other document expressly mentions certain things but leaves out others, the court should presume that those things not mentioned in the statute are excluded from the operation of the statute and should not be taken into consideration while interpreting the statute and document. Therefore, the express mention of 'a bank in liquidity' in the Act excludes any other bank without liquidity problems.

[115] BOFIA 2004, s.66.
[116] CBN Act 2007, s.42(2).

3.6.2 Examining the Regulatory and Supervisory Powers of the CBN over Banks and other Institutions.

The aforementioned powers are as contained in the provisions of the CBN and BOFIA Acts.

(i) *Power to Request, Keep and Determine the Cash Reserves of Banks.*

s.45 of the CBN Act provides that the apex bank can from *time to time*, issue directives by circular, requesting banks to keep with it a particular sum of money as the bank's deposit liabilities. Subsection 3 of the same section further provides the CBN with the power to request for information and do all that is needed and expedient to make sure the cash reserves requirement under s.45 is met by each bank.

S.15 (1) of BOFIA also provides as follows

> *Every bank shall maintain with the Bank cash reserves, and special deposits and hold specified liquid assets or stabilization securities, as the case may be, not less in amount than as may, from time to time, be prescribed by the Bank.*

(ii) *Power to License and Regulate Credit Bureaux*

The CBN Act provides the CBN with the power to license and regulate the credit bureau organizations and anyone who is interested in carrying out the business. It shall also have the power to request any information it deems appropriate and necessary from any bureau organization at any time it deems fit.[117]

[117] CBN Act 2007, s.57.

(iii) *Power to License Banks and Other Financial Institutions.*

The provisions of BOFIA,[118] permits the Governor to use his discretion to issue a license to operate a bank upon the application by anyone if he is satisfied that the requirements stipulated for holding a license by the Act has been met. However, the exercise of this power is subject to the approval of the minister.[119]

The provisions in BOFIA[120] also gives the CBN the power to license any other person wishing to carry on financial business other than insurance and stock broking in Nigeria, upon an application made in lieu of the same provision.[121]

(iv) *Power to Revoke or Vary Conditions of a License.*

BOFIA[122] provides:

> *The bank may vary or revoke any condition subject to which a licence was granted or may impose fresh or additional conditions to the grant of a licence*

This section gives the apex bank the right to revoke or vary the condition to which a bank can hold a banking licence. Such variation must be communicated to the banks who must comply.[123] Failure to do so attracts a fine and can lead to revocation of its banking license.[124] Before the power embedded under s.s5 can be exercised, the Governor is duty bound to send a written note to all banks affected and take representations/arguments from them.[125]

[118] BOFIA 2004, s.3(3).
[119] BOFIA 2004, s.3(5).
[120] BOFIA 2004, s.59.
[121] BOFIA 2004 (2).
[122] BOFIA 2004, s.5(1).
[123] BOFIA 2004, s.5 (2).
[124] BOFIA 2004, s.5 (5).
[125] BOFIA 2004, s.5 (4).

(v) *Power to Regulate any Restructuring, Reorganization, Mergers and Disposal, Etc., of Bank*

The provisions of BOFIA[126] prohibits any bank from entering into any agreement, arrangement or contract to change the control of the bank, sell or dispose any part of the bank, merge the bank, reconstruct the bank or transfer the bank without the prior consent of the apex bank. Failure to comply attracts a fine as stipulated in subsection (2). Chapter five addresses this particular power of the apex bank.

(vi) *Power to Determine the Minimum Paid-Share Capital of Bank*

S.9 of BOFIA gives the apex bank the power to determine the minimum paid-up share capital requirement of banks in the country. Failure to comply with this is a ground for revocation of the banking license.[127]

(vii) *Power to Revoke the License of Banks and Other Financial Institutions*

The apex bank is granted the power to revoke licenses of banks under s.12 of BOFIA. However, aside from the grounds as listed in this provision, a careful look at BOFIA in its *entirety* illustrates that there are other grounds where the licence may be revoked. These are enlisted below.

The first is the failure to meet up with the Minimum paid up share capital as provided for, and determined from time to time by the Apex Bank in accordance with its power in s.9 (1) of BOFIA.[128] The second is the failure to carry on the type of Banking business to which it's license was granted continuously for 6 months, or a term aggregating to six months during a

[126] BOFIA 2004, s.7.
[127] BOFIA 2004, s.9 (2).
[128] BOFIA, s.9 (2).

continuous period of 12 months.[129] The third is liquidation or winding up of the Bank.[130] The Fourth is insufficient assets to its liabilities.[131]

The fifth is failure to comply with any condition to which a banking licence has been granted.[132] The sixth is failure to comply with any duty placed on a bank by the apex bank, the provisions of BOFIA and the CBN Act.[133] The seventh is the failure to meet the minimum share capital ratio or if the share capital of the said bank falls below the minimum accepted share capital.[134] The eighth is 'persistent failure', which is not defined within the law, to comply with the guidelines and other directives of the Bank or persistent refusal to supply returns.[135] The ninth is the revocation of a failing bank licence. This occurs when a 'failing bank' cannot be resuscitated by the NDIC, the bank may revoke the licence on the recommendation of the NDIC, but it must first fulfil the conditions/steps enumerated in Section 35 – 38 of BOFIA.[136]

The CBN also has the power to receive returns and annual accounts from banks and other financial institutions, as provided for by BOFIA. Under the Act,[137] every bank is obligated to submit a statement showing the following to the apex bank within 28 days of the last day of each month. Given that this is mandatory, the question at hand is whether the banks submitted their statements as mandated during the 2008 Nigerian financial crisis. If these banks did submit these, as prescribed by the law, then it is likely that the crisis as experienced could have been prevented.

[129] BOFIA 2004, s.12 (1) (a).
[130] BOFIA 2004, (1) (b).
[131] BOFIA 2004, (1) (d).
[132] BOFIA 2004 (1) (c).
[133] BOFIA 2004, (1) (e).
[134] BOFIA 2004, s.14 (1) and (2)
[135] BOFIA 2004, s.60 (4).
[136] BOFIA 2004, s.39.
[137] BOFIA 2004, s.25.

Banks must also submit further documents as requested by the apex bank, so as to help understand the statement submitted.[138] The provisions of BOFIA also grants the apex bank to receive annual accounts from banks under the Act,[139] which extends this power to specialized banks, financial houses and bureau de change institutions, [140] and to approve an auditor to examine the accounts of the bank. [141]

3.6.3 Supervisory Powers of the CBN

S.31[142] expressly confers the power on the CBN to supervise, and provides in sub section 1 and 2 that:

> *(1) There shall be an officer of the Bank who shall be appointed by the Governor to be known as the Director of Banking Supervision or by such other title as the Governor may specify*
>
> *(2) The Director of Banking Supervision shall have power to carry out supervisory duties in respect of banks, other financial institutions and specialised banks and for that purpose shall-*
> *(a) under conditions of confidentiality, examine periodically the books and affairs of each bank;*
> *(b) have a right of access at all times to the books, accounts and vouchers of banks;*
> *(c) have power to require from directors, managers and officers of banks such information and explanation as he deems necessary for the performance of his duties under this section.*

The Director of Banking supervision shall have the right to request *all* books, account documents and information that is needed for carrying out his duties under the act.[143] However, in the exercise of this duty, the said director should be careful not to unreasonably hinder the daily running of the bank under supervision.[144]

[138] BOFIA, s.25 (3).
[139] BOFIA 2004, s.27 (1) (c).
[140] BOFIA 2004, s.30 (2), (3) and (4).
[141] BOFIA 2004, s.29 (2) b, (8) and (10); s. 29 (4).
[142] BOFIA 2004.
[143] BOFIA 2004, s 31 (7).
[144] BOFIA 2004, s.31 (6).

S.33 of the BOFIA also provides the apex bank with the power to order a special investigation into the affairs of any bank, if the following is established;

a. that it is in the public interest;
b. that the bank is carrying on business in a manner detrimental to the interest of the depositors and creditors;
c. that the bank has insufficient assets to cover its liabilities;
d. the bank has been contravening the provisions of the Act;
e. on the application of either a shareholder, director, depositor or creditor of the bank.[145]

The apex bank may order that the expenses of the said investigation be paid by the bank.[146] This special investigative power can also be extended to other financial houses, including but not limited to discount houses and bureau de change.[147] The apex bank has the power to grant approval if the bank fails to open for business due to a strike.[148]

(i) *Control of a Failing Bank and Other Financial Institutions.*

BOFIA permits the apex bank to control the activities of a failing bank[149] and when all the steps in s.35 do not resuscitate the bank, it is empowered[150] to transfer the control and management of the said bank to the NDIC. However, if the NDIC cannot resuscitate the failing bank, the apex Bank can, on the recommendation of the NDIC, revoke the banking license of the bank in question.[151]

[145] Note, that in (e), the apex bank may not order the said investigation if it is satisfied that this is not needed.
[146] BOFIA 2004, 33 (4).
[147] BOFIA 2004, s.34.
[148] BOFIA 2004, s.46 (2).
[149] BOFIA 2004, s.35.
[150] BOFIA 2004, s.36
[151] BOFIA, s.39.

(ii) *Power to Ratify the Appointment of a Director or Chief Executive*

Finally, BOFIA mandates that every bank obtains written approval from the apex bank, for any proposed appointment of a director or chief executive. [152] When an appointment is made in accordance with the provisions of CAMA, and such person has not been disqualified by the provisions of CAMA,[153] as well as is set out in BOFIA,[154] there is a need for ratification of such appointment by the CBN. The difference between what is stated in CAMA and the BOFIA is that only persons with management experience and qualification can occupy the positions of Executive Director and Managing Director of Banks in Nigeria. The role of the CBN is restricted to ratification and making sure that the provisions of BOFIA[155] and other Acts are followed *stricto senso* in the said appointment, there is a penal provision in BOFIA.[156]

3.7 NDIC

The NDIC is established by the NDIC Act.[157] The objective of the NDIC is to avoid a repetition of the banking failures experienced in the 1950s, when there was no recognized tool or mechanism to protect depositor's funds. The activities of the NDIC are regulated by the NDIC Act and the BOFIA, however in the event of a conflict, BOFIA takes precedence. S.56 of BOFIA provides;

> *The provisions of this Act shall apply without prejudice to the provisions of the Nigeria Deposit Insurance Corporation Act and where any of the provisions of this Act are inconsistent with any provisions of that Act, the provisions of this Act shall prevail.*

[152] BOFIA 2004, s.48.
[153] CAMA 2004, s.257.
[154] BOFIA 2004, s.48.
[155] BOFIA 2004, s.48 (2) – (4).
[156] BOFIA 2004, s.48 (5).
[157] NDIC Act 2006, s.1.

The NDIC Act[158] provides that all licensed Banks and such other financial institutions in Nigeria engaged in the business of receiving deposits shall be required to insure their deposit liabilities with the NDIC, failure to do so attracts sanctions.

3.7.1 Functions of the NDIC

The functions of the body as stated by s.2 of the NDIC Act are enumerated as follows:

1. *Insuring all deposit liabilities of licensed banks and such other deposit-taking financial institutions (hereinafter referred to as "insured institutions") operating in Nigeria within the meaning of s.16 and 20 of this Act so as to en-gender confidence in the Nigerian banking system;*
2. *Giving assistance to insured institutions in the interest of depositors, in case of imminent or actual financial difficulties particularly where suspension of payments is threatened to avoid damage to public confidence in the banking system;*
3. *Guaranteeing payments to depositors, in case of imminent or actual suspension of payments by insured institutions up to the maximum amount as provided for in s.20 of this Act;*
4. *Assisting monetary authorities in the formulation and implementation of banking policy so as to ensure sound banking practice and fair competition among insured institutions in the country; and*
5. *Pursuing any other measure necessary to achieve the functions of the Corporation provided such measures and actions are not repugnant to the objects of the corporation.*

Other functions of the NDIC are contained in the provisions of BOFIA, including:

1. *Taking control and management of a failing bank on the direction of the CBN;*[159]
2. *Power to apply to the Federal High Court for the winding up of a bank whose banking license has been revoked by the CBN.*
3. *Acting as the official liquidator for failed banks and financial institutions.*[160]

3.7.2 Specific Functions of the NDIC.

The predominant function, and reason for the establishment of the NDIC is to administer the insurance deposit scheme. As already noted, The provisions of the NDIC Act,[161] stipulate that *all* licensed banks and financial institutions who are in the business of receiving deposits *must* insure these deposits with the NDIC. However, it should be noted that not all deposits are insurable. S.16 of the Act states that the following deposits are exempted from being insured.

[158] NDIC Act, 2006 s.15.
[159] BOFIA 2004, s.36.
[160] NDIC Act, 2006 s.40 and BOFIA 2004, s.40.
[161] NDIC Act, 2006, s.15.

i. *insider deposits, that is, deposits of staff including directors of the insured institutions;*
ii. *counterclaims from a person who maintains both deposit and loan account, the former serving as a collateral for the loan; or*
iii. *such other deposits as may be specified from time to time by the Board.*

The power of the NDIC under the Act to administer insurance deposit schemes are highlighted below;

i. *Payment within 90 days, of Insured deposit to a failed financial institution whose license has been revoked.*[162]
ii. *Power to terminate the insured status of a failed financial institution.*[163]

3.7.3 Examining the Supervisory Role and Powers of the NDIC

In addition to the above functions, the NDIC also has a supervisory role within the regulation of banks. In order to perform its role effectively, the NDIC Act places an obligation on insured institutions to provide returns and information, which the NDIC may request. The failure of an institution to provide this requested information will amount to an offence, which on conviction, will result in a fine.[164] It should be noted that the enforcement of this provision as a means of deterring such acts is doubtful, primarily because these fines are not imposed until *after* conviction. Given Nigeria's local legal context and the time factor with cases in Nigerian courts, a more sensible approach would be to make the fine administrative, which is not dependent on a criminal conviction This also provides a greater inducement for compliance.

The NDIC is also empowered by the NDIC Act to appoint officers which are charged with the responsibility of examining the books of insured banks and other financial institutions. The appointed officer(s) have the power to gain access to any information relating to any matter, and request information/explanation from officers, directors and other auditors from

[162] NDIC Act, s.21.
[163] NDIC Act, 2006, s.23, 24, 25 and 26.
[164] NDIC Act, 2006s.27.

the insured institutions, if it is felt necessary/imperative to the examination. This right extends to information which is held by the CBN vis-à-vis any insured entity.[165] However, the Act still imposes particular provisions on the exercise of powers conferred on the examiner, including using *reasonable* care to ensure that the examination and the conduct does not unreasonably hinder the daily activities of the entity being examined, and that the examination *must* be limited to 'matters of fact and data deemed necessary for the examination'.[166]

The powers of the NDIC as contained in BOFIA and the NDIC Act are as follows:

i) *Power to Receive and Request Information from Banks and Other Financial Institutions Duly Insured.*

Section 27 (1) and (3) of the NDIC Act provides as follows

> *(1) Every insured institution shall submit to the Corporation such returns and information as may be required from time to time within the stipulated period.*
> *(3) In addition to the powers conferred on it under this Act, the Corporation may require persons having access thereto, at all reasonable times to supply to it information, in such form as the Corporation may from time to time direct, relating to, or touching on or concerning matters affecting the interest of depositors of insured institutions.*

The express interpretation of the above provide the power to receive and request for information from any insured institution under it.

ii) *Power to Take Over Control and Management of a Failed Bank*

As already highlighted, s.35 of BOFIA provides that the CBN may turn over control and management of the failing bank to the NDIC. S.38 of BOFIA further provides that:

> 1. *Where the Corporation has assumed control of the business of a bank pursuant to section 36 of this Act, the Corporation shall remain in control of and continue to carry on the business of the bank in the name and on*

[165] NDIC Act, 2006, s.28.
[166] NDIC Act, 2006, s.32.

behalf of the bank until such a time as in the opinion of the Bank, it is no longer necessary for the Corporation to remain in control of the business of the bank.

2. *Accordingly, the cost and expenses of the Corporation or remuneration of an appointed person of the bank shall be a first charge on the assets of the bank.*

3.7.4 Resolution Powers of the NDIC

In the instance that an insured institution informs the NDIC that it is experiencing difficulties in meeting its obligations to its depositors and to other creditors, persistently suffers from liquidity challenges, or has accumulated losses which have had a substantial effect on the *capital*, the NDIC is obliged to help the entity in question. In addition, the NDIC Act provides the NDIC with a number of options, including granting loans, on the terms agreed by the NDIC and the failing institution,[167] or accept an accommodation bill, with interest, for a period which does not exceed 90 days.[168]

The provisions of the NDIC Act[169] also gives the NDIC discretion, having conferred with the CBN on the issue of management of the failing bank or other institution, until there is a significant improvement in the institutions financial health, the power to make some changes in the structure of the institution. This includes the power to restructure the institution, either by way of a merger, or acquisition/purchase/arrangement, which sees the deposit liability of the failing institution assumed by *another* institution.

It should be noted that the power to revoke the licence of an insured institution is assigned to the CBN, rather than the NDIC. The grounds on which the licence may be revoked are in a separate legislative instrument, though recognized under the NDIC Act.[170] An instance may

[167] NDIC Act 2006, s.37.
[168] NDIC Act, 2006.
[169] NDIC Act 2006, s.38.
[170] BOFIA, 2004.

occur where the licence holder has the intention of contesting the revocation, or the NDIC as liquidator of winding up petition against the financial institution.

This matter may cause disturbance to the process of resolving the failed institution and disrupt payment of insured deposits to depositors. The NDIC Act provides that in the case of actions which challenge the revocation of licence or petition for winding up, or, appoint the NDIC as liquidator, if an application of an interlocutory or interim injunction is brought against the NDIC to contain the payments of the insured deposits, the court must refer the interlocutory or interim application to the court of appeal for determination. Furthermore, the 'reference' will not operate as a stay of the substantive proceedings before the trial court. The court of appeal must decide on the application for an injunction within 60 days of the reference, otherwise the application will be deemed to have lapsed. [171]

As the liquidator, the NDIC is obliged to publish notices to *all* depositors, requiring that they forward their claims *to* the liquidator. It has the power to realize the assets, enforce the individual liability of the directors and shareholders, or wind up the affairs of the failed institutions.[172] In view of these powers of the liquidator under the provisions of CAMA, which are expressly incorporated in to the NDIC Act[173] the function of s 41(2) itself raises doubt.

(i) *Power to Act as Official Liquidator to Banks and Other Financial Institution*

S.40 of the NDIC Act and s.40 BOFIA expressly provide that when the license of a bank or an insured institution[174] has been revoked, the NDIC assumes the position of the official

[171] NDIC Act 2006, s.40 (7).
[172] NDIC Act 2006, s.41(2) (a) (b) (c).
[173] NDIC Act 2006 ,s.40 (1)
[174] NDIC Act 2006, s.15.

liquidator of the said institution/bank[175] and shall assume the powers conferred on a liquidator by CAMA.[176] In the exercise of this power, NDIC can appoint agent/agents to help in the exercise of its duties as a liquidator.[177]

(ii) *Power to Borrow and Make Regulations.*

The NDIC Act[178] also provides the corporation the power to borrow from the CBN, such an amount which is needed to discharge its duties. In addition, the Act[179] provides the NDIC with the power to make regulations for the fulfilment of the NDIC Act. Finally, similarly to the CBN, the NDIC act also contains provisions to protect the NDIC and banks that are taken over by it.[180]

3.7.5 The Effect of the NDIC Act on other Acts

There are some provisions of the NDIC Act and BOFIA, which have effect on each other, in addition to various Acts and Laws of the Federal Republic of Nigeria. These include;

i. *S.56 of BOFIA puts the provisions of BOFIA over that of the NDIC Act*
ii. *S.44 of the NDIC Act states that the provisions of the Limitation Act or laws of any state do not apply to debts owed to a failing or a failed insured institution.*
iii. *The NDIC Act in s.51 provides that the NDIC is exempted from the provisions of the NDIC Act or any amendment.*

3.8 AMCON

AMCON is a body corporate established under the AMCON Act.[181] The capital is fully subscribed by the CBN and the Ministry of Finance in equal proportions as trustees, for the

[175] *Jolimair Nig Limited & Ors v Liberty Bank Plc* [2016] LPELR - 41459 (CA) (Jolimair, 2016)
[176] CAMA, s.425; See also NDIC Act, s.41; Jolimair, 2016, (n 207) and *Olajumoke Akinwalf-Oguntimehin & Ors v Trade Bank Plc* [2016] LPELR – 40581 (CA) (Olajumoke, 2016)
[177] NDIC Act 2006, s.42.
[178] NDIC Act 2006, s.52.
[179] NDIC Act 2006, s.56.
[180] BOFIA 2004, s.41 (1):
Notwithstanding anything to the contrary contained in any law or enactment, no suit shall be instituted against a bank whose control has been assumed by the corporation.
[181] AMCON Act 2010, s.1.

benefit of the Federal Government of Nigeria.[182] The ownership structure of AMCON is peculiar, and this makes it unclear, how it can indeed be an independent institution.[183] The holders of the capital are capable of influencing the administrative aspects of the corporation, thus raising concerns about the 'independence'. Given the fact that the holders are trustees for the Federal Government, it may be argued that the latter has an influence on AMCON.

The AMCON Act expressly sets out its objectives, which are:

a) *assist eligible financial institutions to efficiently dispose of eligible bank assets in accordance with the provisions of this Act;*
b) *efficiently manage and dispose of eligible bank assets acquired by the Corporation in accordance with the provisions of this Act: and*
c) *obtain the best achievable financial returns on eligible bank assets or other assets acquired by it in pursuance of the provisions of this Act having regard to*

i. *the need to protect or otherwise enhance the long-term economic value of those assets.*
ii. *the cost of acquiring and dealing with those assets,*
iii. *the Corporation's cost of capital and other costs,*
iv. *any guidelines or directions issued by the Central Bank of Nigeria in pursuance of the provisions of this Act; and*
v. *any other factor which the Corporation considers relevant to the achievement of its objects.*

Thus, it may be deduced that the core objective for the creation of AMCON is to assist in the disposition of bank assets effectively and efficiently. However, s.5 of the Act states that the sole function of AMCON is to acquire, manage, and dispose of eligible bank assets from eligible financial institutions.

Further, s.24 of the Act puts the power to determine what is 'eligible bank assets' within the purview of the CBN,[184] through its guidelines and the laws. The nature of this power means

[182] AMCON Act 2010, s. 2 (1).
[183] AMCON Act 2010, s. 1 (4).
[184] AMCON Act 2010, s.61.

that there is some flexibility in the *type* of assets which may come under the umbrella of an eligible bank asset.

As previously indicated, the Guidelines provide six categories of assets which fall under the umbrella of eligible bank assets:

> *i. Collaterised or secured non-performing loans (NPLs) of an eligible financial institution (EFI) which are substandard, doubtful, or lost in accordance with prudential guidelines;*
> *ii. Unsecured NPLs of EFIs which are substandard, doubtful or lost in accordance with prudential guidelines;*
> *iii. All loans owed to any bank whose banking licence has been revoked by the CBN pursuant to BOFIA;*
> *iv. Assets acquired by an EFI in the course of satisfaction of any debt owed to it, whether or not the underlying debt obligation remains outstanding;*
> *v. Any loan which poses significant risk to an EFI; and*
> *vi. Such other instruments or asset class which the CBN may, from time to time, designate by order in writing.*

The common theme is that these are *either* obligations which arise from the association of a loan obligation, or a loan obligation itself. There is an additional class of assets which are acquired by an EFI, during the satisfaction of any debt which is owed to such an institution, regardless of any underlying debt obligation which has been discharged. The justification for this class of assets remains obscure, and indeed questions the basis of AMCON in this respect.[185] To simplify, in the instance that a debtor has defaulted on a loan obligation to a financial institution, the bank has enforced its security in satisfaction of its claim and the proceeds of the enforcement is held by the bank, such proceed of enforcement can be classified as an eligible bank asset.

AMCON may, within three months of the designation of the asset as eligible by the CBN, purchase same on a voluntary basis from the financial institution which is desirous of selling

[185]. *Troubled Assets Resolution, Legal Aspects in Emerging Markets* Series Vol II, LexisNexis, 2012 60; *Osho* v *Foreign Finance Corporation*; *Bello v Diocesan Synod of Lagos and Ors* [1973] NSCC 137

such asset.[186] The valuation and purchase price of the said assets shall be as determined by the CBN in its guidelines.[187] However, AMCON is *not* bound to purchase any eligible asset and may only do so if it considers it necessary. Despite this discretionary power, the AMCON Act states that the CBN and NDIC can compel it to acquire such asset.[188] This goes to the heart of the question of whether the role of the CBN is unclear. While the provisions of AMCON provide that it is indeed an independent institution,[189] if the CBN and NDIC can compel AMCON to acquire an asset, then AMCON is not independent. Further, the CBN clearly plays a role in asset management of banks, when this appears to be a role solely designed for AMCON.

When AMCON acquires an asset, such eligible asset shall become vested in the corporation, which shall exercise all the rights and power as regards same, subject to the terms in the purchase agreement in s.32 of the Act.[190] The corporation is also equipped to do all that is germane, expedient and needed to enhance or realize the true value of the eligible bank asset.

3.8.1 Examining the Powers of AMCON.

The powers of AMCON are contained in s.6 and 48 of the AMCON Act. Those contained under s.6 are general powers, important for realizing the object of the Act, which is the management of Assets. The selected powers necessary for this discussion are highlighted as:

i. *The power to enter into a partnership or joint venture with anyone so as to realize the objects of the Act;*
ii. *The power to issue bonds and other debt instruments as payment for acquiring eligible bank assets;*
iii. *The power to draw, accept and negotiate negotiable instrument;*
iv. *The power to borrow or raise money;*
v. *The power to enter into insurance contracts;*
vi. *The power to participate in a trust either as a trustee or beneficiary.*

[186] AMCON Act, s.25.
[187] AMCON Act 2010, s.28.
[188] AMCON Act 2010, s.30.
[189] AMCON Act 2010 s.1 (4).
[190] AMCON Act 2010, s.34 of the AMCON Amendment Act 2015.

The AMCON Act also provides for *special* powers which are further enumerated below as:

i) *Power to Act as a Receiver for a Debtor Company*

The AMCON Act[191] permits the corporation to either act as a receiver or appoint someone to act as one for a debtor company and to have the power to realize the assets of the debtor company, enforce the individual liabilities of the shareholders and directors of the debtor company, to manage the affairs of the debtor company and even attach and freeze the debtor's bank account.[192]

S.51[193] also gives the corporation the power to apply to the court for a receiving order against a debtor who has been ordered to pay any sum in a debt recovery action, if such company fails to pay within 30 days. Winding up can be commenced even if the debtor has not been declared bankrupt. S.52 differs from the provisions of the above as the judgment given must be one in which a particular sum is to be paid to the corporation, and ninety days is given before a winding up order can be made against the company.

3.8.2 Amendment of AMCON Act

The AMCON Act[194] was amended with the inclusion of further subsections to s.48, which states that:

> *shall be exercisable over all the assets and entire undertaking of the debtor company notwithstanding that only a part of the assets of the debtor company was charged, mortgaged, or pledged as security in relation to the eligible banks asset acquired by the corporation: provided that such exercise shall be without prejudice to the existing rights of secured creditor or third parties in such assets.*

The provision of this section is instructive in nature, particularly as it effectively creates a quasi –administrative mechanism, which is similar in tone to the UK, under the Insolvency

[191] AMCON Act 2010, s.48.
[192] AMCON Act 2010, s.50.
[193] AMCON Act 2010
[194] AMCON Act, 2015. s.48.

Act 1985 and the Enterprises Act 2002. These UK laws augmented the possibility of rescuing corporate institutions.[195] As stated in the first chapter, scholars have also advocated for the judicial approach of Chapter 11 in this respect, similar to the US.

3.9 The Statutory Relationship between the CBN, NDIC and AMCON.

It is necessary to illustrate the relationship between these institutions, in order to critique the banking regulatory framework in Nigeria. Thus, the subsequent sections of this chapter discuss the supervisory powers of the CBN over NDIC and AMCON, and provide a general overview of how these institutions work together.

There are certain provisions with both AMCON and the NDIC Acts which provides the CBN with supervisory and regulatory powers over the other institutions. A CBN officer, not below the rank of a Director, must be on the governing body of the NDIC.[196] At the dissolution of the governing board of the NDIC, the finance minister in conjunction with the CBN constitutes a management committee for the NDIC which will include a representative of the CBN.[197] The CBN and the Federal Ministry of Finance contribute 40% of the authorized share capital of the NDIC.[198] In addition, the NDIC has a reporting *duty* to the CBN, as the management of the corporation is duty bound to submit an annual report to the CBN, not later than three months after the end of each financial year.[199] The NDIC is also duty bound to make available to the CBN reports of its examination into any insured institution under it and other relevant information on the insured institutions under the NDIC, including

[195] Rizwaan Jameel Mokal and John Amour,'The New UK Corporate Rescue Procedure-The Administrator's Duty to Act Rationally, '[2004] 1 (3) International Corporate Rescue 136-142; Bolanle Adebola, 'Corporate Rescue and the Nigerian Insolvency System', (Unpublished Doctoral Thesis, Universit College, London2012).
[196] NDIC Act 2006, s.5 (1) (d).
[197] NDIC Act 2006, s.6 (3).
[198] NDIC Act 2006, s.11 (2).
[199] NDIC Act, s.49.

contraventions and offences of the insured institutions.[200] Finally, the CBN grants loans to the NDIC.[201]

3.9.1 AMCON

The CBN is empowered to supervise and regulate the activities, including the functions of AMCON. This power extends to the right to appoint examiners to check the books of the corporation.[202] As the core objective of AMCON is to purchase, management and disposal of eligible bank assets, the AMCON Act[203] gives the CBN the power to determine what are eligible bank assets. Fifty percent of AMCON's share capital is held in trust by the CBN.[204] The CBN has to approve any purchase or investment in eligible equities to be made by AMCON;[205] The CBN nominates the Managing Director and Executive Directors of the AMCON Board of Directors;[206] The CBN determines the salaries of the AMCON board members;[207] AMCON must submit annual reports to the CBN, within 3 months of the end of the financial year.[208] The CBN can also demand that AMCON report to it at any time in whatever manner provided by the CBN;[209] AMCON is also duty bound to submit to the CBN a statement of account for its financial year within six months of the end of same.[210] Finally, the CBN is empowered to make guidelines which will guide the acts of AMCON; this regulatory power is spread all across the AMCON Act. Some include;

i. *S.57 equips the CBN to make regulations to give effect to the provision of the AMCON Act;*
ii. *S.8 of the Act empowers the CBN to issue guidelines and directions in writing to AMCON in connection with the performance of anything under the AMCON Act;*

[200] NDIC Act 2006, s.53.
[201] NDIC Act 2006, s.52.
[202] AMCON Act 2010, s.58.
[203] AMCON Act 2010, s.24.
[204] AMCON Act 2010, s.2.
[205] AMCON Act 2010, s.5 (b).
[206] AMCON Act 2010, s.10 (1) (b) and (c)
[207] AMCON Act 2010, s.12.
[208] AMCON Act 2010, s.21.
[209] AMCON Act 2010, s.22.
[210] AMCON Act 2010, s.23 (2).

iii. *S.4 (c) of the Act which provides for the objectives of the act, requires it obtain best returns on eligible act obtained pursuant to the guidelines or directions of the CBN;*
iv. *S.16 (4) allows the CBN the power to make guidelines to determine what employees of AMCON shall disclose;*
v. *S.20 allows the CBN to specify and determine the accounting standards and books to be kept by the AMCON;*
vi. *S.21 (3) allows CBN to determine the financial year of AMCON;*
vii. *S.28 allows the CBN to issue guidelines that will help AMCON in determining the value and purchase of eligible bank assets;*
viii. *S.56 provides that all guidelines and codes made by the corporation must be approved by the CBN.*

3.9.2 Examining the Relationship between CBN, NDIC AND AMCON

In order to explore the relationship between the three institutions, it should be noted that the CBN has an overall management role, over the other two institutions. The position assumed by the CBN is of an apex nature.

Their relationship and the way they work with each other appears to be more evident when a bank is failing, requires intervention, or is to have its licence revoked. When a bank is failing and the CBN has done all actions, as enumerated to resuscitate it.[211] this same Act permits the CBN to transfer the bank to the NDIC for management purposes and to try to resuscitate it further.[212] If the NDIC, after doing all actions as enumerated in the provisions, is unable to resuscitate the bank, it may make a recommendation to the CBN to revoke the licence of the bank in question.[213] Once this revocation of banking licence has occurred, the NDIC is made the official liquidator of the Bank.[214]

The NDIC also recommends financial institutions whose licences are to be revoked to the CBN.[215] In addition, when the insured status of an institution is taken away by the NDIC, the

[211] BOFIA 2004, s.35
[212] BOFIA 2004, s.36 -38 and the NDIC Act 2006, s7 (1) (j).
[213] BOFIA, s.39 and NDIC Act 2006, s.7 (1) (g).
[214] BOFIA 2004, s 40 and NDIC Act 2006, s 40. See also, Jolimair, 2016 (n 207); and Olajumoke, 2016 (n 208)
[215] NDIC Act 2006, s.7 (1) (h).

CBN is to revoke the licence of such institution.[216] The NDIC is also empowered to work with the CBN in the establishment of Bridge Banks.[217] The role of AMCON is to assist in the disposing of eligible bank assets and bad debts.

3.9.3 Winding up – AMCON

As previously indicated, AMCON is primarily involved in bad debts, taking over organizations which are indebted to banks, with the core objective of realizing the debt of that bank. The role of the NDIC is different in that it is limited to *banks and other financial institutions*, and it remains duty bound, as per its mandate, to register and insure the aforementioned. Thus, while AMCON may go outside the banking sector and take over other businesses, the NDIC is limited to banks.

The challenge with the Nigerian banking system is that while the CBN, NDIC and AMCON are the core players in the regulatory infrastructure, they are not addressing the problems. Within the banking industry, the statutory *functions* of AMCON and the NDIC Act are clear, thus there is no need for further debate on this matter. AMCON is *not* the institution with the power to assume 'ownership' of a failed bank – this is the role and responsibility of the NDIC.[218]

The NDIC, which can create and operate a bridge bank for up to 5 years,[219] performs practically the same functions as AMCON and the statutory provisions, as clear as they are, make this easier to execute. Thus, the role of AMCON appears to be to simply absorb debt, which this thesis argues is not prudent for effective banking regulation in Nigeria.

[216] NDIC Act 2006, s.25 (6).
[217] NDIC Act 2006.
[218] NDIC Act 2006, s.38 and 39.
[219] NDIC Act 2006, s.39.

Part V

3.10 Conclusion

This chapter has presented a discussion of the global financial crisis and the regulatory responses as adopted by the comparator jurisdictions and Nigeria. It concludes that the role of the CBN in the regulation of banks is not as clear, given that the CBN played no role in the creation of SAP, the NDIC and the introduction of the Failed Banks Decree. This chapter has also made a case for the FSRCC to play a more integral role in the banking regulation and that a specialist court should be created, which would allow the CBN to focus on its core responsibility. The subsequent chapters examine the establishment of the CBN and its development.

Chapter Four

Banking Regulation in Nigeria

Part I

4.1 Introduction

This chapter provides a historical background of the banking exchanges and banking regulations pre Nigerian independence. This discussion is necessary in order to have a grounded understanding of the events leading to the enactment of Nigeria's first banking law. The chapter examines the events leading to, and the justification for the Paton Report in 1948,[1] which led to the enactment of the law in question. The chapter then concludes by examining the banking regulatory laws and in particular, the autonomy of the central bank of Nigeria.

Part II

4.2 The History of Formal Banking in Nigeria

4.2.1 Commercial Banks

During the British colonial rule, two types of banks were introduced in Nigeria. These were Colonial and Indigenous Banks.[2] Documentary evidence indicates that the first colonial bank, the African Banking Corporation (ABC) was started in 1891.[3] However, banking in the colonial era is actually dated to 1871, when the Bank of West Africa ('BWA') was incorporated in London under the Joint Stock Companies Act 1862 and 1867[4] respectively. It should be noted that there is no documented evidence available to suggest that this bank commenced business in Nigeria. Its operations are not documented in the literature, nor mentioned in the Parton Report.

[1] Paton Report, 1948.
[2] These banks were incorporated and wholly owned by Nigerians.
[3] Jumoke Oduwole, *The Historical Development of Banking Law and Regulation* in Oladapo Olanipekun (ed) *Banking: Theory, Regulation, Law and Practice* (Au Courant, 2016) 59 (Oduwole, 2016); Chigozie Nwagbara, [2015] 3(4) 'The Role of the Commercial and Development Banks in Nigeria as Recognised under the Law', International Journal of Business and Law Research 2015 43-51.
[4] London Guildhall Library, Archive Division MS28528.

The Bank of West Africa was domiciled in London, and operated with two offices, situated in Lagos and Sierra Leone. The prospectus issued, held:

> *'that the establishment of a bank on the west coast of Africa has long been felt as the only means of increasing European Commerce and encouraging as well as the only method of introducing additional capital, the want of which is one of the largest obstacles of the progress of the West African Trade and to the development of its immense agricultural wealth, while the rapid increase in the commercial relations between Great Britain and West Africa, and the considerable investment of English Capital there, as well as the vastly augmented means of communication by steam, demand the establishment of corresponding financial facilities, more especially the introduction of an efficient system of banking.'*[5]

The rationale for creating this bank was hinged on qualities, which was thought to be in the overall interest of banking. The first was the *potential* to provide an *efficient* banking system, an idea primarily based on the premise that banking business within the British West African Colonies could be profitable. The second was that opportunities for a '*banker'* within the British West African Colonies had arisen, which ought to be seized.[6] However, in spite of the very meticulous and comprehensive analysis that the prospectus provided, there is no evidence, nor in the Paton Report, that this bank commenced business.

The Commercial banks were created to support British businesses and companies in Nigeria.[7] This is evidenced in the attitudes of these banks towards issuing 'loans'. For example, it was generally assumed that providing loans to 'locals' was too risky so the banks avoided doing so.[8] Two commercial banks are examined here, the African Banking Corporation ('ABC') and the Bank of British West Africa ('BBWA'), before examining the indigenous banks themselves.

[5] London Guildhall Library, Archive Division MS28528.
[6] *ibid*
[7] Walter T Newlyn and David C Rowan, *Money and Banking in British Colonial Africa*, (Oxford, University Press 1954) 161 (Newlyn and Rowan, 1954)
[8] Paton Report, 1948. (n 1)

4.2.2 The Establishment of ABC

The ABC was developed by Lagos manager of the Elder Dempster company.[9] This company was engaged in the shipping business, including importing coins into the Nigeria. The ABC was fully operational in South Africa and the fact that there was no recognizable banking environment in Nigeria, prompted the establishment of a branch in Lagos that commenced operation in 1861. Subsequently, the ABC signed an agreement with the Crown Agents,[10] which allowed it to bring new silver coins to Lagos without paying for packing and insurance.[11]

The ABC further strengthened its position as a bank by becoming a banker to the Colonial Government in Nigeria. However, during its first year, Lagos was struck by a downturn in trade, which was triggered by the Egba and Ijebu[12] war. This conflict impeded trade in Lagos, and made movement of goods difficult. This sudden downturn, or as it was described, 'economic depression'[13] was one of the factors that affected the bank's attitude to further investment in Nigeria.

4.2.3 The Establishment of BBWA

The BBWA was formally incorporated in 1894.[14] By agreement with the Crown Agents, the importing and control of the silver in Lagos was transferred from the Government to the BBWA. The Crown Agents refused to assign the right of importation from ABC, and insisted that the bank be 'properly constituted' with £10,000.[15] However, Mr Neville was able to

[9] Oduwole, 2016 (n 3) 59
[10] Crown Agents of the Colonies.
[11] Nkiru Danujma, *The Bankers Liability* (Heinemann Educational Books, 1993) 2
[12] Egba and Ijebu are two subgroups of the Yoruba ethnic group in Nigeria.
[13] Oduwole, 2016 (n 3) 60.
[14] Newlyn and Rowan, (n 7) 14; Oduwole, 2016 (n 3) 61.
[15] J Ojo and W Adewunmi, *Cooperative Banking, in Nigeria - Evolution, Structure and Operations*, (University of Lagos Press, Lagos, 1982) 4.

come to an agreement which enabled the keeping of government funds and avoiding a bank run.[16] This agreement differed from that which ABC had with the government as it granted the *sole* right of importation of the silver to the bank.

4.2.4 The Creation of Other Foreign Banks in Nigeria

The colonial period also saw the establishment of Union Bank as the Colonial Bank in 1917. In 1925, Barclays' Bank (Dominion, Colonial and Oversees) established itself in Nigeria after the merger of The Colonial Bank, The Anglo Egyptian Bank and the National Bank of South Africa, to carry out banking business. Although there were no formal banking laws in Nigeria at this time, there was a requirement that a company, consisting of more than ten people, with the objective of carrying out banking business, be registered under the Companies Ordinance as introduced in the introductory chapter.

4.3 Indigenous Banks

The term 'indigenous banking' refers to banks that were wholly owned and run by Nigerians. This era began in 1929 and lasted till mid-1950. Nigeria was one of the very few countries that had an indigenous banking system *alongside* banks created by the colonists. Other countries that were colonized, such as The Gambia, Sierra Leone and Ghana did not have a dual banking system because they were highly dominated by the Colonial power and laws.

In 1929, the Industrial and Commercial Bank became the first indigenous bank to be created, but it collapsed in 1930.[17] It should be noted that there is very little information on the operations of this bank, but it is noted that the bank had an authorised share capital of £100,000. This was followed by the creation of the Nigerian Mercantile Bank in 1931, which

[16] Oduwole, 2016 (n 3) 61.
[17] Paton Report 1948 (n 1) 7; Bank of England Archive, BEAFN OV68/2 42 1. See also, S. Ibi Ajayi and O.O Ojo, *Money and Banking: Analysis Policy in the Nigerian Context* (George Allen & Unwin 1981) 15; Joshua Ojo and Wole Adewunmi, Cooperative Banking, in Nigeria - Evolution, Structure and Operations, (University of Lagos Press, Lagos, 1982) 71.

failed in 1936 and the National Bank of Nigeria, which was established in 1933. However, poor management, poor accountability and poor infrastructure were some of the reasons why this particular bank failed in 1930.[18] After the failure of this bank, the African Continental Bank was established in 1937.

4.3.1 Industrial and Commercial Bank

There is no documented reason why the first indigenous bank failed, although it is documented that it went into liquidation in 1930.[19] It was reported that the authorized share capital was £100,000, and that the affairs and company records of the bank were so disordered, it was arduous to determine how much of the share capital itself had been paid. Paton reported that:

> *'the managing director of the so called bank was a man with a very shady past. The prospects originally issued by the 'bank' were a highly misleading document. It has prominence to the names who were leading London firms. Those firms had never been informed that their names would appear on the prospectus and when their attention was drawn to it, they ceased to have any dealings with the company…. The liquidators found it impossible to produce anything approaching the accurate statement of the position. The liabilities (some which related to trading operations) were estimated at£25,000. Off book debts estimated at £12,000, only £40 was collected…Included in the book debts were two substantial loans to the managing director and a company under his control – not a penny of which was recovered…'*

4.3.2 Nigerian Mercantile Bank

The Nigerian Mercantile Bank had a share capital of £10,000,[20] and according to the report, its core objective was to push shares.[21] One of the former directors of the ICB became a director in this new bank. Newlyn and Rowan commented that the bank encountered challenges in attracting customers, in spite of the enticing high rates that the institution was prepared to pay on deposits that it received. It was further commented that:

[18] Appendix 1.
[19] Paton Report 1948 (n 1).
[20] *ibid.*
[21] *ibid*.

> *'if the figures revealed by its annual reports are accurate, the gross rate of return (defined as gross profits as a percentage of loans and advances…) Despite this high gross rate of return the bank recorded losses in each year of its existence.'*[22]

There is very little information on the operations of this bank. However, the losses which it recorded each year that it was in existence, suggests that it may have experienced the same challenges as the previous bank discussed. In addition, it may not have helped that one of the previous directors was also an integral owner of the new bank. The assumption would be that such a person would bring a wealth of understanding of banking business, given the experiences of the previous bank. However, this did not appear to be the case.

4.4 The Paton Report

In addition to the aforementioned banks, two others were established, namely the African Continental Bank and the Nigerian Farmers and Commercial Bank. Due to the upsurge in the banking industry, the Chief Secretary to the Nigerian Government appointed GD Paton[23] to head a committee, which was named the 'Commission of Enquiry', charged with the responsibility of investigating the issues associated with Nigerian banking. They were also required to produce a report of these findings.[24]

The Commission of Enquiry were charged with proffering recommendations to the Nigerian Government on the introduction and sustainability of banking law in Nigeria. The report identified different issues that were problematic, amongst which were, the absence of regulatory requirements for banking, sound or otherwise; a clear understanding of banking

[22] Newlyn and Rowan, 1954 (n 7) 96 and; Charles V Brown, *The Nigerian Banking System* (London, George Allen and Unwin Limited 1966) 24.
[23] Mr Paton was a consultant to the Bank of England.
[24] Bank of England Archive OV68/1 165.

business, among other things[25] and suggested that these were some of the reasons banks experienced failure.[26]

Furthermore, the committee was also charged with identifying all banks that had been created in Nigeria at the time. The report indicated that these banks were: a) Bank of British West Africa Ltd;[27] Barclays Bank (Dominion, Colonial and Oversees**)** Ltd;[28] The National Bank of Nigeria Ltd;[29] The Nigerian Farmers and Commercial Bank Ltd;[30] The Agbon Magbe Bank Ltd;[31] and The African Continental Bank Ltd.[32]

The report stated that at least three of these banks had gone into liquidation within the period of their existence, thus leading to a loss of depositors' monies. Further investigation revealed that the prospectus which was originally issued to the banks in question was in fact misleading and that it listed leading banks in London as being in association with them, without getting their permission.

Paton reported that when these banks went into liquidation, many of the accounts were held by 'illiterates'.[33] These illiterates had their accounts debited with amounts, due on application and allotment of shares, although there was no formal application.[34] The absence of regulation or control, and the manner in which they conducted their business, placed banks in a position to take undue advantage of customers.

[25] Particularly the word 'bank' being used for companies carrying out banking business.
[26] Oduwole, 2016 (n 3) 64.
[27] Paton Report 1978(n 1) 4.
[28] *ibid.*
[29] *ibid.*
[30] *ibid* 5.
[31] *ibid* 6.
[32] *ibid.*
[33] This refers to a person who is unable to read or write.
[34] Paton Report (n 1) 8.

The investigation of these banks and the interviews which Paton had coordinated revealed that the government did in fact consider enacting legislation to regulate banking companies. This is particularly interesting as one of the recommendations during this discourse was the use of the word 'bank' by companies that were engaging in the *business* of *banking*. Regulation in this instance was not only deemed to be in the public interest, it was necessary to create some framework for banking regulation.

The report, which included a Draft Ordinance, was however subject to heavy criticism by the banks which the ordinance would affect. These criticisms led to the creation of the Barriff Report, which was produced by the then Assistant Director (Commerce), Department of Commerce and Industries in Lagos. The objective of which was to respond to the identified criticisms of the Paton Report. Collectively, the contents and recommendations of these reports led to the creation of the Bank Ordinance in 1952.

The enactment of the Bank Ordinance was unique as it took into consideration some local factors. For example, other laws which were applicable in Colonial Nigeria were modelled on laws of the United Kingdom. Such examples include the British Companies Act 1908, which was the template for the Nigerian Companies Ordinance of 1922.

The rationale behind the Paton Report is not as well documented in literature and this has led to some discrepancy. It was argued that the report was born out of the rapid registration of banks in 1947, such as ACB and the Nigerian Farmers Commercial Bank, was of grave concern for the Colonial Government. Nwankwo[35] argued that:

[35] Green Onyekaba Nwankwo, 'Indigenization of Nigerian Banking' in Ademola Oyejide and Afolabi Soyode (ed) in *Commercial Banking in Nigeria* (Ibadan, Unibadan Publishing Consultants, 1986).

> *'..the spate of these banking establishments and the collapse of many of them, moved government to set up an enquiry (the Paton Commission) in September 1947 to enquire generally into the business of banking in Nigeria and to make recommendations on the form and extent of control which should be introduced.*[36]*'*

Whereas it was argued by Newlyn and Rowan:[37]

> *'that 'the principal reasons to this sudden burst of registrations is to be found in the prevailing state of expectations with regard to the Governments intentions.'*[38]

It was further argued that while Paton's recommendation that banks share capital should be increased to £12,500[39] was aimed at addressing the significant undercapitalization and liquidity ,[40] the inclusion of this minimum capital base was actually a creative way of making indigenous banking arduous. This thesis argues that the findings and subsequent recommendations of the Paton Report itself accounts for the core reason that so many indigenous banks failed during this period. Particularly, the Bank Ordinance itself was in fact designed to make it harder for indigenous banks to compete in the banking market.

While banks were given three years to comply with the provisions of the Ordinance, such as the capital base requirement, it was clear that some of these banks would not be able to meet these requirements. The reason for this was primarily the logistics involved, including applying for a licence; adhering to the capital base; subjecting their banking business and banking practices to regulation. A combination of this made it near impossible for the indigenous banks to survive.

[36] *ibid*. 17 -18.
[37] Newlyn and Rowan, 1954 (n 7) 108.
[38] *ibid*.
[39] Paton Report,1948 (n 1).
[40] *ibid* 7.

4.4.1 Recommendations of the Paton Report

The report of the Committee of Enquiry identified a few issues which required further clarification and reform. Paton identified a number of areas which were in need of further clarification and reform. Such areas included clarifying the terms '*bank*', '*banker*'; '*banking business*'; the issuance of banking licence(s), and the inclusion of a minimum share capital. Many of these recommendations have been developed through the first banking law,[41] to the applicable law presently. In order to address the issues identified, Paton provided comprehensive and thorough recommendations with a Draft Ordinance to support the recommendations he put forward. The subsequent sections examine some of these provisions. The thesis analyses the contents of these provisions with the aim of ascertaining the position of banking law in the pre colonial era. This will be used to engage the research questions identified in the proceeding chapters.

4.4.2 Colonial Era Banking Law

Prior to the Bank Ordinance, the only applicable regulatory provisions were contained in the Companies Ordinance 1922 and the Stamp Duties Ordinance 1939. These legislations provided for *companies* entering into a *partnership*.[42] The implications of the provisions of the Companies Ordinance was that when there are more than 10 persons, they can carry out the business of banking since they are no required to be a registered company.

The report highlighted s.108 of the Companies Ordinance:

> '*..requires a banking company to render a half yearly statement of its liabilities and assets and copy of this statement to be in a conspicuous place in the company.*'

[41] Appendix 2.
[42] Under s.1 (1) of the Companies Ordinance 1922:

> *'no banking company or partnership consisting of more than ten persons can be formed for the purpose of carrying on the business of banking unless it is registered as a company.'*

It has already been noted by the thesis that the definition of bank, and the challenges attached, are fundamental. The Stamp Duties Ordinance defined a banker as:

> *'any person carrying out the business of banking in the United Kingdom or in Nigeria.*[43]

Although the Paton Report identified this as an issue,[44] it did not make any recommendation as to what 'banking business' constituted, and therefore did not actually address the problem. While it was conceded that it was a challenge to *define* banking business, as a result of the *different* forms that banking business could take, the report concluded that the issuance of cheques and loans could fall under this definition.[45]

The issue of definitions was not only adopted in both the Paton and Barriff Reports,[46] but a position assumed by the Bank of England[47] where it was stated that:

> *'experience elsewhere has shown that it is extremely difficult, if not impossible to contrive a satisfactory definition of 'banking' unless you have special reasons for doing otherwise, I suggest that it is necessary to say no more than that banking means the business carried on by a bank and a bank is an institution doing banking business. The effective decision can be made ad-hoc and administratively by the time a new comer to the procession is to be licenced… in the special circumstances of Nigeria, some form of definition for the limited purposes of the ordinance might still be necessary. Desirable as it may be to avoid a definition and to leave the interpretation of banking to the authority granting the licence, this may not now be acceptable in the political back ground of Nigeria. A possible compromise would be a slight variation of the interpretation used in the South African Banking Act, which still leaves some discretion to the licence issuing authority vis 'banking business' means 'business of which a substantial part consists of the acceptance of deposits of money repayable on demand by means of cheque, draft or order'.*[48]

Despite difficulties in defining 'bank', the report into consideration that in the circumstances of Nigeria, and considering its political position and local context, it was *necessary* to include

[43] Stamp Duties Ordinance, 1939, s.33.
[44] Paton Report (n 1) 6
[45] *ibid*, 10.
[46] *ibid*.
[47] This was contained in a letter from W Jackson of the Bank of England, addressed to the Colonial Office. Bank of England Archive, BEAFN OV68/2 14 and 15.
[48] BEAFN OV68 9 -16.

this definition in any law relating to banking. This was subsequently adopted, as originally recommended by Paton.[49]

Another issue that came up was distinguishing *who* was allowed to use the word bank, and which institutions were allowed to 'carry on banking businesses. This was to be established by an advisory committee, as recommended by Paton[50] for which the core objective would be to preserve the 'sanctity' of the word bank. This was thought to be more important because of Nigeria's economic condition at the time. Paton further argued:

> *'provisions of this section will put the public on its guard against the activities of a company, which may be holding itself out as a bank and whose main business is something very different from any accepted connotation of banking business…the experience in Nigeria and elsewhere had shown it to be desirable to restrict the use of high sounding titles by banks…small firms sometimes give publicity in their letter headings and advertisements to their authorised capital without mentioning the authorised and paid up capital, prominence may also be given to the names of large banks of international standing as agents and correspondents. Objectionable practices of this nature should be curbed by threat of application of this section.*[51]

Clearly, Paton's argument for restricting the use of the word bank was in the public interest, and it was deemed necessary in order to safeguard the public as a whole, against companies posing to be banks. This protection was deemed necessary to regulate effectively for the public interest, which has already been discussed in the earlier chapters, and to correlate with the initial objectives of the report.

Furthermore, the report highlighted the number of banks that were carrying on the business of banking, leading to the recommendation that for such institutions to engage in the business of banking, they should be licenced.

[49] Appendix 2. See Bank Ordinance, s.2 specifically.
[50] Draft Ordinance 1952, s.5.
[51] Paton Report. 1948 (n 1) 12-14.

> *'Roughly 120 existing companies have been registered with banking as one of the objectives. At present, any of these companies can commerce to carry on banking business if it wishes to do so.'*[52]
>
> *This was further defended when the Financial Secretary addressed the House of Representatives, asserting that:*
> *The Registrar of Companies reported that there were 145 registered companies in this country, using the word 'banking' or 'bank' in their titles..Since then, another 44 companies have been registered and while most of these are ordinary commercial firms, at least 14 are known to be operating as true banks, and many have branches throughout the country.*[53]

Additional recommendations include i) banking, or banking business as the case may be, was only conducted by companies; and ii) that companies were mandated to be registered, and have a minimum paid up capital. The recommendation was that such companies had at least £25,00 as a subscribed capital and at least £12,5000 was paid up in cash.

In engaging with the thesis' sub research question, one of the core recommendations of the Paton Report was the suggestion of a minimum share capital as required by banks wishing to engage in banking business. This is particularly important as it was identified as an area of concern,[54] which has been translated into present day banking law instrument.[55] This particular recommendation, which forms the basis of discussion for the penultimate chapter of this thesis, was approved by the Bank of England was noted that the:

> *'..the capital provisions appear adequate (the actual amount of the prescribed minimum is a matter to be determined by local experience) and should not be politically objectionable: they do not discriminate against the native banks in any way'.*[56]

[52] *ibid,* 15.
[53] House of Debates 1952 1113.
[54] Paton Report, 1948 (n 1) 11
[55] BOFIA, s.9.
[56] Bank of England Archive. OV68 2 10.

According to Paton, the intention was to protect depositors' funds. It was seen as the most sensible approach, considering the conclusion of Paton's examination of Nigerian banking at the time. Paton stated that:

> *'By the standards of the outside world, the minimum capital requirements which I suggest for local banks may appear inadequate but in fixing a low minimum I have had special regards for local conditions, in particular the low average income of the people and the need to avoid creating undue obstacles to the formation and development of Nigerian banks by Nigerians*.'[57]

This recommendation was initially not well received, because of concerns that although an amount was necessary; this was not reflective of banks that may find it difficult to adjust to this requirement. Such banks included 'farm banks.' While the report was being considered through the legislature at the time, it was argued in the House of Debates that the capital base requirement need not be applicable to *all* banks. K O Madibwe, who was a member of the house argued that:

> *'there could be no quarrel whatsoever with the minimum requirement of £12,500, but I think to apply it generally to all African banks and we cannot expect each to raise a figure of £12,5000. There could have been a differentiation between commercial banks and farm banks because if we are going to develop agriculture in this country, we must have farm banks and the capital of £7,500 would be adequate to ensure the existence of agricultural banks, but since this provision has not been made, I have no quarrel to accept the minimum requirement…when the minimum requirement has been accepted…to lay any other condition, I consider is an effort to stifle the honest activity of African banks that step is not progressive but going backwards.*[58]

Given that at that time agriculture was a developing area, it is arguable that Paton should have given more consideration to the local context and economic circumstances, and proposed a different capital base for farm banks. The nature of their work and the type of business that they would be bringing to the bank should have be a substantial consideration. Particularly, if a concession were made for these banks, it is arguable that it would have encouraged growth and banking. Madibwe's suggestion was not addressed and there

[57] Paton Report, 1948 (n 1) 11.
[58] House of Debates 1952 1119.

appeared to be no other option left than to accept the minimum as suggested by Paton. The recommendation was implemented despite these apparent concerns.[59]

While the recommendation and implementation of a minimum capital hinges on being a form of public interest regulation,[60] it could be argued that this particular section of the Draft Ordinance was designed specifically to eliminate indigenous banks within the Nigerian banking system. At the time of the Ordinance, the banks which were liquidated happened to be those which were incorporated in Nigeria and could not be compliant with the provisions, as set out in the draft Ordinance,[61] regarding the proposed minimum paid up requirements.

The Paton Report also advocated that banks engaged in banking business should be issued with a licence. Paton's justification for this was that:

> *'..in the view of the important influence which banks may exert over the financial and economic life of a country, I do not consider that mere registration as a company in accordance with the provisions of the proposed section 3 should entitle a company to commence to carry on the banking business. In addition to complying with the minimum capital requirements, it is highly desirable that a bank should be under competent management. This section is also necessary to cover the cases of roughly 120 existing companies which have been registered with banking as one of the objects. At present, any of these companies can commence to carry out banking business if it so wishes*.' [62]

While this recommendation was accepted by both the Barriff report and the colonial government, Paton was asked to further elaborate.[63] This matter was further discussed in the

[59] Appendix 2. Bank Ordinance 1952, s.3.
[60] Paton Report, 1948 (n 1) 10.
[61] *ibid*
[62] *ibid* 15.
[63] Bank of England Archive. OV68/2 16. The secretary of state wrote in his letter to the colonial administrative officer in Nigeria that:

> *'…it would be better if the Ordinance itself was more specific.'*

House of Debates[64] where the Draft Ordinance which provided the secretary of state with powers to licence banks[65] came up for particular criticism. K O Madibwe of the House stated:

> *'I can summarize this section, that after three years, the Financial Secretary can still direct that a bank already in existence, before the legislation is passed could be closed, and that clause of that provisions, is a negative provision. When a bank is already in existence, if it fulfils its requirements of necessary paid up capital and maintains an adequate reserve, and the word 'adequate' we have come to know what adequate really means is left solely at the discretion of the Financial secretary..'*[66]

As with the issues raised earlier, this matter was not debated further and was subsequently included in the Bank Ordinance.[67] The introduction of the capital base made banking difficult for indigenous banks, primarily because they were unable to raise such capital. This led to the demise of the indigenous banking system and the creation of the 1952 Bank Ordinance.

4.4.3 The Demise of the Indigenous Banking System

The demise of the indigenous banking system is to be attributed to the Bank Ordinance. Upon implementation, existing banks were given three years to meet the requirements of the provisions. Failure to meet these requirements would result in the bank being liquidated. This posed a challenge, as noted by the Nigerian Farmers Commercial Bank who were refused a licence. According to Newlyn and Rowan:

> *'..The moment the licence was refused us, it meant that we had to close down either immediately or gradually. The importance attached to the Banking Licence made customers to doubt the continuity of the Bank. They embarked on withdrawal and withdrawal…..'*[68]

Other factors that can be also described to have contributed to the failure of the Nigerian banking system, which are; (i), the general absence of good management and banking experience, as initially identified by Paton; (ii) the fraudulent banking practices of some

[64] 1952.
[65] Draft Bank Ordinance, s.6 (2)
[66] House of Debates 1952 1115-1117.
[67] Appendix 2. Bank Ordinance, s.6.
[68] Newlyn and Rowan, 1954 (n 7) 239.

banking directors, as seen in the case of the Industrial Commercial Bank and subsequently reported by Paton; and the absence of a good understanding of banking practice generally, also noted in the Paton Report.

A number of banks, including the United Credit Bank, Provincial Bank, African Credit Bank and the Standard Chartered Bank of Nigeria went into liquidation as a result of the Ordinance.[69] While a number of the indigenous banks failed, four banks, including the National Bank of Nigeria, the ACB, the Agbommagbe Bank and the Merchants Bank were able to maintain stability for a period of time, through Governmental support. In this case, the Bank Examiner issued the winding up notice, observing that:

> *'Any investigation into the accounts of the Bank revealed a very serious state of affairs. The directors are now facing four charges of stealing and along with the auditor a further charge of concurring in the making of a false balance sheet. The bank cannot, for reasons of its liabilities, persistent stealing, bad management, accounting and other difficulties, carry on its business.*[70]

The Bank of England contended that in addition to the Paton Report, the Bank Ordinance was not only an opportunity to implement a form of regulatory structure, but a step to achieve financial stability in the Nigerian banking system. Paton argued that without this law, the Nigerian banking sector would not improve.

The historical account provided here has been instrumental in the narrative of how Nigerian banking has developed. It has shown that the development is the result of a number of factors, including the economic situation at the time and the need for a regulatory infrastructure by creating banking law. The subsequent section examines the laws after the 1952 Ordinance.

Part III

[69] Bank of England Archive, BEAFN, OV68/3 3.
[70] *ibid*

4.4 Bank Regulatory Law

4.4.1 The Bank Ordinance 1952[71]

Save for the requirements of the Companies Ordinance and the Stamp Duties Ordinance, the introduction of the Bank Ordinance represents a significant benchmark, as it signifies the development of Nigeria's banking regulatory system and forms the basis of both a regulatory and supervisory framework for Nigerian banking.

The Ordinance addressed six fundamental problems that plagued Nigerian banking. The first, the minimum capital base requirement.[72] The second, banking business to be carried out by companies with a prescribed capital base requirement.[73] The third, institutions permitted to use the term 'bank' in their titles.[74] The fourth, overall supervision[75] (in the absence of a central bank or higher institution) of banks generally. The fifth, establishing requirements of bank licensing. [76] The sixth, the registration of banks wishing to carry on business in Nigeria.

4.4.2 The Bank Ordinance 1958

The 1952 Ordinance was successful in instilling some order within the banking environment at the time, by meeting the requirements of Nigeria's local situation at the time. However, when the position and complexities of the banking sector changed, the 1952 provisions were deemed inadequate. This Ordinance was repealed and replaced in 1958.[77] Substantial provisions of the Ordinance remained, including the share capital requirement. Some of the challenges of the 1952 Ordinance, were addressed by the appointment of a Bank Examiner,[78]

[71]Bank Ordinance, 1952.
[72] Bank Ordinance 1952, s.6 (1) - (2).
[73] Bank Ordinance 1952, s.3 (1) -(2).
[74] Bank Ordinance 1952, s.5.
[75]There were no specific provisions that discussed *supervision*, but the issuance of a licence was by the Financial Secretary. Aggrieved persons would appeal to the Governor.
[76] Bank Ordinance 1952, s.5 (1).
[77] Bank Ordinance 1958, s.23 repealed the 1952 Ordinance.
[78] Bank Ordinance 1958, s.11.

and the specific requirements of loans.[79] The role of the Bank Examiner would later evolve into the creation of the Central bank. This inclusion demonstrates that the need to develop banks had not only evolved, but included the need to regulate with more accuracy and an enhanced framework.

4.4.3 The Central Bank Ordinance 1958

During the Colonial Era, Nigeria did not have a Central Bank. The central monetary authority which governed banking activity was the West African Currency Board, which was created in 1912. The objective of the board was to provide for and to control the supply of currency to the African Colonies and Protectorates. The four British West African territories under the Colonial rule were The Gambia, Sierra Leone, The Gold Coast (Now Ghana) and Nigeria.

While West African Currency Board could be argued to assume the position of a central bank, its functions did not exceed that of a bureau de change.[80] The board had no authority to create and make credit available, and was therefore not practically able to fulfil the functions of a central bank or a regulator for monetary supply.

The Central Bank ordinance established and recognized the CBN as a:

'*Corporate body capable of suing and being sued*'[81]

Although a substantial portion of the Ordinance dealt with the objectives,[82] operation/management[83] and general banking powers,[84] there were other sections which addressed more technical aspects introduced in the Bank Ordinance of 1958. The Ordinance also implemented specific restrictions with regards to bank notes and coins. For example,

[79] Bank Ordinance 1958, s.7.
[80] Chibuke Uche, 'Banks and the West African Currency' [2004] Money in Africa 49-53.
[81] Central Bank Ordinance 1958, s.3 (2); CBN Act 2007, s 1(2)
[82] Central Bank Ordinance 1958, s.4.
[83] Central Bank Ordinance 1958, s.28.
[84] Central Bank Ordinance 1958, s.29.

s.26[85] places a caveat in terms of the restriction of the amount of notes and coins which can be in circulation over a period of five years. S.26;

> *'The value of the reserve specified in section 25 shall—*
> *(a) for a period of five years from the coming into operation of section 18, be not less than the aggregate of an amount representing sixty per cent of the Bank's notes and coins in circulation together with an amount representing thirty-five per cent of the Bank's other demand liabilities;*
> *(b) after five years from the coming into operation of section 18, be not less than forty per cent of the aggregate of the Bank's notes and coins in circulation and other demand liabilities.'*[86]

The core variance between the two instruments however is that the Central Bank Ordinance as the main instrument at the time had *all* the main banking related provisions contained. The Central Bank Act is concerned more with management and operational aspects, although there are some provisions which relate directly to banking regulation. General everyday banking related provisions are contained in another instrument, BOFIA.

Part IV

4.5 The Establishment of a Central Bank for Nigeria

The creation of the Central Bank was not a smooth establishment. The Loynes Commission was established by the Colonial Government in 1956,[87] to report on the establishment of a central Bank for Nigeria. The Fisher Report, which was created in 1953, was headed by Justin Fisher who was the Adviser to the Bank of England.[88] The report was issued in 1953 and particularly, it investigated if the creation of a central bank would be beneficial to the Nigerian banking system. Fisher reported that:

> *'..It would be inadvisable to contemplate the establishment of a central bank at the moment. It would be difficult to establish a Central Bank which could operate satisfactorily in such a narrow field. Moreover, it is hard to see how a Central Bank*

[85] Central Bank Ordinance 1958, s.26. See also; Tunde Ogowewo, and Chibuke Uche, '(Mis) Using Bank Share Capital as a Regulatory Tool to Force Bank Share Capital in Nigeria', [2006] 50 (2) *Journal of African Law* (Ogowewo and Uche, 2006) 164, 161-186.
[86] Central Bank Ordinance 1958, s.26 (a).
[87] Eme O. Ama, *Federal Government Nigeria*, (University of California Press 1964) 222.
[88] The Fisher Report 1953; See also, Chibuke Uche, 'Bank of England v INRD: Did the Nigerian Bank Deserve a Central Bank?'[1997] 34 (2) Explorations in Economic History 220-241.

> *could function as an instrument to promote the economic development of the country. But that is not to say that a Central Bank would not be a useful coping stone to the banking system at a future time…'*[89]

This conclusion was reached after a careful examination of the Nigerian system, taking into account the impact of the 1952 Ordinance on banking generally. These findings were also based on the economic development at that time. A particular concern was the absence of a securities market, and the potential impact on the Central Bank, should it be established.[90] These concerns were born out of the need for the Colonial Government to create a stable banking infrastructure before engaging in the creation of a central bank. To further support his recommendation, Fisher contended that:

> *'To be little use to establish a Central Bank, if it could not be operated satisfactorily except only in a very restricted field..'*[91]

After much debate, the Central Bank was established in 1958.

One of the core responsibilities of central banks is to ensure stable economic growth, particularly in developing economies. It is also responsible for the creation of monetary policies. 'Money', plays a key role in an economy and in finance. 'Money' has two main purposes, to act as a means of trade and to represent a *value*. Many will state that the key objective of central banks is the maintenance of monetary stability.[92] Thus, if money represents a value and can be used as an instrument of trade, monetary stability must remain an important objective.

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[89] The Fisher Report, 1953 (n 88) 8.

[90] The Fisher Report, 1953 (n 88) . 13. Fisher reports it would be better:

> '*to build a financial structure from the base upwards, rather than try and build from the top downwards'*.

[91] The Fisher Report 1953 (n 88) 8

[92] Sylvester C.W. Eijffinger and Jakob de Haan, 'The Political Economy of Central Bank Independence,' [1996] Princeton Special Papers in International Economics 19, 1-82. (Eijffinger and Jakob de Haan, 1996)

A central bank also acts as the lender of last resort, but more importantly, it has a duty to *promote* the concept of financial stability within the economy. The implementation and effectiveness of good monetary policies is only possible through a well-organized and well defined system. The creation of the Central Bank of Nigeria was a means to enhance this.

4.5.1 The CBN Act 1991 (2007) and the Regulatory Objective

The Loynes and Fisher Reports stated that the rationale for the CBN was to create a regulatory body charged with the regulation of banks in Nigeria. However, while this is the implied role, the term 'regulator' is not expressly mentioned in the CBN Act, nor is it mentioned in the objectives.[93] The CBN is also responsible for overseeing general banking practices, through the CBN Act and BOFIA. This makes the institution an autonomous body.[94]

This thesis submits that the autonomy of the CBN is non negotiable because of its regulatory and supervisory role. A main reason for this is to guarantee that policy decisions enacted will be in the interest of the financial system and not as a result of political influence. While there is no definite or collectively acknowledged agreement on the definition of a Central Bank's independence, there are some notable characteristics.[95]

The CBN Act provides for the general objectives and responsibilities of the Central Bank; i) to ensure monetary and price stability; ii) issue legal tender currency in Nigeria; iii) maintain external reserves to safeguard the international value of the legal tender currency; iv) to act as

[93] CBN Act 2007, s.2.
[94] Eijffinger and Jakob de Haan 1996 (n 92) 2.
[95] *ibid*.

the lender of last resort; and v) to act as banker and provide economic and financial advice to the Federal Government.[96]

In addition, the Act also confers exclusive powers and duties on the CBN, which include (i) the determination of the naira exchange rate,[97] (ii) the issuance of notes and coins; [98] (iii) the printing of notes and minting of coins,[99] (iv) the publication of the monetary policy rate, [100] (v) acting as banker to states and local governments, [101] and (vi) acting as banker to other banks in Nigeria.[102]

The CBN also has other objectives including:

> *'with the sole aim of ensuring high standards of banking practice and financial stability through its surveillance activities, as well as the promotion of an efficient payment system'.*[103]

This objective is not properly defined, but it may be deduced that it includes ensuring corporate governance within banks in the system[104] and an active role in examinations within banks[105] to ensure that these institutions are financially healthy, and do not pose a risk to the financial system.

[96]Note, these objectives were initially listed in Central Bank Ordinance 1958, s.4, as this was the enabling act for the creation. However, as a result of the promulgation of this act, the same objectives have been transferred to the present CBN Act 2007, s.2 (a) – (e).
[97] CBN Act 2007, s.16
[98] CBN Act 2007, s.17
[99] CBN Act 2007, s.18
[100] CBN Act 2007, s.35
[101] CBN Act 2007, s.39
[102] CBN Act 2007, s.41
[103] Available at: <http://www.cbn.gov.ng/AboutCBN/> (Accessed 13th April 2017)
[104] *ibid*. Particularly, 'ensuring *high* standings of banking practice.' It should be noted however that 'high' is not defined so there is no means to determine what could be deemed as adequate.
[105] *ibid*. 'through its surveillance activities'. It should be noted that there is no means of defining how this is achieved.

4.5.2 BOFIA 1991 (2004)

The core instrument for banking business in Nigeria is BOFIA. Under BOFIA, the CBN Governor is enabled to carry out the tasks of the CBN, including executing policies;[106] appointing directors;[107] carrying out general banking business;[108] placing an embargo or restriction on banking activities,[109] assuming control of failing banks,[110] increasing capital base requirements,[111] and other matters pertaining to Nigerian banking.[112] This Act thus brings the regulation and supervision of all general banking business under the control of the Central Bank of Nigeria.

BOFIA is a result of previous developments.[113] However, although this present Act is an improvement, there are some legislative errors that have become a challenge for the Nigerian Courts. A number of lacunas have become problematic as they directly relate to the ability of the CBN to regulate adequately. In particular, the wording of s.35 poses a challenge:

> *1) Where a bank informs the Bank that;*
> *(a) It is likely to become unable to meet its obligation under this Act; or*
> *(b) It is about to suspend payment to any extent; or*
> *(c) It is insolvent; or*
> *(d) Where, after an examination under section 33 of this Act or otherwise howsoever, the Bank is satisfied that the bank is in a grave situation as regards the matters referred to in subsection 33(1) of this Act.*
> *The Governor may by order in writing exercise any one or more of the powers specified in subsection (2) of this section.'*

The challenge presented is with sub-section (d) of part 1. It is confusing, as 'the Bank' would only act *when* a bank has informed the CBN that it is unlikely to meet obligations stipulated in the Act. The question raised is how often the CBN conducts examinations, since the onus is on the bank to inform it if unable to meet its obligations. With this drafting, the CBN is not

[106] BOFIA 2004, s.57(1).
[107] BOFIA 2004, s.31.
[108] BOFIA 2004, s.2 and s.62.
[109] BOFIA 2004, s.20.
[110] BOFIA 2004, s.35.
[111] BOFIA 2004, s.9.
[112] BOFIA 2004, s.1 (2).
[113] Bank Ordinance 1952; Bank Ordinance 1958; The Banking Act 1969.

mandated to carry out any bank examination, but this should be a form of good practice on the part of the CBN. Regular bank examination should be an embedded regulatory practice, particularly in the light of Nigeria's history of banking failures.

Another challenge vis-à-vis the application of BOFIA is the *general* powers it gives the apex bank. Indeed, a central bank should have powers, but this should be with some caveat in place. S.31 grants powers to appoint to the Directors of banking supervision as well as other examiners. The supervisory powers contained in this section include the power to make a special examination, the identification of a failing bank(s) and for the control of such a bank. Furthermore, it gives power to the apex bank to revoke the licence of a bank.

The appointed director,[114] (under the instruction of the governor) is charged with the responsibility of carrying out supervision of banks and other institutions.[115] While BOFIA enables the CBN to regulate the activities of Nigerian banks, the power to do so is not clearly defined. This is problematic for a number of reasons. First, there is no indication of the qualification of such a director. Secondly, there is no indication to determine what 'adequate supervision' is, with regards to the inspection of the books, and there is nothing to measure what this 'duty' covers.

The above has examined the creation of the CBN, and its role. It concludes that the role has significantly developed since its creation, but particularly, that the provisions do not reflect this. It has further examined the development of banking law provisions, and the challenges it currently presents. The subsequent sections examine the idea of autonomy and attempts to clarify how this aligns with the role of the CBN.

[114] BOFIA 2004, s.31 (1).
[115] BOFIA 2004, s.31 (2) (a) - (c).

4.5.3 The Nigerian Failed Banks Decree 1994

Broad Bank of Nigeria and the Republic Bank Ltd had their banking licences suspended and this added to the turbulent year for banking in 1994 in Nigeria. Other banks including Alpha Merchant, Financial Merchant Bank, United Commercial Bank and Capital Merchant Bank had their banking license revoked. The Central Bank obtained an order from the High Court to take possessions of other banks, which included African Continental Bank, New Corporative Bank and Commercial Bank, and the New Nigerian bank. The number of banks which were adjudged to be distressed rose from 10 to 42 during this period, exclusive of the banks which were closed.[116]

As a result of the above banking crisis in 1994, the Federal Government promulgated the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Decree in 1994. Analysis of the bank failures indicated that the banks and bankers played no part in the Nigerian banking crisis, although it was initially presumed that fraud played a substantial role.[117] Instead, it was argued that the culpability should be directed to the Government and regulatory authorities, who created an unstable environment which was the catalyst for fraud itself.

The Decree specified the creation of military style tribunals, with powers to try offences under the Decree and other legislations applicable to Nigerian banking.[118] It was promulgated to demonstrate the determination of the Nigerian Military Government to prevent people from escaping liability and taking advantage of lacunas within the legal system, as well as to support the work of the NDIC. The tribunal had powers to lift the corporate veil of a body,

[116] CBN Annual Report, 1994.
[117] Chibuke Uche, 'The Nigerian Failed Banks Decree: A Critique' [1996] 11 (10) Journal of International Banking Law 436-441 (Uche, 1996)
[118] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994, s.3

where it was considered necessary to bring any accused members to justice. The Decree also provided that where the assets of a debtor company were inadequate to offset the company's debt, the personal property of the directors of the company in question could be sold and the proceeds used to offset the outstanding debt.[119]

It was argued that in promulgating the Decree, the Government missed the issue at hand.[120] While fraud within the banking industry was part of the crisis, there were other factors of more substantial importance, including the general macro-economic and political instability. As such, the crisis itself should not have been seen to be the operating cause, but rather, the absence of a steady political and conducive environment which would have been instrumental in facilitating sustainable banking. Further, he argued that there were some government policies which had a direct impact in fueling financial system distress, including inefficiency, and at times, incompetency on the part of the regulatory authorities.[121]

Part IV

4.6 Central Bank Autonomy

4.6.1 Examining the CBN Autonomy

Central bank autonomy and independence are used interchangeably in literature, and the notion has become an important cause of academic debate.[122] In particular, the literature has focused on the reasons *why* central banks need to have this autonomy. A central banks' independence can be judged by what the law does and does not permit the institution to do.[123]

[119] Failed Banks (Recovery of Debts) and Financial Malpractices Decree 1994, s.15
[120] Uche, 1996 (n 117)
[121] *ibid.* 436
[122] Kenneth Rogoff, 'The Optimal Degree of Commitment to an Intermediate Monetary Target' [1985] 100 (4) Quarterly Journal of Economics 2279- 89
[123] CBN Act 2007, s.1.

In addition, the level of autonomy can be measured against the regulatory responses/policies which have been implemented.

Scholars have argued *for* central bank autonomy[124] in the context of its role and independence following the pursuit of financial stability. This argument is based on the fact that institutions must be allowed to make decisions free from governmental influence and solely in the interest of the economy. For instance, it was argued that during the global financial crisis of 2007, many central banks were no longer primarily concern with *price* stability, but with financial stability.[125]

Autonomy can be categorised into three tiers. The first, (a) its independence as an institution, (b) the influence of the sitting CBN Governor; and (c) the legal framework supporting the decisions made.

In Nigeria, the apex bank is often considered to be an autonomous body, because of the responsibility attributed. The reasons attributed to this include the role of the office of the Governor in the regulation of banks. The importance of this has been captured in Chapter two of the thesis.

The Governor of the CBN is nominated by the President, subject to confirmation of the National Assembly,[126] which cannot truly guarantee independence with regards to some of the decisions made, nor can it guarantee that the decisions made do not have an element of

[124] Rose Lastra, 'Central Bank Independence and Financial Stability', Available at: < http://www.bde.es/f/webbde/Secciones/Publicaciones/InformesBoletinesRevistas/RevistaEstabilidadFinanciera/10/May/Fic/ref0318.pdf last accessed 19 May 2017. (Lastra, 2009)
[125] Lastra, 2009 (n 124).
[126] CBN Act 2007, s.8 (1).

political influence. The nomination by the President may affect the perception of impartiality in decisions made by the CBN Governor. It is possible to imagine that such decisions are not solely based on the promotion of financial stability as anticipated by the CBN Act. The question therefore is how the CBN Governor is able to adequately balance the independence of the office and separate this from the *institutions* independence. The independence of the institution and how best it aligns its decision making with statutory provisions is therefore the first tier.[127]

The second (b), is the independence of the institution with regards to exclusive decisions pertaining to prudent banking supervision and its position considering certain policy decisions. The second tier builds on the statutory support available to a central bank and the decisions it makes in the interest of 'supervision' of the industry.

The third (c) is the relationship between the idea of transparency and independence as an institution with regards to policy making decisions. The second chapter of this thesis has highlighted the importance of checks and balances, through the examination of the regulatory models of the comparator jurisdictions. This raises a conflict, in terms of determining factors that are best shielded from the public and those which should be revealed to ensure transparency and accountability.[128]

The concept of accountability may be viewed from two perspectives. The first is from the standpoint of the law. From this perspective, it should be expanded to ensure the inclusion of 'judicial review', particularly with regards to the acts of the institutions decisions. The second,

[127] Lorenzo B Smaghi, *Central Bank Independence from Theory to Practice*, Good Governance and Effective Partnership, Budapest, (Hungarian National Assembly 2007).
[128] Rose Lastra, 'Central Banking and Banking Regulation' FMG London School of Economics 1996.

form the perspective of performance, in terms of how the institution is able to meet its core objectives. Here, performance accountability is easier to achieve when there is a single goal, as opposed to some collective objectives.

the issue of Central bank autonomy/independence is not a new debate in Nigeria.[129] It has been extensively discussed on both an academic and political level. The general consensus is that in its present state, the CBN is capable of implementing decisions which affect banking regulation, such as the nationalising of three banks, and are in the interest of Nigeria's banking industry as it competes globally.[130]

4.6.2 The Framework of CBN Autonomy

As a starting point, the thesis examines the infrastructure of the CBN in order to consider the arguments for autonomy. The task of regulation and supervision is primarily carried out by the CBN, although NDIC has some supervisory duties.[131] In other countries, especially that experience high banking failures, the trend among these economies is to separate the act of regulation and supervision, in order to achieve and maximise results. [132]

4.6.2.1 Legal Framework

The autonomy of the Central Bank can be found under two provisions: s.53 (1),[133] and s.57 (1).[134]

Under s. 53 (1) BOFIA, the provisions state:

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[129] Babatunde Afolabi and Susan Abumere, ' Effects of Removal of Central Bank Autonomy on the Nigerian Economy' 2016 Available at SSRN: https://ssrn.com/abstract=2786527 last accessed 20th April 2017 (Afolabi and Abumere, 2016)

[130] Professor Charles Chukwuma Soludo – CBN Governor between 29th May 2004 – May 2009.
Charles. C Soludo, 'Consolidating the Nigerian Banking Industry to Meet the Development Challenges of the 21st Century', *Bank of International Settlement Review* 43/2004 Basel, Switzerland BIS. Available at: http://www.bis.org/review/r040727g.pdf. last accessed 20th June 2017.

[131] BOFIA 2004, s.36.

[132] Ogowewo and Uche, 2006 (n 85) 165.

[133] BOFIA 2004

[134] BOFIA 2004.

> *Neither the Federal Government, nor the Bank, nor any officer that Government or Bank, shall be subject to any action, claim or demand by or liability to any persons in respect of anything done or omitted to be done in good faith in pursuance or in execution of, or in connection with the execution or intended execution of any power conferred upon that Government, the Bank or such officer, by this Act.*[135]

While the above provisions are not intended to *oust* the jurisdiction of the court, it is a good indication of independence. It also makes it difficult for aggrieved parties to challenge the actions of the CBN. The position on *ousting* was clarified in the case of *Savannah Bank v CBN*.[136]

In the case of *Savannah*, in which the Court of Appeal held that in order to allege bad faith, the onus was on the bank alleging. The problem with this ruling is that the CBN may implement policy decisions which result in litigation, but the onus is not on the institution to prove that it acted within the confines of the law.

The second provision is S. 57 (1) which states:

> *'The Governor may make regulations published in the Federal Gazette to give full effect to the objects and objectives of this Act.'* [137]

The above provision empowers the CBN to make regulations or guidelines in order to facilitate the object and objective of BOFIA, limited to the objectives of the Act. This permits the CBN to carry out regulation of the banking system through the use of soft law, since such regulations may be giving full effect to the objects and objectives of the Act. This further highlights the issue of autonomy, given that there is no clear indicator of what may constitute a policy or regulatory implementation.

[135] BOFIA 2004, s.53 (1).
[136] [2012] 1 BFLR.
[137] BOFIA 2004, s.57 (1).

4.6.2.2 Status Autonomy

As already noted, the CBN has undergone several changes. However, the process of enhancing the powers of the CBN was interrupted as amendments were made in 1997. The CBN was subject to informing the President on matters that related to monetary policy. It is clear that being subject to another body undermines the principles of independence. The adjustments completely removed the autonomy that the 1991 Act had provided, placing the CBN back under the watchful supervision of the Ministry of Finance.

The CBN started to regain some of its independence when there was a further amendment in 1998.[138] However, the biggest alteration came with the 2007 act, which completely repealed the 1991 CBN Act and all the amendments. The Act further confirmed its autonomy with regards to executing its functions as prescribed,[139] and in line with the provisions of BOFIA.

By virtue of the Act, the CBN is statutorily empowered to carry out its responsibility in an independent manner, which is free from influence.[140] While the statutory measures in the CBN Act were designed to validate the regulatory decisions as made by the CBN, the Constitution of the Federal Republic of Nigeria (CRFN)[141] contains a specific provision in the case of conflicting laws.[142] This means that the autonomy of the CBN is not guaranteed. In addition, although it is an independent institution, the statutory instruments designated remain subordinate to another law.[143]

[138] The CBN (Amendment) Decree No. 37 of 1998. This repealed No.3 of 1997 and gave the CBN a small degree of autonomy to carry out operational requirements.
[139] CBN Act 2007, s.1 (3).
[140] CBN Act 2007, s.8(1).
[141] CFRN 1999.
[142] CFRN 1999, s.1 (3).
[143] CFRN 1999.

4.6.2.3 Policy Making and Regulatory Autonomy

Policy making is a fundamental and core function of an apex bank, highlighting the importance of its autonomy. The CBN is able to make its policies in line with the basic objectives set out in the Act,[144] and it may be helpful to use the consolidation policy to illustrate. This deals with the debate of autonomy in two ways. The first: the decision to use consolidation as a means to invoke bank reform not only has an effect on the economy, herein the policy autonomy, it also affects the outlook on Nigeria as a whole to other economies.

The second, the decision to implement the consolidation as the choice regulatory policy, reinforces the concept of central bank autonomy, given that there was no consultation/decision making process, pre consolidation. Within the literature, there is no evidence to suggest that the banking consolidation of 2004 followed any particular process; neither is the literature indicative of a consultation period. Additionally, save for the speech delivered by the then Governor, there is no evidence to show whether any stress tests were undertaken to determine the suitability or sustainability of Nigerian banks.

4.6.2.4 Operational Autonomy

In terms of its operation, neither the CBN Act nor BOFIA has specific provisions to deal with the dismissal of bank staff. This, arguably, presents a challenge for the financial institutions as well as the CBN. This means that bank staff may be dismissed without going through a formal process.

The dismissed bank CEO's from the consolidation era were simply removed from their roles without recourse to any particular process. The only step taken was the referral of these

[144] BOFIA 2004, s.57 (1).

matters to the Economic Financial Crimes Commission (EFCC) for further examination. In the case of the former CEO, Cecilia Ibru,[145] the bone of contention was not whether she had engaged in fraudulent activity,[146] but that a particular process was not followed in order to remove her . The BOFIA and the CBN Act do not provide a systemic process, either in provisions or through disciplinary action. The only remedy for aggrieved persons is to institute an action in court. The court with jurisdiction to deal with employer and employee issues is the National Industrial Court.

4.6.3 Consequences of removing the CBN Autonomy

This thesis would advocate for the removal of the CBN's autonomy, particularly because the idea of accountability and transparency are fundamental features of an effective regulator. However, there are a number of areas which would be affected.

4.6.3.1 Reduction of Deficit

The removal of the CBN's autonomy would likely have an impact on the reduction of deficit; and its function as the lender of last resort. The removal of the autonomy of the CBN, or any central bank, would have an impact on its ability to make judgement calls, for example on how best to address a systemic crisis, which in its opinion, are favourable for both the economy and the government.[147]

[145] Cecilia Ibru was the CEO of Oceanic Bank. See also, *Cecilia Ibru v Economic Financial Crimes Commission* 2010 (Unreported).

[146] Ms Ibru pleaded guilty to three counts of fraud and mismanagement. See: < http://www.bbc.co.uk/news/world-africa-11506421> last accessed 15th April 2017 .

[147] Patrick Adeyeye, Oluwasola Ayorinde and Tunde Ajunaj, 'Effects of the Proposed Removal of CBN Autonomy on The Nigerian Economy: An Informed Analysis', [2013] 1(2) International Journal of Business and Management Review 83, 79-88 (Adeyeye, Ayorinde and Ajunaj, 2013).

4.6.3.2 Lender of Last Resort

The CBN's role as the lender of last resort is embedded within the CBN Act.[148] The importance of this function is the ability to make judgement call decisions on issues that have the potential to affect the economy and the position of the banking industry, both locally and globally. In the UK, as part of the regulatory response to the global financial crisis, the Special Liquidity Scheme was introduced *after* the Northern Rock was nationalised. The objective of the scheme was to enhance liquidity in the banking system, by permitting banks to exchange their high mortgage securities for UK Treasury bills, for a period of up to three years.[149]

In order to understand the lender of last resort role of the central bank, particularly in instances of bank crises', Lastra[150] states that there are four pillars which serve as its theoretical basis; first, the financial assistance which should be made available to banks that find themselves in a position of being illiquid but solvent. The second is the role of the central bank, to lend freely to banks, as and when required, with the ability to charge a high interest rate. The third pillar is that the central bank should be able to accommodate any bank that is able to present 'good'collateral which is valued at a price lower than 'pre panic prices'.[151] It should be noted that 'good' in this instance is subjective and a matter for the bank to decide. The final pillar is the central bank being able to exercise its discretion on deciding if it will provide assistance.[152]

[148] CBN Act 2007, s.42 (2):
[149] Rosa Lastra, 'Northern Rock, UK Bank Insolvency and Cross-Border Insolvency', [2008] 9 (3) Journal of Banking Regulation, 163, 165-186 (Lastra, 2008)
[150] Lastra, 2008.
[151] *ibid*.
[152] Lastra, 2009 (n 124) 62.

The removal of this function could have two potential impacts. The first, it will allow a full account of an instance of banking failure, by eradicating the ability to disguise a case of supervisory failure, with a bailout of banks procedure. Secondly, where the apex bank has fallen short in terms of its supervisory function, it will be clear. The removal of the lender of last resort function means the CBN would be under no obligation to bail out *any* bank whose financial health is called in to question. However, it should be noted that the removal of this also handicaps the apex bank to save any bank which may still be redeemable.

During the 2009 Nigerian banking crisis, the CBN used its position to make a liquidity injection to distressed banks[153] to prevent further impact to the system as a whole. The proposed removal of this function *may* present a challenge in this regard.

4.6.4 Advantages of Removing the Autonomy

There are three main reasons to advocate the removal of CBN autonomy. First, the removal guarantees transparency for all three branches of the financial system, including consumers and depositors. It removes the ability of the CBN to act as judge and jury in the decision making process. The previous examples have shown that there is no identifiable process, either in law or in practice with regards to regulatory decisions.

This lack of an identifiable process moves the discussion to the main argument for the removal of autonomy. Historically, the CBN has adopted a culture of focusing solely on banking supervision, considering this to be the main reason for the several banking crises and failures. [154] Banking supervision is of course a fundamental responsibility of the CBN , but

[153] CBN Act 2007, s.30 (b).
[154] Ogowewo and Uche, 2006 (n 85).

this emphasis means that the apex bank negates the primary objective, which is to ensure micro- economic stability. [155]

The introductory chapter of this thesis has discussed how within the literature, it is argued that bank supervision is over regulated in Nigeria. The issue of bank capital, a concept introduced by the Bank Ordinance and transferred to the present instrument, indicates this has not changed.

The assumption that banks are the cause of every failure can be traced to when banks were first created in Nigeria, as well as the generally poor understanding of what constitutes adequate and prudent regulation.

The emphasis placed on bank supervision can be explained by two reasons. The first, that on the part of the CBN, the emphasis placed on banking supervision validates its role as a regulator and justifies it as a form of regulation. The second that the reduction of banks in Nigeria makes the task of supervision easier.[156]

Part V

4.7 Conclusion

This chapter has provided a historical overview of banking exchange pre-colonial Nigeria and examined the position since the introduction of the CBN. It has also examined the development of banking regulation, through a judicious examination of the Paton Report which is influential in shaping present Nigerian banking law. The chapter concludes that the development of Nigerian banking law has been influenced by the need to eradicate the period

[155] *ibid*.
[156] Ogowewo and Uche (n 85) 185.

of the ‘free banking era’ and attain a firmer grip on regulating banking activity. The development, it is submitted, has been an amalgamation of legal, political and administrative factors. The next chapter examines the research questions in order to ascertain the position of the law on the regulation of banks, and bank licence revocation.

Chapter Five

Examining Nigerian Banking Law

Part I

5.1Introduction:

Very little is written on the role and the powers of the CBN as the apex regulator of the Nigerian banking system. This may be because Nigerian courts do not have a cohesive understanding of this role, coupled with rulings which appear to endorse the regulatory decisions of the CBN. It may also be because scholars focus on the issues coming out of the regulatory responses as implemented by the CBN.

The aim of this chapter is to draw final conclusions to the research questions. Given the earlier examinations of the global and Nigerian financial crisis, the objective is to discuss the 2004 regulatory reform exercise, and the role of the CBN on bank license revocation. The concluding section extensively discusses the need to reform Nigerian banking law.

Part II

5.2 The Legal Framework of Mergers and Acquisitions in Nigeria

The CBN only approved the use of Merger and Acquisitions ('M&A') in order for banks to achieve the banking consolidation.[1] The process for creating new business combinations in Nigeria is subject to further regulation, separate to the provisions of Nigerian Banking Acts. There are also specific regulatory agencies, which play an active role in M&A programmes, which include the CAC, SEC, FHC, Nigerian Stock Exchange ('NSE') and the CBN. The laws that regulate M&As include; ISA,[2] The Rules and Regulations of SEC,[3] and CAMA[4].

[1] The CBN made it very clear that the only approved method of achieving this *recapitalization* was through a mergers and acquisitions programme. The CBN published guidelines to this effect. See: CBN Publication on Merger Procedure. Available at: < http://www.cenbank.org/out/publications/bsd/2005/revised%20procedures%20manual%20for%25mergers-takeovers.pdf> Accessed 15th December 2015; Tunde Ogowewo and Chibuke Uche '(Mis) Using Bank Share Capital as a Regulatory Tool to Force Bank Consolidations in Nigeria' [2006] 50 (2) Journal of African Law 161,161-186 (Ogowewo and Uche, 2006)

[2] ISA 2007.

5.2.1 Mergers and Acquisitions

The term 'corporate restructuring' is a term used to identify the reshuffling or reorganization of a business/company. Gaughan[5] defined this as:

> *'..Referring to asset selloffs such as divestitures. Companies that have acquired other firms or have developed other divisions through activities such as product extensions may decide that these divisions no longer fit into the company's plans. The desire to sell parts of a company may come from poor performance of a division, financial exigency, or a change in the strategic orientation of the company.'*

The restructuring of the banks come under this bracket, since they are also companies. Corporate restructuring[6] may be used as a means to address company law matters, eradicate business distress and enhance profitability.[7]

5.2.2 Clarifying the Terms

'Merger' and 'Acquisition' are terms used interchangeably, but the outcomes are different.[8] A *merger* occurs when two organizations come together to form a new entity. A merger, also referred to as an amalgamation, which simply means that the incoming company assuming the name of the other.[9]

In the case of an *acquisition*, an existing company is bought, or *acquired*. In this instance, there is no *new* creation.[10] Defining an acquisition is slightly more challenging as it may be placed into any context. The concept of acquisition is associated with taking *control* of a

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[3] Rules and Regulations of the SEC (Nigeria) 2013 Available at <http://sec.gov.ng/files/SEC%20Consolidated%20(JUNE2013)%20SIGNED(WEBSITE)%20(1).pdf> (accessed 1 May 2017)
[4] CAMA 2004.
[5] Patrick A. Gaughan *Mergers, Acquisitions, and Corporate Restructurings* (John Wiley, 2007) 19; Afolabi, Elebiju, 'The Investment & Securities Act of 1999: An Overview of Anti-Trust Considerations in Regulation of Mergers in Nigeria', [2001] 22 (1) International Company and Commercial Law Review 116 - 121.
[6] Brenda Hannigan, *Company Law*, (4th Edition, Oxford University Press, 2016) 716; Nelson Ogbunaya, *Essentials of Corporate Law Practice in Nigeria* (Novena Publishers, 2010) 579 (Ogbunaya, 2010)
[7] Michael Pomerleano and Williams Shaw, *Corporate Restructuring: Lessons from Experience* (World Bank Publications, 2005) 209.
[8] Tunde Ogowewo, 'A Critique of the Statutory Procedures for Effective Corporate Structural Change in Nigerian [1996] 1(2) Lawyers' Bi-Annual
[9] Ogbunaya (n 6) 364
[10] *ibid*

company. In many instances, a larger company 'acquiring' a smaller one. *Control* has been defined to mean a person 'owns more than one half of the issued share capital of the company'.[11] An acquisition can also transpire when one company seeks to add value to its own company by acquiring another one.

A business may consider M&A for a number of reasons. Examples include the enhancement of pre-existing management expertise. It may be to *incorporate* a particular set of skills from the incoming company.

Other reasons may be to diversify risk. This may prove to be an attractive option for the following reasons. First, it may be to prevent potential failure by redistribution and diversifying the risk. Secondly, companies may invest in a merger to maximize profits. Finally, this may be an option to avoid absolute extinction of a company.

Gaugh[12] has defined a merger as

> *'of the term corporate restructuring usually are referring to asset selloffs such as divestitures. Companies that have acquired other firms or have developed other divisions through activities such as product extensions may decide that these divisions no longer fit into the company's plans. The desire to sell parts of a company may come from poor performance of a division, financial exigency, or a change in the strategic orientation of the company.'*

ISA,[13] describes a merger[14] as:

> *' the amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or any part of the undertakings or interest of one or more companies and or one more bodies corporate.'*

[11] Companies Act 2006.
[12] Patrick A Gaughan, *Mergers Acquisition and Corporate Restructurings* (25th Edition John Wiley & Sons, 2010) (Gaughan, 2010)
[13] ISA 2007, s.119

5.2.3 The M&A Experience in Nigeria

Nigeria's first M&A for a public company was in the early 70's.[15] In 1972, three companies, namely Re Bendel Co Ltd, Bendel Intra City Bus Service Ltd, and Kalife Ltd[16] came together to form 'Bendel Transport Service'. In the same year, the SEC was created, which introduced regulation in this area[17] and supervised the merger process of *Lipton Tea Ltd Nigeria*.[18]

5.2.4 The Process for M&A in Nigeria

There is a three stage process which banks must adhere to in any merger. These are the Pre-Merger Consent, Approval-in-Principle and the Financial Approval.[19] The FHC plays a part in this process as it is authorised by the court. Throughout the stages of the merger, the CBN and SEC play a supervisory role, to prevent business combinations which may result in unfair competition or a monopoly.

The ISA provides that a merger or acquisition may be realised through (a) the use of a scheme of arrangement; (b) through the purchase of lease of shares, or (c) through an amalgamation or other combination with the company in question. In the case of banks, this was achieved either by a larger bank acquiring smaller ones, or banks of similar sizes merging to form a new entity.

SEC is empowered, as per the provisions of ISA,[20] to prescribe a lower and upper threshold, which is an amalgamation of annual turnover or assets, in order to determine the appropriate

[15] Oserheimen.A. Osunbor, 'The Company Director: His Appointment, Powers and Duties', in O. Akanki (Ed.), *Essays on Company Law*, (Lagos, 1992) 1.
[16] Ogunbunya 2010 (n 6).
[17] Moses O Olatunji, *Modern Nigerian Company Law*, (Soft Associates, 2010); Rasheed O Alao 'Mergers and Acquisitions: The Nigerian Banking Industry: An Advocate of Three Mega Banks.' [2010] 15 (4) European Journal of Social Sciences 554- 563
[18] (Unreported Case) FHC/L/80; Ogunbunya 2010 (n 6) 603.
[19] CBN Act 2007, s.7.
[20] ISA 2007, s 120

category of the merger. There are three categories 'small', intermediate' and 'large' mergers. In accordance with ISA,[21] the lower threshold is N500, 000,000.00[22] and the upper threshold is 5,000,000,000.[23]

SEC's approval is necessary before any company or bank merges/acquires or engages in any type of business combination.[24] This is essential as it affords SEC the chance to examine the prospects of competition becoming a challenge, or the potential of a business combination on the market.[25] ISA[26] lists factors which SEC takes into deliberation when deciding whether to approve a merger. One such factor is the potential impact of the proposed merger on competition. SEC also considers the position of the market and the likelihood of the proposed company operating either *competitively* or *co-operatively* within the market. Other factors which are likely to affect the application include any public interest, the likely impact on employment, and the capacity of smaller businesses to engage in competition with the proposed new organisation.

SEC may then decide to grant an approval in principle and instruct the companies who have proposed a merger to apply to the FHC, and to then order meetings of the shareholders. There must be at least 2/3 of the members present at this meeting, and voting either themselves or by proxy, in order to agree the scheme.

[21] ISA 2007, s.120 (4).
[22] The equivalent in pounds: £ 2,556,928.26. Available at: http://www.xe.com/currencyconverter/convert/?Amount=3300000&From=USD&To=GBP. Accessed 05 July 2017.
[23] The equivalent in pounds: £ 25,573,834.56. Available at: http://www.xe.com/currencyconverter/convert/?Amount=33000000&From=USD&To=GBP. Accessed 05 July 2017.
[24] Under the provisions of ISA 2007, s8, it has a duty to 'review, approve and regulate mergers, acquisitions and 41 forms of business combinations.'
[25] At present, Nigeria does not have a competition law, although this is now being considered by the National Assembly. See: http://www.nassnig.org/document/download/8196 accessed 05 July 2017.
[26] ISA 2007, s.121

SEC may also refuse a merger application,[27] if; incorrect information was supplied to SEC;[28] if the approval was obtained by dishonest means, or if the company seeking to merge has contravened one or any of the conditions attached to the decision.

5.3 The Recapitalization Programme

The CBN has sculptured the banking system into its current structure, through the use of mergers, acquisitions, takeovers and other forms of restructuring.[29] The banking consolidation of 2004 was governed by a number of laws including ISA, the SEC Rules and CAMA.

During the announcement at the Bankers Meeting in 2004[30] the CBN Governor stated that the CBN would:

> *'collaborate with other institutions – the NDIC, SEC, NSE, the fiscal authorities, National Assembly and Bankers committee to work out the structure of incentives and legal/regulatory frameworks to facilitate the rapid consolidation of the system..*[31]

This collaboration would have been instrumental in addressing the legal and regulatory framework to facilitate the consolidation exercise, and was necessary given the CBN preferred business combination. Leaving aside the failure of the CBN to address this framework, eight banks, including Liberty Bank Plc, Fortune International Bank Nigeria Plc, Gulf Bank Nigeria Ltd; Express Bank Ltd; Metropolitan Bank Ltd; Triumph Bank Plc; Eagle Bank Nigeria Ltd; and African Express Bank Plc, were unable to meet the deadline itself and subsequently had their banking licences revoked.

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[27] ISA 2007, s.127 (1)
[28] Tunde Ogowewo, 'The Role of Target Management in a Tender Offer: The Position in Nigerian Law,' [1996] 40(1) Journal of African Law 1-18
[29] Fabian Ajogwu, *Mergers and Acquisitions in Nigeria: Law and Practice* (2nd edition, Centre for Commercial Law Development, 2011) 237.
[30] Charles Soludo, 'Consolidating the Nigerian Banking Industry to Meet the Development Challenges of the 21st Century', 2004 43Bank of International Settlement Review 43/2004 Basel, Switzerland BIS. (Soludo, 2004) at: <http://www.bis.org/review/r040727g.pdf> accessed 19 April 2017.
[31] *ibid*.

To execute the consolidation policy, the Governor of CBN, Professor Charles Soludo, mandated all banks to increase their capital base from N2,000.000,000[32] to N25,000.000,000.[33] Prior to this increase there were 89 banks, but only 25 were left when the exercise was completed.[34] In response, the Nigerian banking sector underwent an inundation of bank consolidations, most achieved by mergers and acquisitions.

The 2004 banking consolidations have previously been described as unparalleled,[35] but it was the only way for banks to survive. This exercise also saved some banks from being pushed out of the market. The use of minimum capital base increase is traceable to pre-colonial banking.[36] The 2004, banking consolidation programme,[37]occurred following an investigation into the health of banks at the time.[38]

During the consolidation process, banks were able to raise a total of N406, 400,000,000[39] which substantially came from the capital markets.[40] Of the 25 surviving banks, 14 were a result of mergers, while only 6 were able to achieve this recapitalisation without assistance.[41]

[32] The equivalent in pounds: £ 4,920,411.625. Available at: http://www.xe.com/currencyconverter/convert/?Amount=2000000000&From=NGN&To=GBP Accessed 05 July 2017.
[33] The equivalent in pounds: £ 61,506,948.993. Available at: http://www.xe.com/currencyconverter/convert/?Amount=25000000000&From=NGN&To=GBP Accessed 05 July 2017
[34] Appendix 3. The number of banks later reduced to 24 when IBTC Chartered Bank PLC and the Stanbic Bank Nigeria Ltd merged post consolidation.
[35] Fabian Ajogwu, 'Mergers, Takeovers and Reorganisations of Banks in Nigeria' in Oladapo Olanipekun (ed) *Banking: Theory, Regulation, Law and Practice* (Au Courant, 2016); Chkuwuma Agu 'Mergers and Acquisitions: The Nigerian Banking Regulation' [2012] 8 (4) International Journal of Banking and Finance 19-46
[36] Chibuke Uche, 'Bank Share Capital Regulation in Nigeria', [1998]13 Journal International Banking Regulation 30-33.
[37] See Chapter 1 para 1.2.1
[38] Soludo 2004 (n 30) 2
[39] The equivalent in pounds: £ 996,404,463.722. Available at: http://www.xe.com/currencyconverter/convert/?Amount=406000000000&From=NGN&To=GBP. Accessed 05 July 2017.
[40] Cajetan Anayanwu, 'Overview of the current Banking Sector Reforms and the Real Sector, Central Bank of Nigeria' [2010] 48 (4) Economic and Financial Review 31- 56
[41] Appendix 3.

The decision to recapitalize has been criticized on many levels. The CBN took the decision to mandate banks to recapitalize as a regulatory response to the financial health of banks at the time. It was thought instrumental in remedying what appeared to be a near collapse of banks.[42] In doing so, a number of references were drawn from other economies, such as America, South Africa and Asia with emphasis on how these newly consolidated banks would be in a stronger position to compete in the global market.[43]

The consolidation was initially not embraced, with concerns expressed vis-à-vis redundancies[44] and the impact these newly created banks will have in the market. It was also observed that the consolidation itself was an impulsive and global reaction to the new approach to mergers[45] and there was a lack of regard for other factors such as the general management of economic crisis[46] and any impact these mergers would have on performance in the banking sector. Any decision to consolidate should have been based on a clear and systematic process, communicated to the banks involved to ensure a smooth consolidation.[47] The CBN had a duty to ensure that it engaged with stakeholders within and outside the bank, in order to achieve its policy objective within the confinements of the law and maintain confidence within the banking sector. There is no evidence to suggest that it the consolidation underwent a thorough process.

Part II

[42] Soludo, 2004 (n 30).
[43] Ogowewo and Uche, 2006 (n 1) 167.
[44] Oyebode Oyetunde, 'Consolidation Reform of the Nigerian Banking Sector: The Perspectives of Angels and Tools', [2005] 20 (6) Journal of International Banking Law and Regulation 280 -285; Ogowewo and Uche, 2006 (n 1)
[45] Soludo, 2004 (n 30) 3.
[46] Ayo Teriba, 'The Facts Soludo Left Out', *Thisday Newspaper* (Nigeria, 19 July 2004)
[47] Violet Aigbokhaevbo and Nelson Ojukwu-Ogba 'Banking Consolidation in Nigeria: Imperative of a Shift from Consolidation to Repositioning', [2015] 30 (4) Journal of International Banking Law and Regulation. 236 - 240

5.4 Case Examination

5.4.1 Liberty Bank[48]

There is a dearth of Supreme Court decisions on bank licence revocation. Ordinarily, cases do not usually go to the Supreme Court except there is a recondite point.[49] Thus, the leading case on this issue is Savannah Bank v CBN.[50] This is a Court of Appeal decision, But that does not invalidate the arguments as raised in the thesis.

The absence of cases on bank licence revocation could be attributed to the fact that Nigerian banks do not want to confront the CBN and risk reprisals, in the use of what has been argued to be 'very arbitrary' powers. The provisions of BOFIA allows the CBN to *vary* the licence of a bank, and the exercise of this power may be viewed as an exertion of arbitrary authority.

In addition, banks avoid suing the CBN because it may be viewed as perusing a lost cause. Moreover, the Nigerian judicial system is slow in hearing cases, which means that such cases may potentially drag on for years, leading to an erosion of confidence in such banks.

In addition, banks are less likely to challenge license revocation because Nigerian judges do not have specialist knowledge of banking law. On closer analysis of the case, the learned judge erred in his decision and should have addressed the issues for determination from a different perspective.

5.4.2 The Judgment of Liberty Bank[51]

[48] *Liberty Bank Plc & Ors v CBN & Ors* (Unreported Case) Suit No FHC/L/CS/307/06 (Liberty Bank).
[49] The Supreme Court in Nigeria is established by the CFRN 1999, s.230(1).
[50] *Savannah Bank of Nigeria v CBN* & Ors [2012] 1 BFLR (Savannah, 2012)
[51] Also referred to as '*Liberty*' in the remainder of this chapter.

In the case of Liberty, [52] eight banks had their licences revoked due to their inability to meet the recapitalization deadline. The respondents in the case were the CBN, the Governor of the CBN and the NDIC. The banks wrote to the CBN with their Memorandum of Understanding and applied for an Approval-in-Principle from the CBN. The approval was granted, and the CBN directed that the licences of the plaintiffs be deposited with it and the expected recovering of N10.5bn,[53] 'Insider Credit' must be achieved and escrowed with the CBN on or before 30th December 2005 to the SEC.

The plaintiffs sought the Approval-In-Principle of SEC for the proposed merger and received a response on the 29th December 2005, granting three months' extension until 29th March 2006. Before this extension had lapsed, the first and second respondents declared these banks insolvent, withdrew their licences and halted their merger exercise. It was held that they should have concluded their merger exercise by 31st December 2005.

The managing director of Fortune International Bank, being the second plaintiff, stated under oath that the 1st and 2nd respondents had granted an extension of time to the members of Unity Bank, which was another bank pre-consolidation, to hold their court ordered meetings, a pre-merger condition which has already been discussed, on the 27th January 2006, which was *after* the plaintiffs had been denied the same opportunity. He further stated that the 1st and 2nd respondents had assigned a goodwill value[54] to Unity Bank, which would allow them to meet the N25bn recapitalisation requirement. Other banks such as Wema Bank Plc and

[52] The researcher has a Certified True Copy of the judgment obtained 15th May 2016, from the Federal High Court, Ikoyi, Lagos Nigeria.
[53] This is the equivalent of £ 36,991,120.393. Available at: http://www.xe.com/currencyconverter/convert/?Amount=15000000000&From=NGN&To=GBP Accessed 12 July 2017.
[54] N17,085,024,000. In pounds sterling, this is the equivalent of : £ 42,132,295.792. Available at: http://www.xe.com/currencyconverter/convert/?Amount=17%2C085%2C024%2C000&From=NGN&To=GBP Accessed 12 July 2017.

Skye Bank Plc were also assigned several goodwill values; to assist them meet the recapitalisation requirement.

The position of the Director was that the 1st and 2nd respondents had been prejudicial and biased and denied the plaintiff bank its right to a fair hearing and/or the right to make a representation in accordance with the provisions of the law.[55] It was also stated that the additional conditions imposed on the plaintiffs by the 1st and 2nd respondents were never imposed on other banks. It was argued that this equated to being 'discriminating', 'unjust' and 'arbitrary.'

The financial controller of Triumph Bank Plc, being the sixth plaintiff stated on oath that as of the 6th July 2004, *all* of the plaintiffs were sound and viable banks, able to meet the needs of their customers and depositors. In addition, he testified that the 1st respondent did not honor any of the assurances given in respect to the N10.5bn which the 1st and 2nd respondents directed the plaintiffs to raise. The plaintiffs had raised and escrowed the sum of N4.8bn[56] with the 1st and 2nd respondents before the revocation of licence. As the 1st and 2nd respondents had halted the completion of the recapitalising programme, they did not withdraw the licence of African International bank, even though the bank did not meet the recapitalisation requirement more than 2 years *after* the consolidation exercise. This was a pre- consolidation bank, which is discussed in the later sections of this chapter.

5.4.3 Issues for determination

In the written address, the plaintiff's core issue for determination was:

[55] CFRN 1999, s.36; BOFIA 2004, s.5 (4)
[56] In pounds sterling, this is the equivalent of £ 11,734,072.33.Available at: http://www.xe.com/currencyconverter/convert/?Amount=4800000000&From=NGN&To=GBP Accessed 12th July 2017.

'Having regard to the fact and circumstances of this case, particularly the state of pleadings and evidence lead on same, whether the plaintiffs are not entitled to the reliefs sought in this suit.'

In addition, the plaintiffs sought the leave of the court to argue the sole issue for determination as articulated under the following subheadings:

1. *The legality of the respondents' reform Agents for consolidation of the banking industry in Nigeria considered;*
2. *The legality of the revocation of the plaintiffs banking licences considered;*
3. *The effect of the Approval in principle granted to the plaintiff considered;*
4. *The defendants discriminated against the plaintiffs in the course of the consolidation exercise and; the 1st and 2nd respondents acted in bad faith.*

These issues are discussed as follows; First, the question was raised as to whether the 1st and 2nd respondents, within the law, had the power to issue the guidelines and forcefully coerce the consolidation of banks through mergers and acquisitions. To address this issue, we examine s.57 (1) of BOFIA[57] and s. 51 of the CBN.[58] These two provisions state that the powers of the CBN to make regulations or to issue guidelines are limited to the furtherance of the objects and objectives of the Act. On this issue, the position of the law is trite in that the exercise of the power to make subsidiary legislation is subject to the general scope of the principal Act.[59] The aforementioned cases[60] support the argument that any exercise of subsidiary rule making power *outside* the tenor of the principal Act would be in breach of the CFRN[61] and therefore null and void.[62]

On the issue of the wide powers, the thesis has highlighted this chapter two vis-a-vis the sui generis nature of the Nigerian banking model. It should be noted that Nigerian law does not

[57] BOFIA 2004.
[58] CBN Act 2007
[59] *Conac Optical (Nigeria) Ltd v Akinyede* [1995] 6 NWLR Pt 400 p 22 at 222; *Suleiman v Osindehinde* [1994] 2 NWLR Pt 327 p 477; and *Phoenix Motors Ltd v N.P.F.N.B* [1993] 1 NWLR Pt 272 p 718 at 728.
[60] ibid
[61] CFRN 1999, s. 4
[62] *Attorney General of Abia State v Attorney General Federation* [2006] 16 NWLR Pt 1005 265 at 381.- 382 and; INEC v Musa [2003] 3 NWLR Pt 806 72 at 114.

recognise the concept of 'unfettered discretion' and discretionary powers must be exercised according to law and reason. The CBN's role as an administrative body is subject to certain implied limitations. A power which is exercised in bad faith or arbitrary is liable to be set aside.[63] Particularly in the case of the *Governor of Lagos State,* the Supreme Court per Obaseki JSC stated that:

> *'The Nigerian Constitution is founded on the rule of law, the primary meaning of which is that everything must be done according to Law. It means also that government should be conducted within the frame work of recognized rules and principles which restrict discretionary powers. Coke colourfully spoke of this as 'golden and straight forward restriction of discretion by rules and principles as opposed to the uncertain and crocked cord of discretion'….The judiciary cannot shrink from its responsibility to the nation to maintain rule of law. It is both in the interest of the government and all persons in Nigeria. The law should be even handed between the government and its citizens.*

It was argued that in regards to these wide regulatory and supervisory powers as provided for by both the CBN Act[64] and BOFIA,[65] the court should give due notice to the fact that both acts were initially Military Decrees[66] which are protected by the CRFN.[67] They must therefore be read and interpreted with such adjustments which bring them to par with the provisions of the CFRN.[68]

It was further argued that on the reliance of the provisions of the CFRN,[69] the 1st and 2nd respondents were not permitted to issue guidelines which would have the effect of forcefully causing the plaintiffs to merge and consolidate in the absence of clear and express statutory provisions to that effect. It was argued that this would give both the CBN Act and BOFIA the

[63] *Governor of Lagos State v Ojukwu* [1986] 2 NWLR Pt 18 p 267 at 638
[64] CBN Act 2007, s.2
[65] BOFIA 2004, s.1
[66] Chapter 3 para 3.3.1.3
[67] CFRN 1999, s. 315.
[68] *IGP v ANPP* [2007] 18 NWLR Pt 1066 p 457 at 494.
[69] CFRN 1999, s. 40, 43 and 44 (1)

effect of expropriatory statute and the court was urged to construe the wide powers as contained in BOFIA and the CBN Acts.[70]

The attention of the court was also drawn to the provision of BOFIA[71] and the plaintiffs argued that the 1st and 2nd respondents did not have the power to vary minimum paid up share capital of licenced banks in a whimsical, capricious or arbitrary manner. It was also noted that since the implementation of the Bank Ordinance 1952 when the issue of share capital base formed an integral aspect of this law,[72] there has not been a review of the amount.

Concerning the issue of bank licence revocation, the plaintiffs licence was revoked under the powers as conferred to the CBN Governor.[73] However, it was argued that the power was exercised whimsically. As earlier noted, the CBN does have discretionally powers, but as an administrative body, this is subject to limitations.[74] Particularly, the Supreme Court reiterated that the phrase 'unfettered discretion' is contradictory in Nigerian law.[75]

5.4.4 Addressing the Issues of Discrimination

On the matter of discrimination, it has been noted previously that Skye Bank Plc, Wema Bank Plc and Unity Bank Plc[76] were also unable to meet the deadline as provided in 2005, yet, they were granted an extensions of time. There is no evidence within the literature which provides an insight to why these banks were given extensions, but it may be fair to conclude that these banks were given some form of preferential treatment by the CBN Governor.

[70] *Provost of Lacoed v Edun* [2004] 6 NWLR pt 870 p476 at 505.
[71] BOFIA 2004, s.5 (1), (3), (4), and 5 and s.9 (1) and (2).
[72] Chapter 4 para 4.4
[73] BOFIA 2004, s. 12
[74] *Ideozu v Ochomu* [2006] All FWLR (Pt. 308) 1183 at 1207 – 1208; *Dagaya v The State* [2006] All FWLR (Pt. 308) 1212 at 1230 1231.
[75] *CBN v. Okojie* [2002] 3 SC 99 at 104.
[76] Appendix 4.

If this was the case, there are a number of issues that arise within the judgment, to which due attention was not given. The first is equality of treatment as a cornerstone of the rule of law;[77] and the question of whether the CBN acted beyond its powers as contained in the statute. In other words, the issue is whether the CBN applied the same rules to *all* banks.

5.4.4.1 Bad Faith?

On the issue of 'bad faith', the plaintiffs relied heavily on the decision of *Savannah Bank*[78] because it raised similar questions. It was argued that in addition, the issue of bad faith, which formed a substantial element of the Court of Appeal's rationale, had been proven particularly on the following grounds; (1) the CBN's failure to comply with the procedure as provided for in BOFIA;[79] the inability of the CBN to specifically identify the *reason/justification* for revoking the plaintiffs licence.

In response, the CBN argued that it acted within the provisions of both BOFIA and the CBN Act. It was submitted that the provisions of BOFIA,[80] and the CBN Act[81] recognized the institution as germane to the proper resolution of the issue in contention. It was further argued that the provisions of both acts are clear and unambiguous, and the court was urged to consider that the fundamental objectives which guide the CBN in discharging its statutory duty to regulate and supervise the Nigerian banking sector includes fostering and developing monetary stability, and ensuring a sound financial system. It was further argued that by virtue of its position, the CBN had a special responsibility to protect and safeguard the operation of the system.[82]

[77] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, McMillan, London 1885).
[78] [2009] 6 NWLR (Pt 1137) 237.
[79] BOFIA 2004, s, 35-38
[80] BOFIA 2004, s.1(1) 2(1), 5(1), 7(1), 9(1) and (2)
[81] CBN Act 2007, s.2 (c)
[82] CBN Act 2007, s 1(c)

In his ruling, Justice Yunusa formulated four questions to be answered which would assist in reaching a conclusion. These were:

1. *Whether or not the enabling laws establishing the defendants are valid legislations in the eyes of the Constitution of the Federal Republic of Nigeria 1999 as amended;*
2. *Whether or not the 1st and 2nd respondents are vested with the statutory powers to issue banking licence and to revoke same;*
3. *Whether 1st and 2nd respondents have obtained the requisite approval of the Board of Directors prior to the purported revocation of the banking license of the Plaintiffs;*
4. *Whether or not the plaintiffs have complied with the obligation to recapitalise to the tune of N25bn and were unduly and unfairly denied the opportunity to merge.*

The court acknowledged that the CBN is generally to control and administer monetary and banking policies of the Federal Government, and that it was established for public service. Citing the case of *CBN v Ukpong*[83] the court held that:

> '*in construing a statute like the Central Bank Act, all sections must be taken into consideration to arrive at the right interpretation of same, A section should not be taken in isolation. To do so will occasion violence of the law. '*

In the same light, BOFIA[84] provides that

> *'The Central Bank (hereinafter in this Act referred to as 'the bank', shall have all the functions and powers conferred and the duties imposed on it by this Act'*

Further, the court held that on the issue of interpretation, the case of *Amechi*[85] demonstrates the Supreme Courts' position that:

> *'the fundamental duty of the court is to expound the law and not to expand it. It must decide what the law is and not what the law might be. Where the words used in couching the provisions are clear and unambiguous, they must be given their ordinary and grammatical meanings, no more. Although the judex must always have a resort to the intention of the legislators, that intention can only be found in the words used to frame the provisions and nowhere else'*

On the submissions that the CBN Act and BOFIA are Decrees inherited from the Military regime, the court relied on the Supreme Court's decision in the case of *A Adewunmi v A G Ekiti*[86] where it was held that

> *'in cases of statutory construction, the Court's duty is limited. Where the statutory language and legislative intent are plain, the judicial enquiry ends there. A court is*

[83] [2007] ALL FWLR (Pt 357) p 958 at 966.
[84] BOFIA 2004, s.1 (1)
[85] *Amechi v INEC* [2008] 5 NWLR (Pt 1080) p 227 at 437. (Amechi, 2008)
[86] [2002] 2 NWLR (Pt 474) 512.

> *therefore not permitted to distort a statutes' meaning in order to make it conform with the judges own views of sound social policy. More over under Nigerian jurisprudence, the presumption is that ill-considered or unwise legislation will be corrected through democratic processes.*

In considering the argument of 'bias' and 'bad faith' put forward by the plaintiffs, the learned judge stated that credible evidence was not submitted to the court and the allegation of bias was not substantiated. The inability of the plaintiffs to adduce evidence to support this position was fatal to the arguments here.

On considering the issues raised, the court, was of the opinion that the revocation of bank licences was valid and in line with the provisions of the enabling laws. It was concluded that the suit had no merit and was thus dismissed.

5.5 Case Analysis of *Liberty*

However, in delivering the judgment, the learned judge erred in formulating the issues of determination. At its core, the issues which were to be considered should have been formulated thus;

1. *Whether the CBN was permitted to revoke the banking licences of the plaintiffs, without going through the prescribed process as provided for in BOFIA*[87]
2. *Whether the CBN as a statutory agency, acted outside the scope of the powers as contained within the statute and applied the same rules to all the banks, with regards to the consolidation;*[88]
3. *The effect of the Approval-In-Principal as granted to the plaintiffs.*[89]

On the revocation of bank licences, the position of the law is clear and there should be no need for a further clarification on this point. The law is also clear that if the statute provides a procedure for executing an act, there should be no other means of doing so.[90]

[87] BOFIA 2004, s.33-38
[88] It follows that the argument should centre on the equality of treatment as is defined in the bounds of the rule of law.
[89] This is of particular interest since it is not discussed in depth in the judgment itself.
[90] *Nwankwo v. Yar'Adua* [2010] 10 NWLR (Pt. 1209) 518 at 559 paras. A – B; 565 para. H; *Unthmo v Nnoli* [1994] 8 NWLR (Pt 636) p 376 at 412

It is clearly not the case that the CBN applied the same rules to all banks. The court should have paid closer attention to why other banks were given further time as it forms one of the grounds of objection to the revocation of the plaintiff's bank licences. If the CBN did not treat the banks equally, this may give rise to further consideration of the earlier arguments vis-à-vis the influence of the governor on banking regulation.[91] If the CBN was of the opinion that preferential treatment was *not* given to these banks, then it should not have been a challenge to present this argument to the court. The judgment appears to circumvent this by not addressing the issue directly.

On the matter of the Approval-in-Principle, the learned judge stated that:

> *My understanding is that the said Approval-In-Principle is a step toward a final approval in the event of failure to comply with the stipulated conditions under the said Approval-In-Principal, certainly it will lapse as it is a step towards continuing the process of consolidation with the hope that before the set deadline of December 31 2005 the Plaintiffs must have complied fully with the conditions stipulated in the Approval-In-Principle. As a matter of fact, there was no evidence before the Court that the plaintiffs have fully complied with the obligation to recapitalise to the tune of N25bn as at 31st December 2005. Even the other two conditions were not fully complied with. It should be noted that even the recovery of N10.5bn Insider Credit by the merging banks was a condition that was self-imposed by the plaintiff. It was the failure to comply with these conditions that resulted in the revocation of the licences of the plaintiffs'*[92]

The position of the court goes to the advocacy of the creation of a special court to deal with banking matters. In this instance, the court has concluded that the failure to comply with these conditions was the cause of the revocation of banking licences, when the condition for revocation of banking licence is contained in s.12 and in s.5(4).

If the issues of determination were articulated and addressed as proposed above, the learned judge, respectfully, would have reached a different conclusion. If the law is closely

[91] Chapter 2. para 2.6
[92] Liberty (n 48)

examined, giving due respect to the fact that rules of interpretation are indeed at the discretion of the court, it would have been clear that the CBN cannot circumvent these provisions and revoke the licences. At the very least, the conditions of the licence may have been varied and an opportunity for representation provided to the banks in question.

Furthermore, the court should have given more consideration to the question of equality of treatment. This might have led to a different conclusion when determining whether the CBN had acted in bad faith. Finally, on the matter of the Approval in Principal, the court should have considered its impact, especially as the CBN accepted escrowed payments from the banks, then subsequently revoking the licence.

5.5.1 Savannah Bank[93]

It is pertinent to discuss the leading case in this area. In 2002, the then CBN Governor[94] issued a notice to revoke the bank licence of Savanah Bank. The notice was based on the banks insufficient assets to meet liabilities and non- compliance with obligations imposed by BOFIA. This was despite the CBN and the NDIC's attempts to save the bank, given its alleged financial health. As earlier discussed, the revocation of a bank's license means that the NDIC is automatically as the liquidator.[95] The branches of the bank were sealed with the assistance of the Nigerian Police Force.

Savannah bank challenged the CBN on the grounds of bad faith vis-à-vis the revocation of its licence. The bank sought a declaration stating that the CBN was not entitled to interfere with the running and operation of the bank. Further, Savannah bank sought a declaration that the CBN had contravened the provisions of BOFIA in the revocation of its licence and prayed for

[93] Savannah, 2012 (n 50)
[94] Chapter 2. para 2.6
[95] Chapter 3 para 3.3.1.2

the licence to be restored. Additionally, the bank claimed for damages of N100bn, as special, exemplary and general damages.

The court held that on examination of s.53 (1)[96] there was no bad faith on the part of the CBN. The court concluded that the CBN had acted within the statutory provisions and dismissed the case. Savannah Bank appealed to the Court of Appeal.

5.5.2 The Position of the Court of Appeal

The Court of Appeal formulated the issues of determination as follows:

1. *Whether there was a conflict between the provisions of the CFRN[97] and the provisions of BOFIA[98] which could make the latter unconstitutional;*
2. *Whether 'bad faith' was established during the course of the CBN's decision to revoke Savannah Bank's licence.*

Regarding the first issue, the Nigerian constitution prevents the National Assembly from enacting any law which purports to oust the jurisdiction of a court of law, or a judicial tribunal which is established by law.[99] The court found that this was *not* the intention of s.53 (1) and that the objective of this provision was to prevent the CBN and any of its officers from being subjected to any action, claim, demand, or liability in respect of things done or omitted to be done, in good faith, pursuant to or in the execution of any power conferred by the Act.

Per Abba Aji JCA, it was held that:

> *The learned trial judge in the Federal High Court erred in law when he held that S.53 (1) is not unconstitutional and this error occasioned a miscarriage of justice to the appellant...*[100]

The Court of Appeal also cited the case of *NDIC v CBN & Another*[101] and *CBN v Industrial Bank Ltd*[102] to clarify this matter. It was held that this section does *not* impact access to the

[96] BOFIA 2004
[97] CFRN 1999, s.4 (8).
[98] BOFIA 2004, s. 53 (1).
[99] BOFIA 2004
[100] Savannah Bank, 2012 (n 50).

court and more importantly, does *not* oust the jurisdiction of the court. Rather, it creates a pre- condition to be satisfied before the court can have jurisdiction,[103] which is whether bad faith can be established.

The Court of Appeal stated the presumption of regularity as provided for under the Evidence Act.[104] This is an administrative law principle and presumes that an act is reasonably and honestly done, until the contrary is proven to be the case. In this instance, the burden rests with the party making the allegation of bad faith to establish this in order to provoke judicial action. The court accepted this was the case in this matter, and the CBN acted in bad faith in revoking the licence.

The court defined what may constitute bad faith in these words:

> *'The term 'bad faith' is not simply bad judgment or negligence, but rather, it implies a conscious doing of a wrong because of dishonest purpose or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a furtive design or ill will.*[105]

The CBN stated the following grounds for the revocation;

1. *The insufficiency of the appellant's assets to meet its obligations;*
2. *The appellants failure to comply with the obligations imposed on it by the CBN;*
3. *The failure of the actions taken by the regulatory authorities to halt the deterioration of the appellants conditions to achieve positive results.*[106]

The Court of Appeal discovered that the evidence as presented to the trial court demonstrated the bank was in distress at the time the licence was revoked, and that bad faith could be established, given the short period that Savannah was given to recapitalize. The Court of Appeal however asked the following questions:

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[101] [2002] 7 NWLR Pt 766 272.
[102] [1997] 9 NWLR Pt 522 712.
[103] Savannah, 2012 (n 50) para 276-277.
[104] Evidence Act 2011, s.150
[105] Savannah, 2012 (n 50)
[106] *ibid*, para 294

1. *Why did the 1st Respondent spare the appellant between 1993-2000 when the slide into insolvency continued, but shut the bank down after only 22 months of operation in the hands of IRA?;*
2. *Why should the 1st respondent give the new management of the IRA only 3 months to recapitalize when it is practically impossible for it to do so, being a public liability company?*[107]

The revocation of the licence in question occurred a month before the recapitalisation exercise which would have allowed the bank to achieve the required capital. The argument of bad faith was further buttressed by the fact that the licence was revoked the day after the issuance of a circular to all banks mandating them to comply with a new recapitalizing programme,[108] and that other banks, including Societe General, Bank of the North and African International Bank, found themselves in a similar position, and did not have their licences revoked. The Court of Appeal allowed the appeal and awarded damages.

In the case of *Stockland Nigeria Ltd*,[109] the bank sued the CBN for the revocation of its licence and raised similar issues as *Savannah*. It was asserted that during the period of the consolidation in 2004, the 2nd Plaintiff[110] started the process of merging or being acquired by other banks. However, one of the conditions was for the plaintiff to seek and obtain forbearance of 80%- 100% of the debts, in addition to other conditions attached.

There was no dispute about the fact that the bank was in distress. It had not operated as a bank for a while, but it was only granted the forbearance on January 5th 2006 after the 31st

[107] Savannah, 2012 (n 50).
[108] Chapter 2 para 2.6.
[109] *Stockland Nigeria Limited & 2 Ors. v. CBN & 5Ors* Suit No. FHC/ABUJ/CS/34/2006 (Unreported) (Stockland, 2006)
[110] Referred to as SGBN. This bank reopened later as Heritage Bank.

December 2005 deadline given by the CBN. The plaintiff was also required to pay a sum of N1.5bn[111] into an escrow account with the CBN. This was not in dispute.

Despite these conditions, which were impossible for SGBN in its financial state, the CBN published in the gazette that the bank's licence had been revoked. It was argued that while the provisions of BOFIA permitted the CBN to revoke the licence, it must be done in accordance with the provisions themselves.

In this case, the FHC considered that 'forbearance' simply meant a 'waiver'. It was held that this was discretionary, a privilege and not a right. However, the SGBN argued that the CBN's failure to timeously communicate the approval of the forbearance which led to the eventual revocation of its licence was without justification and not done in good faith. It was also argued that the CBN did not intend for SGBN to meet the conditions it imposed for the grant of the forbearance and this was therefore in bad faith. The court held that the conditions imposed on SGBN were in bad faith and unjustifiable. It set aside the revocation of its licence and ordered that no winding up proceedings could be brought against the bank.

5.5.3 Analyzing *Savannah*

The decision of the Court of Appeal may be criticized, given that it allowed the appeal despite clear evidence the bank was financially distressed. It may be argued that in this instance, the CBN was indeed within its regulatory rights to revoke the licence. While the decision is a favorable outcome for the bank, it brings pertinent issues to the fore, including the demonstration that regulatory powers of the CBN may be challenged, other issues which

[111] The equivalent in pounds sterling is £ 36,985,317.873. Available at : http://www.xe.com/currencyconverter/convert/?Amount=15000000000&From=NGN&To=GBP Accessed 13th July 2017.

are outstanding for consideration include the determination of 'bad faith', and the onus to prove the bad faith.

It is clear that the court's interpretation of what may or may not come under the parasol of 'bad faith' is subjective, and may differ from case to case, depending on the interpretation of the judge. This was clearly the case in *Liberty* where the learned judge did not view the fact that the CBN had given other banks extensions and neglected to do the same for *Liberty* bank as bad faith. This may have constituted bad faith on the part of the CBN if the interpretation of the learned judge resembled that of the Court of Appeal.

In response to the research question however, the approach of the CBN to bank licence revocation is not prudent and threatens the development of banking regulation. However, the discussed cases demonstrate that banks are less likely to challenge a licence revocation in court, particularly because there is a strong possibility that the bank would suffer reputational damage, even if there is a favourable outcome.

5.6 Other Judicial Decisions on Revocation of Banking Licence

5.6.1 *Republic Bank Limited v Central Bank of Nigeria & Another*[112]

In this case, the defendant/applicant raised a preliminary objection to the plaintiff's action which was seeking the reinstatement of its licence on the ground that the revocation of its licence by the defendants was not done in good faith and was therefore null and void. The defendants' objection was that the court had no jurisdiction in respect of the action and that the plaintiff had no right of action. They based their arguments on the provisions of Banks and Other Financial Institutions Decree (BOFID) (later known as BOFIA), which precluded

[112] [1994-1996] 6 (Pt 1) NBLR 482-490.

any suit against the Federal Military Government or the Central Bank in respect of the exercise of any power granted under the decree.

The sections of the Decree relevant to the actions are reproduced thus:

> *The Governor may, with the approval of the President by Notice published in the Gazette, revoke any licence' granted under this Decree if a bank-*
> *a) Ceases to carry on the type of banking business for which the licence' was issued for a continuous period of 6 months;*
> *b) Goes into liquidation or is wound up;*
> *c) Fails to fulfil or comply with any condition subject to which the licence' was granted;*
> *d) Has insufficient assets to meet its liabilities;*
> *e) Fails to comply with any obligation imposed upon it by the Central Bank."*[113]

The same Decree provided protection against adverse claims: s.49 (1)

> *Neither the Federal Government nor the Central Bank nor any officer of the Government shall be subject to any claim or demand by or liability to any person in respect of anything done or omitted to be done in good faith in execution of any power conferred upon that Government, the bank or such Officer by this Decree."*[114]

The second defendant/applicant urged the court via a notice of preliminary objection to strike out the suit upon the following grounds:

i. That the court was coram non judice[115] *in respect of this action; and*
ii. That plaintiff had no right of action.

Counsel on behalf of the second defendant/applicant relied on s.49 of the Decree which precludes any suit against the Federal Military Government or CBN in respect of any power granted under the Decree. He posited that the reliefs sought, the revocation of the plaintiff's banking licence', and the appointment of the second defendant should be declared null and void. The learned counsel further submitted that the word intended used in s.49 of the Decree is synonymous to "purported" per Black's Law Dictionary; and therefore, s.49 of the Decree

[113] BOFID 1991, s.12.
[114] BOFID 1991, s.49
[115] The court, in this instance had no jurisdiction.

ousts the jurisdiction of the court in this action by providing that the administrative decision of the Governor of CBN is final.

Concerning the second relief, the counsel to the second defendant/applicant submitted that a declaration judgment cannot avail where the plaintiff cannot obtain a relief from the defendant; He therefore urged the court to neither look at the declaration nor to grant it. He submitted that the CBN had done the following:

i. *The revocation of the licence;*
ii. *The determination of the plaintiff's right to carry on the banking business;*
iii. *The exercise of judicial and quasi-judicial functions of the finding of facts.*

Counsel to second defendant/applicant further argued that an action to challenge the above exercise of administrative actions will be struck out; by the decision in *Eguamwense v. Amaghizemwen*[116] such cannot be challenged by a declaratory decision and must be struck out since the court cannot sit to review finding of facts. The counsel for the first defendant/applicant completely aligned himself with the submissions of the learned counsel for the second defendant/applicant.

The learned counsel on behalf of the plaintiff/respondent submitted that the second defendant's notice of preliminary objection was not apt to meet the circumstances of the case. According to him, Order 27 of the Federal High Court Rules provide that the preliminary objection conceives only of a legal defence, hence there is no affidavit, and that such an affidavit can only take cognizance of legal, but not factual defenses. Counsel further argued that once the second defendant had admitted the facts alleged in the writ of summons, it cannot have recourse to s.49 of the Decree, unless it has filed an affidavit, or other documents. He further submitted that the preliminary objection was highly premature.

[116] [1993] 9 N.W.L.R. (pt. 315) 1 (Eguamwense, 1993)

Furthermore, the fact that s.49 of the Decree permits the factual defence of 'good faith' means that it is possible that an action for 'in bad faith' be commenced. In this instance, the onus lies on the defendants to demonstrate that they acted in good faith as there is no presumption of 'good faith'. The Nigerian courts have held 'bad faith' to be the conscious doing of a wrong because of a dishonest purpose of moral obliquity.[117] It should be noted that the Evidence Act[118] provides that the:

> *burden of proof as to any particular fact lies on that person who wishes the court to believe in the existence unless it is provided by any law that the proof shall lie on any particular person, but the burden may in the course of a case, be shifted from one side to the other.*

In this instance, he who asserts, must prove. To place this into context, if the CBN maintains the position of proving the defence of faith, the onus should be on them to prove this. If they sufficiently proved good faith, the onus would then be shifted to the bank that there is no good faith and that the revocation of licence was done in bad faith.

Learned counsel conceded that it was not the place of the court to substitute its own decision for that of the statutory body, but it is the place of the court to test whether the power vested had been exercised in accordance with the law; and thereafter to issue an appropriate declaration.

In response to the plaintiff/respondent's submission, counsel on behalf of second defendant/applicant posited that it was elementary that the defendants did not waive their right for want of jurisdiction and since the plaintiff ascribed bad faith to the first defendant's action, it was for the defendants to show good faith. He submitted further that under s.147 of the Evidence Act 2011 there was a presumption of good faith in favor of the public

[117] *Ezedigwe v Ndichie* [2001] 12 NWLR P6t 726 37; *Auguoreghian v State* [2004] 3 NWLR (Pt 860) 367.
[118] Evidence Act 2011, s. 136

administrator. Even where a lawful act was done for the wrong reason, s.49 would avail. The intention is immaterial and that the defence offered by s.49 fully availed the defendants.

At the close of Counsels' submissions, the following issues arose for the court to determine:

a) *Did the court have jurisdiction to entertain, hear and determine the substantive suit.*
b) *Did the plaintiff have a right of action to institute and maintain the substantive suit.*
c) *Depending on the findings in quaere (1) and (2), what is the proper order to make?*

(i) *Jurisdiction to hear and determine this suit*

The court held that in the light of Supreme Court decisions in the cases of *Nwosu v Imo State Environmental Sanitation Authority;*[119] *Merchants Bank Ltd v Finance Minister;*[120] *s.3(5) (b) and s.14 of the Banking Ordinance 1958,* it is for the Minister, and not for the Courts, to exercise the right of determination of banking licence'. According to the court, the Governor of the Central Bank of Nigeria had exercised his administrative function by revoking the plaintiff's operating licence' which was based on factors and circumstances cognizable under the provisions of s.5 and s.12 of BOFID and that left no room for the review of the exercise of that function by the court.

Concerning whether the revocation was done in "good faith" in terms of s.49, the court held that there was no evidence to that effect as nowhere was it pleaded categorically that the Governor of Central Bank acted in "bad faith" (that is, that he acted fraudulently, maliciously or dishonestly).

[119] [1990] 2 NWLR (Pt 135) 688
[120] [1991] ALL N.L.R (Pt.1) 598

(ii) *Right of Action.*

The court herein stated that it would be inappropriate for it to grant, for the benefit of the plaintiff, the declaratory orders sought since the Court cannot make the ancillary order to compel the second defendant to restore to the plaintiff the enjoyment of his revoked banking licence'. Relying on the authority of *Eguanwense's case*[121] the court held that this was not an appropriate case in which to make the declaratory orders sought. Furthermore, s.49 excludes civil action against the appropriate officers, whereas, s.48 specifically confers criminal jurisdiction on the court. Therefore, the court's orders cannot avail in the circumstance of this case.

(iii) *Procedural Lapses*

The court relied on decisions of superior courts as in the cases of *Nneji v Chukwu*[122] and *Hausa v The State*[123] wherein the court deemed the suit to have been properly commenced as the issue of technicality must not override the interest of justice. The notice of Preliminary Objection succeeded and the action was dismissed.

5.6.2 Governor of Central Bank of Nigeria v Alpha Merchant Bank[124]

In the case of *Alpha*,[125] the respondent bank had its license revoked pursuant to s.12 of BOFID. The NDIC was appointed as a provisional liquidator of the respondent bank.

Counsel for the petitioner submitted that based on the provisions of s.38 (4) of the Decree, the appointment of the provisional liquidator should be deemed to have been made by the Federal

[121] Eguamwense, 1993 (n 116)
[122] [1988] 3 NWLR. (Pt. 81)184
[123] [1994] 6 NWLR. (Pt. 350) 281
[124] [1994-1996] 6 NBLR (Pt. 2) 348 (Alpha, 1994)
[125] *ibid.*

High Court and urged that the appointment of NDIC be deemed to have been made by the court. It was also submitted by counsel that the revocation of the license by the petitioner could constitute one of the grounds for winding up and that under s.38 of the Decree, the petitioner was competent and had the *locus standi* to present the petition.

It was held by the court that as per the provisions of s.38 of the Decree, the bank whose license is revoked and the Governor of Central Bank of Nigeria who revoked the license are *both* empowered to file a petition for the winding up of an affected bank.

The court further held that the provisions of s.38 (4) of the Decree provide that s.408 CAMA be construed as if the revocation of the license is a ground for winding up of a company. In other words, the revocation of the licence is one of the grounds for which a bank may be wound up under the aforementioned provisions.

Per curiam, the court was satisfied that the necessary procedures for the winding up of the respondent bank had been complied with. Accordingly, the court ordered that the respondent bank be wound up under the provisions of CAMA as amended by s.38 of the Decree and that the NDIC which was appointed as its provisional liquidator be appointed as a liquidator, in order to enable it carry out its functions as provided for by CAMA.[126] In this instance, the petition was granted.

Prior to Savannah, the judicial decisions fthe issuesuggest that the Nigerian courts have historically endorsed the CBN's regulatory decisions to revoke banking licences. However,

[126] CAMA 2004, s.422-450.

the *Savannah* case creates a new dimension, particularly on the issue of 'bad faith' and the onus placed on the bank asserting this to prove.

Part IV

5.7 Examining the Law on Revocation of Banking Licences in Nigeria

Following on from the examination of relevant cases, this section examines the law. The principal provisions are contained in BOFIA, the NDIC Act and the CBN Act. The grounds for revoking the licence include; when a bank is unable to meet up with bank recapitalisation requirements,[127] where a bank is non-compliant with bank ratio,[128] failure to comply with the apex banks directives and guidelines,[129] and in the event that the NDIC recommends to the CBN, as a 'resolution measure' that bank licence revocation is an option.[130]

S.12 of BOFIA prescribes that:

> *(1) The Governor may, with the approval of the Board of Directors and by notice published in the Gazette revoke any licence granted under this Act if a bank -*
>
> *a) ceases to carry on in Nigeria the type of banking business for which the licence was issued for any continuous period of 6 months or any period aggregating 6 months during a continuous period of 12 months;*
> *b) goes into liquidation or is wound up or otherwise dissolved;*
> *c) fails to fulfil or comply with any condition subject to which the licence was granted;*
> *d) has insufficient assets to meet its liabilities;*
> *e) fails to comply with any obligation imposed upon it by or under this Act or the Central Bank of Nigeria Act, as amended.*

S.5 (1) and (2) of BOFIA prescribes the power of the apex bank to revoke or vary a condition for which a license was granted initially, and the need for banks to adhere to such terms to hold on to their licenses. However, before making any edits to licensing conditions, the CBN '*Shall'*) do the following:

[127] BOFIA 2004, s.9 (2).
[128] BOFIA 2004, s.14 (1) - (2).
[129] BOFIA 2004, s.60 (4).
[130] BOFIA 2004, s.39.

a) *Give notice/ intention to make such edits to licensing conditions to the banks which are likely to be affected*
b) *Give the Bank an opportunity to make representations on the proposed edits.*[131]

While it is for the courts to determine which rule of interpretation to use when interpreting an act, it should be noted that when the word 'shall' is used by a statute, it shows an indication of a command and is mandatory.[132] The use of shall by BOFIA makes the fulfilment of these conditions, a condition precedent to making edits to the conditions for holding a banking licence. Aside from the grounds prescribed in s.12 of the Act, a careful look at BOFIA in its entirety illustrates that there are further grounds for revocation of a banking licence. These are discussed below.

The first is the failure to meet up with the minimum paid up share capital as provided for and determined time to time by the Apex Bank in accordance with its powers under s.9 (1) of BOFIA.[133] The second is the failure to carry on the type of banking business to which its license was granted continuously for 6 months or a term aggregating to six months during a continuous period of 12 months.[134] The third is liquidation or winding up of the bank;[135] insufficient assets relative to its liabilities;[136] failure to comply with any condition to which a banking license is granted;[137] failure to comply with any duty placed on a bank by the Apex bank, BOFIA and the CBN Act;[138] failure to meet the minimum share capital ratio or if the share capital of the said bank falls below the minimum accepted share capital;[139] persistent

[131] BOFIA 2004, s.5 (4).
[132] *Bucknor Maclean v. Inlak Ltd* [1980] ANLR 18; *Kato v. CBN* [1991] 9 NWLR (Pt 214) 126.and *Okpala v. Director-General of National Museum & Monuments* [1996] 4 NWLR (Pt 444) 587.
[133] BOFIA 2004, s.9 (2)
[134] BOFIA 2004, s.12 (a) (a)
[135] BOFIA 2004, s.12 (1) b)
[136] BOFIA 2004, s.12 (1) (d)
[137] BOFIA 2004, s.12 (1) (c)
[138] BOFIA 2004, s.12 (1) (e)
[139] BOFIA 2004, s.14 (1) and (2).

failure to comply with the guidelines and other directives of the Bank or 'persistent refusal' to supply returns;[140] when a bank is failing and cannot be saved by the NDIC, the Central Bank may revoke the licence on *recommendation* of the NDIC, but, it must fulfil the steps as provided for by s.35 -38 BOFIA.

The aforementioned appear to cover all the grounds to ensure the CBN discharges its regulatory and supervisory role, however, some of these grounds are in fact open to abuse of administrative power, especially if they are not subjected to proper checks. Furthermore, such checks may lead to abuse and unfairness on the part of the bank. In the case of *Savannah*, the court held that:[141]

> *"It is trite that a public body vested with statutory powers such as those conferred upon the Respondents by the Banks and Other Financial Institutions Act (BOFIA) must take care not to exceed its powers. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably."*

However, this has not been the case in other instances of bank licence revocation.[142] Rather than the expectance of 'good faith' from the CBN, it would be more practicable for the grounds of revocation to be left unrestrictive as with s.12 (1) (c) of BOFIA.

5.7.1 Examining the Legislative and Quasi-Judicial Power of the CBN in the Revocation of Banking Licenses.

The power to revoke a banking licence has been provided for by s.5 (1) of BOFIA. S.57 also permits the Governor to make additional rules or regulations for the fulfillment of the Act.

S.5 (1) and (2) permit the Governor of the CBN to introduce a *new* condition for licenced banks under the act. This was the provision relied on when the CBN increased the minimum

[140] BOFIA 2004, s.60 (4).
[141] Savannah, 2012 (n 50)
[142] Stockland, 2006 (n 109).

share capital, to at least N25 billion naira.[143]The CBN, operating under the provisions of sub section 2, also included an 18 month window for banks to comply with this new 'law' in order to preserve and retain their banking licences.[144]

The rationale behind the law making power of the Central Bank is the administrative law principle of delegated legislation. It has been observed that the rationale for delegating the law making power of the National Assembly[145] to the CBN is the technicality of banking practice, which is better left in the care of experts.[146]

It should also be noted that the provisions of s.12 (1) (c), s.5 and s.57 of BOFIA are clear . With respect to the rules of interpreation and giving regard that indeed, this is for the courts to determine a closer look at the provisons indiactes that they are unambigious, and therefore the literal meaning should be given to the said law.[147] In clear interpretation terms, the above provisions mean that failure to adhere to the terms enacted/varied or revoked with the power granted by s.5 (1) will be a ground for revocation of licence and this gives the said condition 'the force of law', which raises a number of issues.

Some of these issues include whether the variations of the condition are *absolute* and *restrictive*; whether there are cautious steps to be adopted or if guidelines are to be followed when the CBN decides to make such a variation; and if there is a supervisory measure to monitor the way the power is exercised by the apex bank. On further examination of the

[143] Ogowewo and Uche, 2006 (n 1) 165
[144] Abikan Ibrahim, (IL) Legality of the 2004-2—5 Reform of the Nigerian Banking Sector, [2010] 33 University of Maiduguri Journal; B A Oluyomade and B U Eka *Cases and Materials on Administrative Law in Nigeria* (Obafemi Awolowo Press Limited 1992) 73. (Oluyomade, 1992)
[145] CFRN 1999, s.4.
[146] Oluyomade, 1992 (n 144) 73.
[147] *Abioye vs Yakubu* [1991] 5 NWLR (Pt. 190) 130.

statutory provisions, it is clear that the available options for an aggrieved bank[148] is to make representations in lieu of s.5(4) or file for an action in court as no provisions of BOFIA ousts the jurisdiction of the court.[149]

The quasi judicial role of the central bank in revocation of licences can be found in s.5 (4) of BOFIA which states:

> *'Where the Governor proposes to vary, revoke or impose fresh or additional conditions on a licence, he shall, before exercising such power, give notice of his intention to the bank concerned and give the bank an opportunity to make representations to him thereon.'*

This provision expressly states that *before* a condition for the grant of a license can be edited / varied and revoked, the CBN is duty bound to give notice to any bank likely to be affected by the variation. However, after the said notice, the CBN may receive representations (arguments) from the bank, be the judge and decide whether these representations are valid or not.

A more practical solution would be to adopt a systemic process to revoke a licence, akin to the provisions of BOFIA. This may consist of issuing a notice of revocation by the CBN to the affected bank, and the opportunity to make a representation to an independent third party. The thesis has argued for the creation of specific court or tribunal[150] to hear issues arising from Nigerian banking law. If the conclusion reached by this court/tribunal is that the revocation was not executed in bad faith, it will help with ensuring the affected bank does not suffer reputational hazard, especially if the apex bank acted negligently or in bad faith.

[148] BOFIA 2004, s.5 (1)
[149] BOFIA 2004, s.53(1).
[150] Chapter 3 para 3.3.1.4

Regarding the second research question, the power given to the Central Bank of Nigeria to revoke a banking licence, particularly as contained in s.12 1(c) of BOFIA is too generic, broad, extensive and open to manipulation and abuse. It is necessary to impose a caveat, as a means of curtailing the CBN's bank licence revocation. It is important that the power granted in s.5 of the Act be limited and monitored, allowing the bank to take steps to make variations to the conditions of holding a banking licence. The current rules leave banks with little or no option than to dogmatically follow any conditions as enacted/formulated.

The question of whether banks can challenge the conditions as stipulated should be considered. While they can, it is likely that the courts would rule in favour of the CBN, as a result of the provisions of s.5 and s.57, which permit the banks to make such variations and policies. The absence of clarity on this point means that it is possible for anything or policy to fall under the purview of s.5 and s.57 of BOFIA. In addition, the provisions of s.5 does not extend to variation of any part/ grounds/ conditions already listed in the BOFIA since it is clear that only the National Assembly can edit or make variations to BOFIA.[151]

Fair hearing is the foundation of any judicial process. Without it, a party is placed in a detrimental position. The extant principles of fair hearing hold that each party must be heard by an independent party. As already mentioned, the quasi-judicial power of the apex bank is granted under s.5 (4) of BOFIA. In this instance, the CBN is made a judge in its own cause because other banks are expected to make representations to it. However, this power is open to abuse as all efforts to represent or pass across constructive viewpoints will fall on deaf ears if the bank already intends to push through its agenda. Given that it is the apex regulator; it

[151] CFRN 1999, s.4 (1) (2)

may be concluded that it will take decisions that are favourable to the fulfilment of its agenda.

From the above, it is clear that the quasi-judicial power of the apex bank is excessive and and does not give regard to the rule of fair hearing. It appears that the only resort available to banks that have had their license revoked is to allege bad faith on the part of the apex bank. It appears save for the decision reached in *Savannah*, the court has tilted excessively towards the central bank in judicial decisions relating to the revocation of banking licences, leaving banking institutions unprotected.

5.7.2 Moving Forward

Based on the aforementioned issues, the following three measures are necessary to clarify the role of the apex regulator. First, it is necessary to ensure that the procedure to revoke banking licences is followed step-by-step. Secondly, given the earlier discussion, it is necessary to amend s.5 BOFIA. Finally, it is necessary to create an independent body which can perform the quasi –judicial function independently.

On revoking a banking licence, a detailed and mandated step by step procedure is necessary. This addresses the role of the CBN in the regulation of banks, particularly in revoking bank licences. It will also curtail the CBN's power in this respect, avoiding potential misuse. The second is the need to amend s.5 BOFIA and *clearly* specify the scope of variation to the conditions for a licence, as well as the limitations to the power to make variations. In its current state, this is not satisfactory and similar to the previously argued position, gives rise to a misuse of the provision itself.

5.8 Bank license Revocation in the Context of the Global Financial Crisis 2007

The above section concludes the discussion on bank licence revocation. From the discourse, it is clear that banking law in this area needs to be reformed. The consolidation process appears to have raised several important questions, this section discusses bank licence revocation in the context of the comparator jurisdictions. This will enable a demonstration of where Nigeria may draw critical lessons from.

5.8.1 The US's Response to Banks in the Global Financial Crisis 2007

As previously noted, The Lehman Brothers[152] filed for Chapter 11 bankruptcy in 2008. Notwithstanding Lehman Brothers large base and its position within the financial system, it experienced sporadic liquidity problems. The result of these challenges meant that the market started losing confidence in Lehman Brothers, resulting in some banks retracting their dealings.

The eventual global financial crisis may be divided in two stages, namely the subprime mortgage crisis, and the global financial crisis.[153] The first stage was what Gorton and Metrick[154] defined as a run on shadow banking, which is the act of lending, or other financial activities, conducted by unregulated institutions.[155] The second stage was the global financial crisis itself, which occurred as a result of losses from the subprime market.[156] It is important to note that while the failure of Lehman Brothers substantially contributed to the global financial crisis, the system was already weakened. It did not help that the Federal Reserve

[152] Chapter 2 para 2.3.1.1.
[153]David Greenlaw et al, 'Leveraged Losses: Lessons from the Mortgage Market Meltdown' Proceedings of the US Monetary Policy Forum, [2008] (Chicago: US Monetary Policy Forum) 8.
[154] Gary Gorton and Andrew Metrick, 'Securitized Lending and the Run on Repo,' [2012] 104 Journal of Financial Economics 1-56
[155] Imad A Moosa, 'The Regulation of Shadow Banking' [2017] 18 (2) Journal of Banking Regulation 180-200.
[156]Frederic Mishkin, Over the Cliff: From Subprime to the Global Financial Crisis' [2011] 25 (1) Journal of Economic Perspective 49- 70. (Mishkin, 2011)

made a decision to allow Lehman Brothers to fail, although it should be noted that the US Government did not have the authority to place Lehman Brothers within the confines of Government conservatorship. [157]

Other factors included the fact that given the bailing out of Bearn Stearns, there was a clear fear of taking on further risks.[158] Furthermore, bailing out this bank would have resulted in even more losses for the tax payer. It had clearly become unacceptable for the US Government to rescue private financial institutions.

5.8.2 The UK's Response to Banks in the Global Financial Crisis 2007

Government rescue packages have not normally been used in the UK. The Bank of England intervened by arranging a loan facility for Northern Rock. This bank experienced financial challenges due to its exposure to the 2008 global financial crisis.[159] The 'rescue' of Northern Rock by the Bank of England is one of the first bank runs since the collapse of Overend, Gurney & Co, a discount bank in 1866.[160] Similar to Northern Rock, this bank experienced liquidity challenges and requested liquidity assistance from the Bank of England, which was refused. In the case of Northern Rock, the government injected taxpayer funds[161] to maintain liquidity within the bank. Banking failure is not a new concept in the UK, given the collapse of the Bank of Credit and Commerce Insurance, which collapsed in 1991. Barings Bank was

[157] *ibid*
[158] Andrew Sorkin, *Too Big to Fail: The Inside of How Wall Street and Washing Fought to Save the Financial System – and Themselves'* (New York Viking, 2009). The American International Group (AIG) was another bank that the Federal Government bailed out; Frederic Mishkin, 2011 (n 156) 5.
[159]Gerard Caprio, 'Financial Regulation after the Crisis: How Did We Get Here and How Do We Get Out?' LSE Financial Markets Group Special Papers Series, Available at: <http://www.lse.ac.uk/fmg/workingPapers/specialPapers/PDF/sp226.pdf> accessed 15th July 2017
[160] Geoffrey Elliott, The Mystery of Overend & Gurney: A Financial Scandal in Victorian London (London: Methuen Publishing Co, 2006).
[161] Estimated at £28bn.

one the largest merchant banks, and this collapsed in 1995. In the case of Barings, it was found that the collapse was largely due to fraudulent dealings.[162]

The Labour Party, which was the Government at the time was of the opinion that Northern Rock should not be allowed to fail because of the latent damage that it may cause to the UK banking system. It was announced[163] that Northern Rock would go into 'temporary public ownership', and the former board of directors would be replaced.

The agenda behind the temporary public ownership was very clear, and the objectives identified as; (1) Government intervention which was necessary to negate further distress to the system; (2) The need to safeguard depositors funds; (3) Under the public ownership, the funds secured would be used to bear the risks during the period of market uncertainty.[164]

The Banking (Special Provisions) Act 2008 was passed into law, which provided powers to facilitate the smooth nationalization of the bank. Specific provisions include the power to act beyond the nationalization of Northern Rock and other deposit taking institutions,[165] and a sunset clause,[166] unlike the case of Nigeria with AMCON.

5.8.3 Critically Drawing from the Comparator Countries

As is observable from the decision to rescue Northern Rock, and AIG, and not Lehman Brothers, it is clear that both comparator countries are selective in choosing the banks that may fail or be bailed out. This decision is made based on several factors, including the impact

[162] Roman Tomasic, 'Corporate Rescue, Governance and Risk Taking in Northern Rock: Part 1' [2008] 29 (10) Company Lawyer 297-303.
[163] *ibid*.
[164] House of Commons, Treasury Committee, 'The run on the Rock, Fifth Report of Session 2007-2008. Available at: <https://publications.parliament.uk/pa/cm200708/cmselect/cmtreasy/56/56i.pdf> last accessed 15th July 2017
[165] The Banking (Special Provisions) Act 2008, s. 4
[166] The Banking (Special Provisions) Act 2008, s.2 (8)

of the failure of the bank on the remainder of the system, and whether such banks pose systemic risks to the financial system as a whole.

One of the important lessons that Nigeria should critically draw is understanding the importance of embracing the culture of a prompt corrective action plan to deal with banking failures and crises. Both the UK and the US were not prepared for a crisis and this one exposed a number of regulatory weaknesses. However, both countries employed a systematic approach to dealing with their banks, rather than a direct revocation of licenses, or raising the capital base as seen in the Nigerian instance.

Another lesson that Nigeria needs to critically draw is that similar to Lehman Brothers, it may prove to be necessary to simply allow some banks to fail, rather than use taxpayers funds to revive them. This goes against the backdrop of understanding the justification and reasoning for banking regulation, in order to discount the less appropriate option. AMCON's power to absorb bad debts and on performing loans from Nigerian banks, in the absence of sound strategies to address the failing of the bank, simply encourages a culture of banks issuing non-performing loans. The apex bank needs to be more selective in the banks it decides to assist.

The rationale for banking regulation is another point to note in the Nigerian response. Both comparator jurisdiction approaches towards banking regulation after the global financial crisis resonates well with the rationale behind public interest regulation and is a method that Nigeria needs to adopt.

Part V

5.9 Procedural Issues of the CBN

5.9.1 Removing and Appointing Directors of Failing Banks

In addition to the procedural issues highlighted in the process of revoking bank licences, and an examination of the position of banks in the comparator jurisdictions, 'procedure' and the issues attached have an impact on banking regulation in Nigeria. This has especially become apparent in the removal of CEO's of 'distressed banks'. It is also important to examine the position in the comparator jurisdiction, to identify where Nigeria may critically draw lessons.

The provisions which address this issue are found in BOFIA. A strict interpretation of s.35,[167] makes it clear that the CBN Governor is entitled to either; remove directors of failing banks; appoint directors for such banks; or replace. On further analysis, it is arguable that BOFIA does not confer the CBN the power to carry out the above. [168] In comparison however, leaving aside 'or' the provisions enable the CBN Governor to remove and appoint in director's position.

In employing the literal rule of interpretation, the first position as articulated above may be a more plausible approach, but given the other rules[169] the second argument embodies the correct position of the law.

In the case of *Danson Izedomwen*,[170] the CBN Governor conducted a special investigation into the accounts of Union Bank, which conveyed that the bank was distressed. The CBN Governor, under the provisions of BOFIA, [171] removed and replaced the directors. BOFIA

[167] BOFIA 2004.
[168] BOFIA 2004, s.35 (2) (d) (i) and s.35(2) (d) (ii)
[169] *AT Ltd v ADH Ltd* [2007] 15 NWLR (Pt 1056) 118 116-177.
[170] *Danzon Izedomwen & Ors v. Union Bank Plc & Ors* - Suit No. FHC/B/290/2009 (Unreported).

provides that the CBN Governor may appoint anyone who, in his opinion[172] is able to exercise powers which are specifically expected of the Director of Banking Supervision. At first glance, it may be construed that within the Act, there is no determination of who may or may not be able to discharge this role. However, this is likely to have an impact on the performance of banks and their position within the banking sector.

The removal of the bank director resulted in an action instituted at the FHC. It was argued that the statutory provisions were '*ultra vires*.' It was further argued that the provisions of the banking law Acts did not permit the Governor to a) apportion or b) assign the role of the directors at any time.[173] The provisions of BOFIA, namely s33 and s 35 form the crux of the case, especially as it was argued that this action was in breach of the articles of association of the

The lower court held that the Governor was entitled to use '*any*' of the specified sections as provided within the Act.[174] The court noted this and specifically emphasized the use of '*or*' and '*and*' in s.35.[175] It was held that although it is better to use either one of the two above words, it can be used interchangeably in order to avoid absurdity and this would have been the intention of the legislature.[176]

The Court of Appeal in this case was faced with construing the differing positions vis-à-vis the interpretation of the law as previously illustrated. In dismissing the appeal and endorsing the power of the Governor in this respect, the learned judge JCA Okoro held that:

[172] The provision states: 'who he deems fit'.
[173] Section 33 and 35 BOFIA form the crux of this case. It was further argued that this action was in breach of the articles of association of the banks in question.
[174] BOFIA 2004, s.35 (2)
[175] BOFIA 2004, s.35 (2) (d) (i) - (ii)
[176] *Ndoma Egba v Chukwuogor* [2004] ALL FWLR (Pt.217) 735.

> '*By section 35 (1) the CBN Governor is empowered to exercise any one of the powers specified in subsection (2) of section 35 of the Act. To interpret the word 'or' which separates sub section (2)(d)(i) and (2)(d)(ii) respectively disjunctively, will in my opinion, lead to a serious conflict with other parts of the statute. In the view of the fact that subsection (1) of section 35 gives the CBN Governor the power to do 'any one or more of the powers specified in sub-section (2) to section 35 of the Act, I am well fortified to conclude that this is one of such situation where the word 'or' as used in the section can be read as 'and'.*[177]

The learned judge provided further clarification on the objective of s. 35:

> *'The legislative intent underpinning the provisions of section 35 of the Act is the ability of the CBN Governor to provide a failing bank with the necessary managerial and operation support to facilitate the banks turnaround….. I do not think that the legislature intends the CBN Governor to remove ailing directors and then leave the bank to bleed to death. Or that the Governor should appoint new directors to work with those who have run the bank aground. That would lead to impractical results.*[178]

The provisions of BOFIA do not make a distinction between executive and non-executive directors, and it is contended that this is a challenge. This is particularly so, since CAMA provides that the removal of a director of a company only occurs if a resolution is passed in accordance with the prescribed section.[179] In the case of *Longe,*[180] the Supreme Court held that these were two different roles. A managing director holds the position of an *employee*, while an executive director holds the position of a *director* in the company. For this reason, the failure of the provision to distinguish between the two roles, and the absence of a clear procedure to *remove* a bank director, are problematic. This can easily be addressed if a distinction is included.

The absence of procedural protection on the part of the failing bank or the bank director is to be compared against the backdrop of s.34 (1) - (2) of ISA, which provides:

> *'34(1) The Commission may review any disciplinary action taken by a securities exchange, capital trade point or other self-regulatory organization against its members and may affirm or set aside such*

[177] BOFIA 2004.
[178] BOFIA 2004.
[179] CAMA 2004, s.262
[180] *Longe v FBN Plc* [2010] 6 NWLR (Pt 1189) SC 1 (Longe, 2010)

> *decision after giving the member and the securities exchange, capital trade point or self-regulatory organization* ***an opportunity of being heard.***
> *(2) Nothing in this section shall preclude the Commission from suspending, expelling or otherwise imposing or causing disciplinary action to be taken against a member of a securities exchange, capital trade point or other self-regulatory organization where a securities exchange, capital trade point or other self-regulatory organization fails to act against a member: Provided that, before exercising the power conferred upon it by this subsection, the Commission shall give the affected member and the securities exchange, capital trade Point or self-regulatory organization* ***an opportunity of being heard.***

These provisions *clearly* state that there should be a *hearing*, *before* the affected party is suspended or relieved of his/her duties. There is no such provision in BOFIA. On interpretation, it is unclear if the CBN is empowered to remove a bank director of failing banks, or if the power is granted to simply replace them.

This was at issue in *Danson Izedomwen.* S.48[181] is very clear about the appointment but mentions nothing on removal. For clarity, it is important to refer back to S.35 and the provisions of CAMA on company directors.[182]

In the case of *Okomu Oil Palm Co. Ltd v Iserhienrhien,*[183] it was held that the Interpretation Act[184] provides that the power to hire supports the power to fire and this is implied, even when the law is silent on this. The reliance on these statutory authorities and case law suggest that although S.48 is silent on the power to remove, the removal is in fact implied. The court relied on the Interpretations Act[185] and *Apena v NUPP*[186] in relation to the case of *Danzon Izedomwen.* The provisions of BOFIA[187] and the decision of the courts have made it clear that there is no threshold as to the number of times 'any' is used by the Governor in removing bank directors.

[181] BOFIA 2004, s.48 (1) and (2).
[182] CAMA 2004, s.262 (1) (2) (3) (a)-(b)
[183] *Okomu Oil Palm Co. Ltd v Iserhienrhien* [2001] FWLR (Pt.45) 670
[184] Interpretations Act 1990, s.11 (1).
[185] Interpretations Act 1990, s.14 (b)
[186] *Apena v NUPP* [2003] 8NWLR (Pt.822) 426.
[187] BOFIA 2004, s.35 (d) (i) BOFIA

The Supreme Court decision in the case of *Longe*[188] has settled the legal ambiguity on the issue of removing and appointing a bank director. In this case, the Longe was appointed as the Chief Executive and MD of the First Bank of Nigeria. (FBN) Prior to this time, Longe was the FBN's executive director.

Longe was alleged to have been negligent in his actions by granting unauthorized shares which resulted in a substantial loss for FBN. The Board suspended Lounge in April 2002 and in a further meeting which was held in June 2002, the board arranged a further meeting in which it then retracted Longes' appointment.

Lounge brought an action against FBN, under s.266 (1) and (2)[189] on two grounds, namely (i) he was entitled to be given notice of the meeting revoking his appointment, and secondly (ii) that he was not given notice of the meeting, the meeting was therefore invalid and accordingly, all decisions taken at that particular meeting were unlawful, null and void, and incapable of having any legal effect especially the decision of the board to revoke his appointment.

The bank argued that *Longes'* suspension itself meant that he was not entitled to receive further notice of the meeting during which is appointment was revoked. Both the FHC and the Court of Appeal dismissed the arguments of Lounge, and the matter went before the Supreme Court.

[188] Longe, 2010 (n 180)
[189] CAMA 2004.

The Supreme Court considered the provisions of CAMA,[190] and held that in order for a director to be removed, it was mandatory that the director was given notice of the meeting at which the removal is to be discussed, and that failure to do this invalidated the meeting. The provisions of s.262 meant that a company may, by ordinary resolution, remove a director before the term of appointment expires, despite any of the provisions as contained in the companies' articles of association, or by any other agreement with the company and the director. It is a requirement under that section that special notice is given, of any resolution to remove a director, or to appoint any other person, in the meeting at which the director is removed. The company, on acknowledgement of that resolution to remove a director must ensure that it immediately sends a copy to the director concerned, and this director is *entitled* to be heard at the meeting, regardless of whether the director is a member of the company or not.

In addition, s.266 (1) prescribes that *every* director is entitled to receive notice of directors meetings, except if the director has been disqualified for any reason under the act.[191] Thus, the decision to remove Lounge was clearly a defilement of the law, and as such, it draws the penalties as provided for in the law. The failure to give notice, invalidates the meeting.[192] In this instance, the Supreme Court held that Lounge was still the CEO and the MD of FBN.

The provisions of s.44 (1)[193] demonstrate that both an executive director and a non- executive director are treated the same. The position of the Court of Appeal on this issue was an attempt to provide a distinction between the two roles, but this distinction was not contained within

[190] CAMA 2004, s 262(1), (2) and s.266 (1).
[191] CAMA 2004.
[192] CAMA 2004, s 266.
[193] CAMA 2004.

the framework of Nigerian law. In overturning the decision of the Court of Appeal, the Supreme Court held that:

> *'The statutory definition of directors under s.244 (1) of [the Act], does not recognize the nomenclature raised by the court below as between executive and non- executive directors. Rather directors are appointed by the company "to direct and manage the business of the company...The further reasoning of the court below that an executive director is not the same as a non-executive director is untenable. From other angles it may be correct but for the purpose of removal under Section 266 (1) [the act], all directors are the same as long as they are all engaged to direct and manage the business of the company."*

The Supreme Court's decision to find in favour of Longe is a departure from earlier cases such as *Dairo v Western Nigerian Technical Co Ltd*[194] where the position of the court was that the decision to remove the plaintiff as a director of the first defendant company was irregular, ultra vires and illegal; and reinstated the plaintiff as a director immediately and not retrospectively.

The decision of the Supreme Court in this instance has quite clearly brought a strict and *literal* interpretation to the provisions of CAMA, regarding the appointment and dismissal of bank directors. The decision has also quite clearly derogated from the general right of the employer to determine the expiration of an employee's contract,[195] and appears to proffer special treatment on the employment of company director.

The position of the court is further reiterated in the leading judgment, where Oguntade JSC commented:

> "*To accept as the court below did, that suspension of the plaintiff would deny him protection afforded him under Section 266 is to confer the right on the defendant to vary the status of the plaintiff without complying with the procedure laid down for doing so. The defendant cannot first suspend the plaintiff without notice to him of the*

[194] NCLR 1979.
[195] C*hukwumah v Shell Petroleum Development Company of Nigeria Limited* [1993] 4 NWLR (Pt 289) 512; *Osisanya v Afribank (Nig) Plc* [2007] 6 NWLR (Pt 1031) 565).

> *meeting at which the suspension was discussed and agreed to turn round to say that the suspension has removed the necessity to give him notice as mandatorily required under Section 266 (1) of [the act]. The court cannot grant to a litigant the right to disobey the law under any artifice or guise'.*

In considering the Court of Appeals decision vis-à-vis dual tiers of directorship within a Nigerian company, the court held that by virtue of s.244(1), a director is simply a person who is appointed by the company to direct and manage the *business* of the company, regardless of the fact that the board of directors made the appointment. The decision of the Supreme Court also confirmed that the status of a director with a Nigerian company is governed by the Act. It should be noted that the provisions of BOFIA do not distinguish between an executive or a non-executive director.

The rationale of the appeal court in regards to the appellant not being notified of the meeting was also firmly rejected by the Supreme Court. It was held that encouraging this argument would permit institutions governed by the act to evade s.266. The Supreme Court held that:

> S*uspension of an employee from work only means the suspension of the employee from performance of the ordinary duties assigned to him by virtue of his office. Suspension is not a demotion and does not entail a diminution of rank, office or position…. The Statutory definition of directors under Section 244 (1) of [the act], does not recognise the nomenclature raised by the court below as between executive and non- executive directors. Rather directors are appointed by the company "to direct and manage the business of the company...The further reasoning of the court below that an executive director is not the same as a non-executive director is untenable. From other angles it may be correct but for the purpose of removal under Section 266 (1) [the act], all directors are the same as long as they are all engaged to direct and manage the business of the company.*"[196]

5.9.2 The Position in the UK

In contrast to Nigeria, directors of banks are called 'bank managers'. The removal of a bank manager in the UK is effected by a process. If an employee is dismissed outside of this process, it may be possible to bring an action against the employer. In the case of a bank, the employer (the bank) must provide a valid reason which can be justified, and demonstrate that

[196] CAMA 2004.

it acted reasonably in the circumstances. It must also be demonstrated that the actions of the employee have been consistent, and that an investigation into the situation was completed *before* the dismissal.[197]

If an employee believes that there are grounds for unfair dismissal, any claims can only be brought before a tribunal. In the case of *HSBC Bank Plc v Madden,*[198] the tribunal judged the reasonableness of the employers' decision to dismiss the employee on the 'band of reasonable responses' basis, which assesses whether the employers decision is outside the range of responses of reasonable employers. [199]

5.9.3 The Position in the US

As previously mentioned, the US system is fragmented into state and federal levels. There is the 'employment-at-will' doctrine[200] which is an amalgamation of both formalistic contract doctrine and laissez faire economic theory. This was first articulated in the case of *Payne v Western & Atl,*[201] where the court held:

> *Men must be left without interference..to discharge or retain employees at will for good cause or for no good cause, or even for bad cause, without thereby being guilty of an unlawful act per se'.*

The at-will doctrine, in its simplest form, states that an employer may terminate an employee at any time, and or, for no reason. In the US, most states employees are presumed to be in such contracts, unless evidence can be adduced of an employment contract.

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[197] Employment Rights Act 1996, s.86.
[198] [2000] EWCA Civ 330
[199] Steven R Wall and Barry I Mordsley 'The Dismissal of Employees under the Unfair Dismissal Law in the United Kingdom and Labor Arbitration Proceedings in the United States: The Parameters of Reasonableness and Just Cause' [1983] 16 (1) Cornell International Law Journal 1-49
[200] Charles J Muhl, 'The Employment- At-Will doctrine: Three Major Exceptions', [2001] Monthly Labor Review. 3-9 (At-Will Doctrine, 2001); Gary S Marshall and Maris M Wicker, 'The Status of at Will Employment Doctrine in Virginia after *Bowman v State Bank of Keysville'*, [1986] 20 (2) University of Richmond Law Review 267-294.
[201] *R.R.* 81 Tenn 507 (1984)

Save for the exceptions as identified by Muhl,[202] and those by Roehling[203] there are further exceptions to this doctrine. These include the fact that an employee may not be dismissed on the grounds of discrimination; and retaliation from the employer for performing a legally protected action. Such actions include whistleblowing illegal activities or taking an action on a discrimination or harassment suit, or refusal to perform an illegal activity.

The approach adopted in the US is directed at making employment easier for the employer than the employee. This is clear from the –at-will employment. In the UK, it is the opposite, in that employment is channeled to favor the employee. Before an employee may be terminated from work, the employer must provide justification, and this itself may give rise to a challenge. Even in the instance where a redundancy may be necessary, payout is usually attached, which is calculated based on the number of years that the employee has worked with the company.

Unlike Nigeria, the UK has a more *defined* route towards termination. Unlike the US, UK employment law,[204] is more formal , in that it is structured through written contracts. The contract details how employment can be terminated and there is usually a requirement to provide prior notice. This is not the case in the US.

Nigeria would do well to draw from the UK position, especially in the dismissal of bank staff which is the area of interest here. While Nigeria has labor laws, which include the Labour Act 2004, The Trade Union Act 2005, The Employees Compensation Act 2010, the Factories Act

[202] Muhl, 2001 (n 200)
[203] Mark V Roehling, 'The Employment- At Will Doctrine: Second Level Ethical Issues and Analysis', [2003] 47 (2) Journal of Business Ethics 115-124.
[204] Employments Rights Act, 1996

200 , the Pensions Act 2004 and the Trade Disputes Act 2004, and a specialist court,[205] it is preferable to adopt the US approach in terms of dismissing bank staff,[206] and perhaps the UK in terms of instilling a process.

Part VI

5.10 An Examination of the General Powers Provided for the CBN

The final section draws a distinction between the powers of CBN and the CBN Governor,. The CBN board is established by the CBN Act,[207] and is subject to the CBN Governor. The CBN Act provides[208] that the board is comprised of the following:

i. *A Governor (as the chairman)*
ii. *Four deputy Governors*
iii. *The permanent secretary, Federal Ministry of Finance*
iv. *Five Directors; and*
v. *Accountant - General of the Federation.*

The objective of the subsequent sections is to analyse the current arrangement of the CBN as an institution and to examine the powers of the CBN Governor. The outcome of this examination finds that the powers are arranged in such a way that the board itself is subjected to the decision of the CBN Governor.[209] This apparent excess power provided to the Governor may lead to a monopoly and abuse of power.

Under the current arrangement, the Governor of the CBN presides over the board and its meetings.[210] The governor is the chairman of the board and only two people from outside the CBN are members of the board. These are the Permanent Secretary for the Federal Ministry of Finance and the Accountant General of the Federation. The other members of this board

[205] CFRN 1999, s. 254C (2)
[206] *Osamota Macaulay Adekunle v. United Bank for* Africa Plc (Unreported suit No: NICN/IB/20/2012 judgment delivered on 21 May 2014 (http://judgment.nicn.gov.ng/cont-dtl.php?contC=616)
[207] CBN Act 2007, s.6.
[208] CBN Act 2007.
[209] CBN Act 2007, s.6 (3).
[210] CBN Act 2007, s.13 (2).

are directors of other departments, appointed by the CBN Governor.[211] The deputy Governor(s) are assigned to tasks as created by the board, based on the recommendation of the CBN Governor. The powers of the board have been so curtailed that it is not permitted to decide the remuneration of the Governor.[212]

In this respect, it is expedient that the CBN Act is amended in order to provide external participation in the board, meaning that the CBN Governor would not also be the chair of the board or directors. In addition to this, it is recommended to increase the powers and function of the board so as to ensure more accountability on the part of the Governor. This should be beneficial, providing a clearer picture of the regulatory role, and causing the discharge of this task to be clearer.

On reflection of the other models this thesis has examined, the UK and the US have benefited from this model of power distribution, and it has made their regulatory frameworks more effective. Nigeria would do well to draw from these lessons. It is expedient that the CBN Act be amended to increase more external participation in the board as well as increase the powers and functions of the board in ways which will make the Governor answerable to it. The Governor should not also chair the board of directors.

5.10.1 Powers of the Central Bank of Nigeria

An examination of the provisions contained in BOFIA suggests the powers provided to the Bank are inferior to those given to the Governor, especially as the power of the latter is exercised by *one* person. [213] This power is open to abuse, given that there is no system or mechanism in place for its regulation.

[211] CBN Act 2007, s.6 (5).
[212] CBN Act 2007, s.14 (6).
[213] Either by the Governor OR any of the Deputy Governors if the Governor is unavailable.

5.10.2 The Power to Grant and Revoke Banking Licenses

BOFIA provides a step-by-step procedure[214] for banks wishing to secure a banking licence, with the purpose of continuing banking business in Nigeria. The power to grant the license lies with the Governor and not with the Bank itself. For banks that have been refused a banking licence, BOFIA does not have specific provisions or available options for redress. This is further evidence that the Governor has very broad powers. While it is generally assumed that the Federal High Court would be the appropriate court to apply for redress,[215] the time factor challenges that the Nigerian court system faces will present a serious problem for any prospective applicant. As such, it is proposed that a council be established within the CBN with the objective of hearing appeals on the decision made by the CBN Governor, prior to refused banks taking their matter to court for redress. This would also assist in avoiding further congestion for the courts.

Another challenge presented by these broad powers is that the provisions of BOFIA[216] release the Governor from providing a justification for the decision to refuse a bank licence. This needs to be addressed, because should the affected bank wish to challenge the decision for refusal, there is no basis to support this. Further, since it is only the Governor who is empowered to refuse a licence, there appears to be no means of judging the merits of the decision, or its appropriateness.

The apex banks' powers on the revocation of bank licences needs to be addressed. While these points have been addressed previously, to conclude, the powers as provided in s.5(4), particularly with '*shall*' compels the CBN Governor to provide notice of his intention to

[214] BOFIA 2004, s.3
[215] Chapter 1 para 1.4
[216] BOFIA 2004, s 3 (3).

revoke, vary or impose new conditions on the banks affected, and to additionally give the said banks the *opportunity* to make representation to him. In this respect, the CBN adjudicates and decides on the validity of the representation.

The earlier sections have noted that the quasi-judicial power of the CBN is far to excessive and infringes on the entrenched principle of fair hearing. Rather than make a representation to the CBN Governor, a council/board should be created and charged with taking such representations, deliberating on its merits, and *deciding* if the variation, revocation or imposition of the new conditions to the licence is fair.

5.11 Protection against Adverse Claims

The provisions of the CBN vis-à-vis adverse claims, as it stands, exonerates any officer of the bank from actions, claims, demand or liability in respect of anything done in *good faith* in the performance of any duties under the Act. The notion that officials should not ever have discretionary powers is unreasonable, since it would be impossible for statutory provisions to deal with every situation which may present itself. However, what is argued is that the discretion should have a caveat placed, which permits it to be *carefully* exercised, and for bank officials not to exert personally or for political inclinations.[217]

This provision clearly presents as a challenge to aggrieved individuals, or banks who wish to make a claim against the CBN. There are circumstances which may be deemed good faith, but do not exonerate liability. One of these is where an officer of the bank is unaware of a development in the law, for example, a new decision of the court, and goes further to take actions against this decision.

[217] *Entick v Carrington* (1765) 19 St. Tr. 103.

While this can be argued to have been done in ‘good faith’, ignorance of the law should not exonerate liability. The selected immunity of this provision to employees of the CBN is problematic because it may result in abuse of power and such employees carrying out actions which they ought not to. There is no yardstick to ensure that this does not occur.

Part VII

5.12 Conclusion

This chapter concludes that in light of examination of the 2004 banking consolidation, the issues as raised in *Liberty* bank and the decision of the Court of Appeal in *Savannah* demonstrate that the CBN’s approach to bank license revocation has a substantial impact on banking regulation in Nigeria and needs to be reformed. At present, the development of the law in this area is contingent on the court’s interpretation. The chapter has also concluded that in light of the Supreme Courts’ decision in *Lounge*, and an examination of the position adopted in the comparator jurisdiction, there is a need to reform the law on the removal of bank directors.

The last chapter brings the thesis to a concise conclusion.

Chapter Six

Conclusion

6.1 Main Findings

The objective of this research has been to examine the powers of the CBN in episodes of banking crises and failures. It has also been to determine the impact of the 2004 banking consolidation policy and bank licence revocation on Nigerian banking regulation.[1] Given the theoretical discussion of the objective of banking regulation and the role it plays within the regulatory environment,[2] the thesis concludes that the regulatory framework is defective and requires substantial reform. This is evident, given the critical analysis of the regulatory response adopted by Nigeria to manage the 2008 banking crisis. The analysis of this response in comparison to the comparator jurisdictions demonstrates that a more pragmatic and proactive response is necessary for a sound banking environment.[3] This is necessary in order to not only manage, but also prevent a crisis.

To substantiate this position, it has been necessary to examine pertinent issues, such as the historical, institutional, local, political and general development of Nigerian banking.[4] The findings demonstrate that while the development of Nigerian banking law and the CBN[5] has been an amalgamation of the aforementioned factors, it has been primarily reactionary in nature.[6] This has presented challenges in promoting an effective regulatory regime, which is not contingent on the occurrence of a potential banking failure.

The thesis has also examined the recapitalisation exercise of 2004 in order to decipher the powers of the CBN to revoke banking licences. With respect to the rules of interpretation of the courts, a literal reading of the law has established that the revocation of a banking licence

[1] Chapter 1 para 1.6
[2] Chapter 2 para 2.3
[3] Chapter 3 para 3.5.5
[4] Chapter 4 para 4.4.2
[5] Chapter 4 para 4.5
[6] *ibid*

is preceded by a step-by-step procedure.[7] In light of this and of the change of position as adopted by the courts in *Savannah*,[8] the thesis has shown that the powers of the CBN may be challenged, but it is likely that this option may not be explored by banks, in order to avoid what may be argued as an exercise of arbitrary powers.[9] This shows that the exercise of powers by the CBN may have a direct impact on the development of banking regulation in Nigeria, thus giving rise to a need for further revision.

6.2 A Scheme for Reform

Although the objectives may differ among countries**,** this thesis has demonstrated that banking regulation is a fundamental concept, with the general objective of ensuring the promotion of effective regulation.[10] In light of the historical development of regulation in Nigeria, it is essential that Nigeria strikes a balance, ensuring that it promotes an effective banking regulatory environment and regime, while being proactive in its approach.

It should be noted that the thesis does not argue that Nigeria should simply adopt the regulatory regime of another country without consideration of the local context and setting. In addition, there is no specific model to be adopted, given that the US has multiple regulators and the UK had a single regulator, but both were deeply impacted by the global financial crisis.[11]

However, given that Nigeria continues to borrow from the comparator jurisdictions, the thesis advocates for Nigeria to critically draw from their models in order to establish a method which adopts lessons and modifies its approach to suit the Nigerian regulatory framework.

[7] Chapter 5 para 5.7
[8] Chapter 5 para 5.5.1
[9] Chapter 5 para 4.4.1
[10] Chapter 2 para 2.5
[11] Chapter 3 para 3.5.5

Such lessons include the developments made to the regulatory models as part of the responses to the crisis and the continued commitment to further development.

6.3 Addressing the Legal Framework

6.3.1 The CBN Act and BOFIA

Notwithstanding the poorly drafted syntax of BOFIA,[12] the thesis has established substantive issues with the legal framework for Nigerian banking. It has also been demonstrated that the absence of the term 'regulation' as defined in the Act, is one of the factors which have led to legal disputes on regulatory policies and decisions implemented by the CBN.[13] In terms of the revocation of banking licences, it has been established that the process to be followed when a bank licence is revoked needs to be clearer.[14] In addition, it is necessary to include specific provisions which enable banks to have a form of recourse available to them.

On the issue of recourse, the thesis has established that banks do not have the opportunity to present their case to the CBN for reconsideration of a decision made or fresh conditions which may have been prescribed by s.5.[15] In light of the Court of Appeals decision in *Savannah*, it is clear that the CBN's approach towards bank licence revocation needs to be revisited. While the case has illustrated that the decision of the CBN may be challenged, it suggests that the bank is required to adduce evidence which demonstrates that the licence was revoked in bad faith.

There is no fixed panoptic solution to resolve the challenges that have been identified with the banking system. However, given the examination of the comparator jurisdiction models, the thesis argues that there is a need to reform the regulatory procedures currently in place.

[12] Chapter 3
[13] Chapter 3 and Chapter 5
[14] Chapter 5 para 5.10.1
[15] BOFIA 2004.

6.3.2 Recourse for Relieving Bank Staff

In addition to revisiting the law on bank licence revocation, the thesis has demonstrated that there is a need to revise the law vis-à-vis relieving bank CEO's of their duties. The Supreme Court's decision in *Longe* has settled the ambiguity on the removal and appointment of bank directors, and has also brought about a strict and literal clarification of the law in this regard. This decision, which has departed from the courts approach in earlier cases such as *Dairo*, has established that in addition to banks being special in nature, a special treatment is to be proffered on the employment of a company director. Given the comparison to the comparator jurisdictions, it is clear that Nigeria should draw lessons from the comparator jurisdictions in this regard.

6.3.3 Creation of Specific Courts

The thesis has established that Nigeria would benefit from the creation of a special court to address banking law issues.[16] The earlier establishment of banking Tribunals[17] were fundamental in resolving banking law disputes and the recreation of this tribunal would play a fundamental role in the development of Nigerian banking law. Specifically, it would enhance the banking regulatory environment.

6.3.4 Addressing the NDIC

The thesis has extensively discussed the powers of the NDIC, which include the power to act as a liquidator without having to apply to the Federal High Court, as was the previous position under the Decree.[18] While this amendment is welcomed and has been successful in terms of administrative effectiveness, the thesis has established that there are more pressing reforms which are necessary, such as revisiting the powers of the NDIC in terms of the management of banks. Given the extensive analysis of bank failures and regulatory

[16] Chapter 3 para 3.3.1.3
[17] *ibid*
[18] NDIC Decree 1998.

responses,[19] it is clear that the development of banking regulation in this area has occurred only as a result of banking crises and failures, rather than as part of the evolution of the banking system.

6.3.4.1 Reforming NDIC

There are a number of recommendations put forward by the thesis. These include the promotion of the NDIC as the sole institution for the management of failed banks. It is argued that with the introduction of a specific insolvency procedure which enables speedy and corrective action, this will help reduce the number of litigation and ensure expedited management of bank related cases. Further reforms include addressing the matter of non-performing loans, which this thesis has identified as a substantial factor in the Nigerian financial crisis of 2008.[20]

6.3.4.2 Towards a Clear Resolution System for Banks

Given the establishment that banks are of a special nature, it is necessary to ensure that if they fail, there is an effective resolution system in place. Given the analysis of *Longe* which has further demonstrated the intertwining of Nigerian banking and company law, it is proposed that this resolution system is reformed and addressed. The thesis has illustrated that the activities of these institutions have an impact on monetary policies, which in turn impact the economy. In light of this, it is essential that the resolution system for the failure of banks is clearly defined. The CBN and NDIC Acts only make mention of 'liquidity'. Given that AMCON plays a substantial role in the resolution of banks, this is an area which needs to be revisited. The thesis has also argued for the FSRCC to play a more active role in the regulatory model. The proposal of cultivating this subcommittee as an interagency would complement the overall Nigerian regulatory model, by expanding the agencies mandate to deal with systemic risk and potential financial crisis.

[19] Chapter 3 para 3.3.1.2
[20] Chapter 3.

6.4 Scope for Further Research

This research has built on the work of Uche,[21] who investigated banking pre colonial independence and the establishment of the CBN. It also examined banking regulation during this era. This thesis has filled in the gaps vis-à-vis the position of Nigerian banking regulation and how the regulatory environment can be enhanced to ensure an effective regulaytory regieme. This thesis has also built on the work by Uche, by examining the regulatory powers of the CBN in light of the espisodes of banking failures and crises. Given the aforementioned research areas, further research is necessary with regards to the potential impact of separating the powers of the CBN. Research into this particular area would complement the findings in this thesis, given the examination into the regulatory power of the CBN itself. It may be prudent to research the potential impacts of separating the roles and the likelihood of the CBN effectively realizing the core objective of financial stability. This area has been touched on by Ogowewo and Uche,[22] but further research would contribute to the academic discourse on the entrenched arguments of the 'over supervision of banks' in Nigeria.

There are other areas for research vis-à-vis banking regulation in Nigeria, including the creation of an ombudsman, which Nigeria does not currently have. The creation of this institution, with enabling laws, would be a practical approach in developing the regulatory model in Nigeria. Against the backdrop of its effectiveness in the chosen comparator jurisdictions of this thesis, it is likely that the creation of an ombudsman would be successful in addressing third party redress. This area has been touched on by Ojukwu-Ogba.[23] While the article focuses on the legal necessity of creating an ombudsman in Nigeria, it is submitted

[21] Chibuke Uche, 'Banking Developments in Pre-Indepdence Nigeria: A Study in Regulation, Control and Politics' (Unpublished Doctoral Research, London School of Economics, 1997)
[22] Tunde Ogowewo and Chibuke Uche, '(Mis) Using Bank Share Capital as Regulatory Tool to Force Bank Share Capital in Nigeria' [2006] 50 (2) Journal of African Law 161-186.
[23] Nelson Ojuku- Ogba, 'Towards Effective Bank Customer Protection in Nigeria: The Legal Imperative of Banking Ombudsman System', (2015) 30 (8) Journal of International Banking Law and Regulation 454-459

that there is enough scope to engage in further research in order to contribute to the academic discourse in this area.

Part III

6.5 Final Remarks

Given that BOFIA has not been updated since its enactment in 1991, it may be plausible to argue that reform to the Act may not occur in the near future. However, the fact that ISA was separated from CAMA in 1999 should act as a template for reform. Indeed, while these are two separate Acts from BOFIA, ISA remains an integral aspect of the banking sector.

It remains imperative that Nigeria addresses the issues of banking failure and crises in order to maintain a stable, sustainable and manageable banking environment. This is particularly true as the banking sector acts as a catalyst for a successful economy. The thesis concludes that while there is no magic bullet to improve Nigeria's banking sector, the country should draw lessons from the comparator regimes. This will be instrumental in redefining the CBN's role in discharging banking regulation.

Some of the good practices established in the comparator jurisdictions may be directly transported into the Nigerian setting. However, if the features of a good banking model, as articulated in the thesis are embraced, they can be modified in a manner which develops banking regulation in Nigeria.

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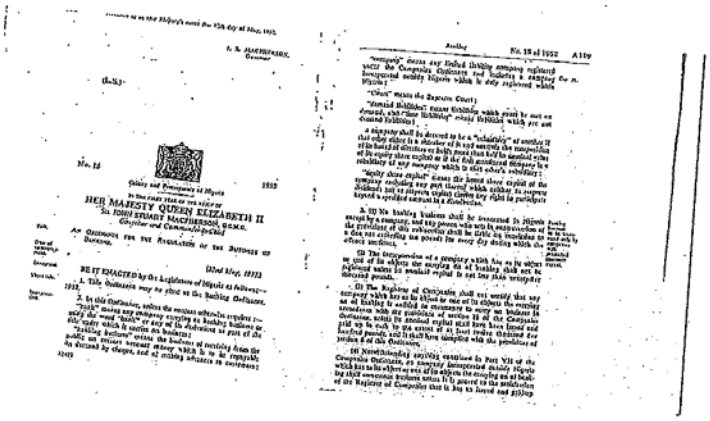
Appendix 1

Appendix 1. List of Failed Banks in Nigeria; 1929 – 1959.

Bank Name	Year	Failure
The Industrial and Commercial Bank	1929	Failed in 1930
The Nigerian Mercantile Bank	1931	Failed in 1936
National Bank of Nigeria	1933	-
Agbomagbe Bank	1945	Wema Bank
Nigerian Penny Bank		Failed in 1946
Nigerian Farmers and Commercial Bank	1947	Failed in 1953
African Continental Bank	1947	-
Pan Nigerian Bank	1951	Failed in 1954
Standard Bank of Nigeria	1951	-
Premier Bank	1951	-
Nigerian Trust Bank	1951	-
Afroseas Credit Bank	1951	-
Onward Bank	1951	-
Central Bank of Nigeria	1952	-
Metropolitan Bank of Nigeria	1952	-
Merchants Bank	1952	Failed 1960
Union Bank of British Africa	1952	1954
United Commercial (Credit) Bank	1952	-
Cosmopolitan Credit Bank	1952	-
Mainland Bank	1952	-
Group Credit Bank	1952	-
Industrial Bank	1952	-
West African Bank	1952	-
Muslim Bank	1958	-
Bank of Lagos	1959	-
Bank of the North	1959	-

Source CV Brown, *The Nigerian Banking System* (Northwestern University Press, 1966)(Table 1)

Appendix 2



No. 15

1952

HER MAJESTY QUEEN ELIZABETH II

SIR JOHN STUART MACPHERSON, G.B.E.

An Ordinance for the Regulation of the Business of Banking.

[22nd May, 1952]

BE IT ENACTED by the Legislature of Nigeria as follows:—

1. This Ordinance may be cited as the Banking Ordinance, 1952.

2. In this Ordinance, unless the context otherwise requires—

"bank" means any company carrying on banking business to which the word "bank" or any of its derivatives is applied in such manner as to indicate or tend to indicate that the business of carrying on banking business is being carried on;

"banking business" means the business of receiving from the public on current account money which is to be repayable on demand by cheque, and of making advances to customers

Number No. 15 of 1952 A 119

"company" means any limited liability company registered under the Companies Ordinance and includes a company incorporated outside Nigeria which is duly registered under that Ordinance;

"Court" means the Supreme Court;

"deposit liabilities" means liabilities which must be met on demand, and "time liabilities" means liabilities which are not deposit liabilities;

A company shall be deemed to be a "subsidiary" of another if that other either is a member of it and controls the composition of its board of directors or holds more than half its nominal value of its equity share capital or if the full nominated company is a subsidiary of any company which is also that other's subsidiary;

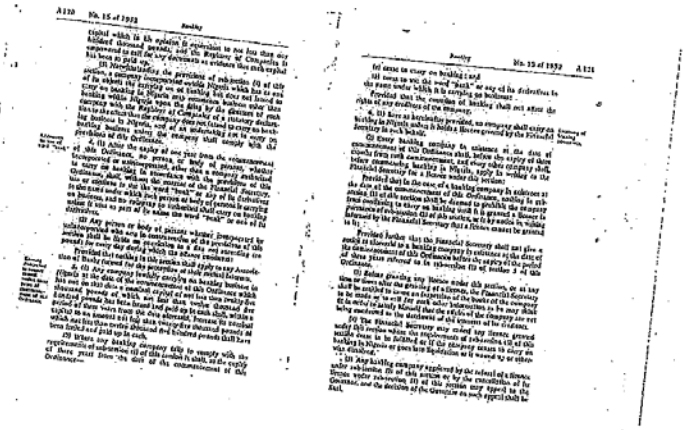
"equity share capital" means the issued share capital of the company excluding any part thereof which neither as respects dividend nor as respects capital carries any right to participate beyond a specified amount in a distribution.

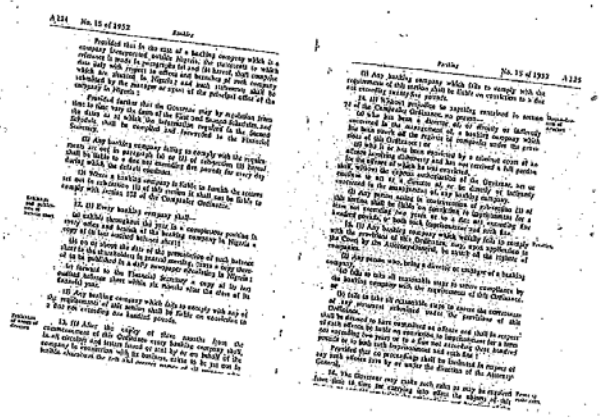
3. (1) No banking business shall be transacted in Nigeria except by a company, and any person who acts in contravention of the provisions of this subsection shall be guilty of an offence and liable on conviction to a fine not exceeding one pound for every day during which the offence continues.

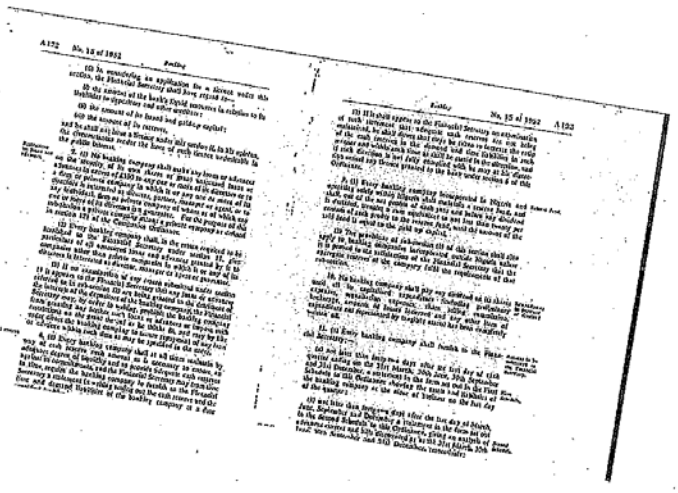
(2) The incorporation of a company with any of its objects the carrying on of banking shall not be registered unless its nominal capital is not less than twenty-five thousand pounds.

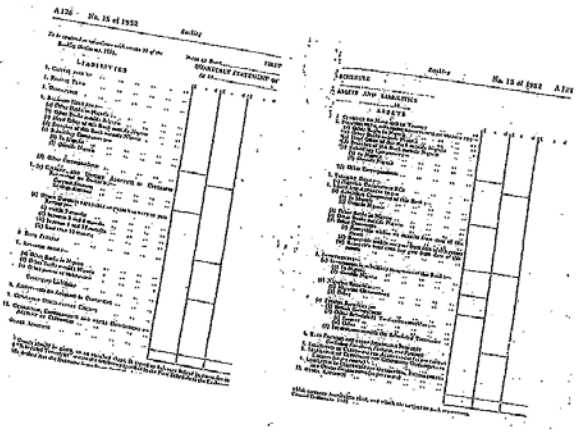
(3) The Registrar of Companies shall not certify that any company which has as its object or one of its objects the carrying on of banking is entitled to commence to carry on business in accordance with the provisions of section 21 of the Companies Ordinance, unless its nominal capital shall have been fully paid up in cash by the issue of at least twelve thousand five hundred pounds, and it shall have complied with the provisions of section 8 of this Ordinance.

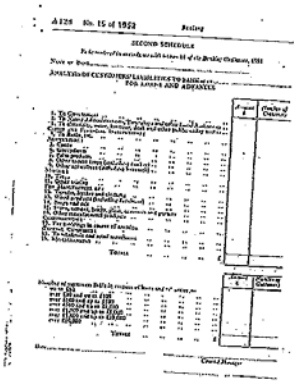
(4) Notwithstanding anything contained in Part VII of the Companies Ordinance, no statutory declaration mainly dealing with which has as its object or one of its objects the carrying on of banking shall commence business unless he is granted to the satisfaction of the Registrar of Companies that it may be issued and filing











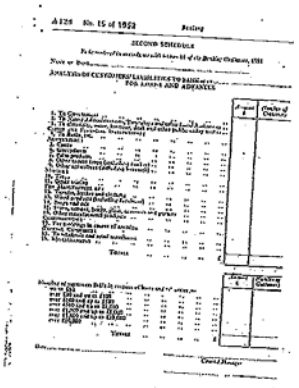
A 128 No. 15 of 1952 Printing

SECOND SCHEDULE

Printing No. 15 of 1952 A 129

This printed impression has been carefully compared by me with the Bill which has passed the House of Representatives, and I have found it to be a true and correctly printed copy of the said Bill.

A. ADE, QSO.
Clerk of the House of Representatives



A 128 No. 15 of 1952 Stamp

SECOND SCHEDULE

Stamp No. 15 of 1952 A 129

This printed impression has been carefully compared by me with the Bill which has passed the House of Representatives, and I have found it to be a true and correctly printed copy of the said Bill.

A. ADE, QSO.
Clerk of the House of Representatives

Appendix 3

Appendix 3. List of Banks pre and post consolidation 2004

Bank	Constituents Banks	Capital Base (Billion Naira
First Bank	First Bank, MBC International, FBN Merchant Bankers Ltd	44.62
Diamond Bank	Diamond Bank, Lion	33.25
Oceanic Bank	Oceanic Bank International, International Trust Bank	33.10
International Bank Group	Intercontinental Bank, Global Bank, Gate way Bank, Equity Bank	51.70
Fidelity Bank Group	Fidelity Bank, FSB International Bank. Manny Bank	29.00
FCMB	FCMB, Coop Dev. Bank, Nigerian. American Bank Ltd	30.00
Spring Bank Group	Citizen Bank International, ACB International, Guardian Express Bank, Oceanic Bank, Transinternational Bank, Fountain Trust Bank	35.00
Access Bank Group	Access Bank, Marina International Bank, Capital Bank International	28.50
Unity Bank	Intercity Bank, First Interstate Bank, Tropical Commercial Bank, Centre Point Bank, Bank of the North, Societe Bancaire, Pacific Bank, NNB	30.00
Equatorial Trust Bank Group	Equatorial Trust Bank, Devcom	26.50
Union Bank Group	Union Bank of Nigeria, Union Merchant Bank, Broad Bank, Universal Trust Bank	58.00
First Inland Bank Group	First Atlantic Bank, Inland Bank, IMD, NUB	28.00
IBTC, Chartered Bank	IBTC, Chartered Bank,	35.00

Appendix 4

exH 18

2007: INEC Shops for N60.5bn

From Kola Ologbondiyan in Abuja

Independent National Electoral Commission (INEC) Chairman, Professor Maurice Iwu, yesterday told the Senate Committee on INEC that his commission would require the sum of N60.5bn to conduct transparent polls in the 2007 general elections.

Iwu, who appeared before the Senator Nicholas Yahaya Ugbane-led committee to defend the commission's budget, explained that he had proposed a total budget of N74bn to the executive but the commission only received N60.5m envelope upon which it had to tailor its 2006 Budget.

He, however, noted that some part of the funds required could not be covered in the 2006 budget, adding that provisions had not been made for the ad-hoc staff that would work during the elections as well as the litigations that might arise from the various elections to be held and contested.

"Such things would have moved forward either to a supplementary budget later in the year or to the budget of 2007 since such issues will come up in 2007," he said.

Giving the breakdown of how the N60.5 billion will be expended, Iwu said N4.7 billion will be on personnel cost; N3.091 billion will go to overhead in all personnel services while about N15.2bn will be required for overhead electoral and N35bn will be needed for capital electoral projects for the 2007 general elections.

"We then have some new projects that we consider strategically important to 2007 election. In some local government areas, it is sad that we have INEC offices in people's private homes. The total of such capital projects which we envisaged will be about N1.4 billion. We are also mindful of the fact that we are six weeks behind," he said further.

Continuing, Iwu implored Ugbane "to persuade your colleagues that this budget if passed with any kobo lesser than N60.5 billion will be a threat to our democracy.

"We have done a very calculated budget; everything that is superfluous has been taken out. Everything that we think can be deferred has been deferred and we have also taken note of your comments at our previous appearances."

Continued on Pg. 4

Thursday, January 26, 2006, Vol. 11, No. 3932, Price: N100

www.thisdayonline.com

THISDAY

Northern Lawmakers Restate Opposition

• PDP meets governors today

From Kola Ologbondiyan and Donald Andoor in Abuja

The speculated third term agenda of President Olusegun Obasanjo suffered another setback yesterday as Northern members of the House of Representatives under the aegis of the Northern [illegible] from a meeting in Abuja, resolving to remain firm in their opposition to [illegible] extra term for the President.

The 180-member [illegible] resolution comes against the background of a meeting of the National Working Committee (NWC) of the Peoples Democratic Party (PDP) with its 25 state governors today in Abuja to discuss what the National Publicity Secretary of the party, Mr. John Odey, called "activities of the party."

The legislators at their meeting held at the main chambers of the House of Representatives said they reinstated their position taken at the inauguration of the forum last November because it was obvious that the tenure extension project was not in the national interest, contending that it was to pursue the insatiable desire of an individual or a group of individuals at the expense of the greater interest of the majority of Nigerians.

The resolution contained in a statement signed by its Chairman, Hon. Victor Lar, also expressed the determination of the forum to block any attempt to amend the constitution in order to pave the way for the speculated presidential desire to stay in office after the expiration of his tenure in 2007.

Pledging to collaborate with legislators from other parts of the country to derail the third term train, the Northern legislators commended the 19 governors as well as senators from their region for their opposition to the project and asked them to remain steadfast in the struggle against the extra term bid.

Extracts of the two-page statement issued after the read: "Having resolved to pursue the path of honour by not supporting any attempt at amending

Continued on Pg. 4

Ngige: Ladoja's Removal Portends Grave Danger

Soyinka threatens mass action

By Philip Ogunnlade and Hilary Dibiagwu

The Governor of Anambra State, Dr. Chris Ngige, has stated that the unconstitutional impeachment of his Oyo State counterpart, Senator Rashidi Ladoja, portends a grave danger to the survival of democracy in the country.

Ngige, who said this yesterday in Lagos, argued that like a [illegible] going into the farm and [illegible] everything, including [illegible] vital instrument, the 18 Oyo legislators had [illegible] their most [illegible] [illegible] the constitution [illegible] created their way [illegible] as lawmakers.

Ngige maintained that the removal of a serving governor should be in accordance with the provision of section 188 of the constitution, sub-section 1-9, adding, "you can't even remove or subtract or add anything there. For those legislators to be subtracting, amending, panel [illegible] some areas, suspending some people and saying that they are not members, bringing the 2/3 membership to a ridiculous 16 or 17 is mark of a dan-

Continued on Pg. 4

THE MORE YOU LOOK

L-R: President Olusegun Obasanjo, Mrs. Amina Ibrahim, Special Adviser to the President on Millenium Goal, and Vice President Atiku Abubakar, at the Federal Executive Council meeting in Abuja... yesterday

PHOTO: Innocent Okafor

[illegible] Summons Police Chiefs over Security

• FG deploys more troops to Niger Delta

By Mike Odunyi and Yemi Akinsuyi with agency report

[illegible] regarding threats to security in the country especially in the oil producing Niger Delta region, Inspector General of Police, Mr. Sunday Ehindero, has summoned all Commissioners of Police [illegible] today to discuss the [illegible] crisis.

[illegible] the Nigerian Army deployed more [illegible] Delta State to protect key oil and gas facilities even as oil companies also stepped up security in their operational bases.

Eight policemen were killed Tuesday when gunmen stormed the operational base of the Nigerian Agip Oil Company (NAOC).

Police sources told THISDAY that the IG had become worried over the threat to the nation's security as demonstrated by the incessant attacks on lives and property in the last one month.

"Really, the continue [illegible] to the nation's security is [illegible] some. The IG will be meeting with all Commissioners of Police tomorrow (today) in Abuja over the situation," the source disclosed.

Police sources said further that while no arrest had been made of the Agip attackers, the police were still on manhunt for the gunmen.

The US Department of State [illegible] in issuing a new travel warning to its citizens said there was lack of law and order in Nigeria and that it posed considerable risks to travelers.

"Security conditions in the Niger Delta region [illegible] to deteriorate [illegible] groups have [illegible] we continued [illegible] local [illegible] oil company facilities, resulting in several deaths in the area, the [illegible]

NSE	[illegible]
J.BERGER	[illegible]
ASHAKA CEM	[illegible]
CADBURY	[illegible]
MOBIL	[illegible]
Top Losers	
OKOMU OIL	[illegible]
DANGOTE	[illegible]
FIRST BANK	[illegible]
UNILEVER	[illegible]
GUINNESS	[illegible]
Volume:	[illegible]
Value:	[illegible]
Deals:	4,318

IN THE FEDERAL HIGH COURT OF NIGERIA HOLDEN AT LAGOS

SUIT NO. FHC/L/CS/54/2006

IN THE MATTER OF THE INVESTMENTS AND SECURITIES ACT NO 45 OF 1999

AND

IN THE MATTER OF AN APPLICATION UNDER SECTION 100 THEREOF

AND

IN RE:

1. UNITY BANK PLC (RC 94524) and
2. BANK OF THE NORTH LIMITED (RC2000) and
3. NNB INTERNATIONAL BANK PLC (RC 7554) and
4. NEW AFRICA BANK PLC (RC 84254)

MEETING OF THE HOLDERS OF THE FULLY PAID ORDINARY SHARES OF UNITY BANK PLC

NOTICE IS HEREBY GIVEN that by an Order of the Federal High Court, Lagos (hereinafter called "the Court") dated the 25th day of January 2006 made in the above matter, the Court has directed that a Meeting of the holders of the fully paid ordinary shares of Unity Bank Plc (hereinafter called "Unity Bank" or "the Bank") be convened for the purpose of considering and if thought fit, approving (with or without modification) a Scheme of Merger between Unity Bank, Bank of The North Limited, NNB International Bank Plc and New Africa Bank Plc (Bank of The North Limited, NNB International Bank Plc and New Africa Bank Plc are hereinafter collectively called "the Transferring Banks"). The Scheme is explained in detail in the Explanatory Statement on Pages 18 to 27 of the Scheme Document.

The Meeting will be held at NICON Hilton Hotel, 1 Aguiyi Ironsi Street, Maitama, Abuja on Friday, the 27th day of January 2006 at 11.00 a.m. at which place and time all the aforesaid shareholders are requested to attend. The following sub-joined resolution will be proposed and if thought fit passed as a resolution at the meeting:

That:

1. this Meeting approves the Scheme of Merger dated the 5th day of January 2006, a print of which has been submitted to the Meeting and for the purposes of identification subscribed by the Chairman, and that the Directors be and are hereby authorised to consent to any modifications of the Scheme of Merger that the Central Bank of Nigeria, the Securities & Exchange Commission or the Federal High Court, may think fit to impose and approve;

2. notwithstanding the provisions of the Bank's Articles of Association, ordinary shares of the Bank be issued, allotted and credited as fully paid to the shareholders of Bank of The North Limited, NNB International Bank Plc and New Africa Bank Plc in accordance with the Scheme, in consideration for the transfer of all the assets, liabilities and undertakings, including real properties and intellectual property rights of the Transferring Banks to Unity Bank without further act or deed and the cancellation of the entire share capitals of the Transferring Banks;

3. Pannell Kerr Forster, Olaniwun Ajayi, Cashcraft Trust Company Limited, Crown Flour Mills Limited, Amek Holdings Limited and Kabo Holdings Limited be appointed to represent, monitor and enforce the rights of the shareholders of the Bank in respect of any post-merger share adjustments and other post-merger issues to be made pursuant to the Scheme and the Merger Agreements; and

4. the Board of Directors of Unity Bank be and is hereby authorised to take the actions required to put the Scheme into effect."

By the said Order, the Court has appointed Alhaji Balala Bello O F R *(Sarkin Bai Zazzau)*, or failing him, Alhaji Lamis Shehu Dikko, or failing them both, a Director of the Bank appointed by the Directors at the Meeting to act as Chairman of the said Meeting and has directed the Chairman to report the results thereof to the Court.

The said Scheme of Merger will be subject to the sanction of the Court.

Shareholders may vote in person or they may appoint another person, whether a shareholder or not, to attend and vote in their stead. In the case of joint holders, the vote of the senior holder who tenders a vote, whether in person or by proxy, will be accepted to the exclusion of the votes of the other joint holders, and for this purpose seniority will be determined by the order in which the names stand in the Register of Members of the Bank.

A Proxy Form is being sent to each shareholder. It is requested that the executed Proxy Form be lodged at the office of the Company Secretary, as shown on the Proxy Form, not less than 24 hours before the time appointed for the Meeting. Please note that the lodging of a Proxy Form does not prevent you from attending the meeting and voting in person should you so wish. However, if you attend the meeting in person, your proxy will not be permitted to attend or vote.

Dated this 25th day of January 2006

OLANIWUN AJAYI
4th Floor
UBA House
57 Marina
Lagos

(SOLICITORS TO UNITY BANK PLC)

Paragraph 36 of Mr - Lasisi's Statement on Oath

First Lady Dame Patience Jonathan receiving the "2010 Citizen of Distinction" Award of Toronto East General Hospital from Chief Executive Officer Rob Devitt in Toronto, Canada during the First Lady's visit to the hospital...recently

CBN Extends Unity, Wema Bank Recapitalisation Deadline

By Emele Onu

The Central Bank of Nigeria (CBN) yesterday extended the recapitalisation deadline it gave Unity Bank and Wema Bank by three months.

Both banks had been given till tomorrow, June 30 to recapitalise or face the axe of the apex financial institution.

The CBN said in a statement signed by its Head of Corporate Communications, Muhammed Abdullahi that the banks now have up to September 30, to complete the recapitalisation process.

The banking watchdog noted the progress by the boards of the two banks on their recapitalisation and said it was satisfied by their efforts.

It said the extension of the deadline became imperative due to unanticipated three months extension in timeline for setting up the Asset Management Corporation of Nigeria (AM-CON).

"We wish to inform the general public that due to unanticipated three months extension timeline for setting up Asset Management Corporation of Nigeria (AMCON), the Central Bank of Nigeria has granted a three months extension for the two banks to recapitalise. The Central Bank of Nigeria is fully abreast of the significant progress made by the boards of the two banks on their recapitalisation and is satisfied with the efforts.

"It is our hope that with the progress made so far, the two banks should be recapitalised by the end of September 2010 through the combination of sale of toxic assets to AMCON and injection of fresh capital," CBN said.

Following the result of the joint examination on 10 banks by the CBN and the NDIC, as released on October 2, last year, Wema Bank was found lacking in the two financial parameters for the test, namely liquidity and capital but its executive management was not removed because they represented new investors and were new in the management of the bank and so could not take the blame for the rot in the financial institution. The management was however, urged to recapitalise the bank not later than June 30, 2010.

Unity Bank on its part was adjudged in the same examination to have insufficient capital but not in grave situation because it had a healthy liquidity position and was well managed. The management was also asked to recapitalise latest tomorrow.

Also yesterday, the CBN Governor, Sanusi Lamido Sanusi said the banking watchdog expects three foreign banks, a number of private equity houses and local financial institutions to submit offers for the rescued banks by mid-July.

Sanusi told Bloomberg News in an interview yesterday in Basel, Switzerland that the interested parties are undertaking detailed due diligence.

"We have got three international banks that have remained in the serious running to acquire banks. There is also a number of local banks and private equity firms. By the middle of August we should actually have clear visibility on at least five of the banks," he said.

According to the Governor, securing a future for Union Bank, Oceanic, Intercontinental, Bank PHB and Afribank among others is the priority of the CBN as these banks are the most systematically important to Nigeria.

Sanusi also said he sees no reason now for a change in the benchmark interest rate, adding: "A rate cut at this particular moment in time doesn't appear to be necessary. There is no compelling imperative at this point to review the interest rate stance."

Sanusi

House Wants 17.9m Euros Aviation Contract Suspended

From Onwuka Nzeshi in Abuja

The House of Representatives Committee on Public Procurement yesterday asked that the automation of the Aeronautical Information Service (AIS) project in some airports be stopped pending the outcome of investigations into allegations that the contract did not follow due process.

The contract valued at 17.9 million euros was awarded to a company called MOCOM.

But some firms who took part in the bid petitioned the National Assembly, alleging irregularities.

Chairman House Committee on Procurement Hon. Yusuf Tuggar disclosed this at an interactive session with contractors who took part in the bidding process.

The committee, Tuggar said, had earlier queried the rationale behind giving out the contract which was awarded in December 2009, two years after the bids were opened.

He lamented the absence of the Minister of Aviation Mrs. Fidelia Njeze, and the leadership of the Nigerian Airspace Management Agency (NAMA) at the interactive session and warned that the committee would sanction [illegible] in the event that they fail to appear at the next meeting to defend their actions in respect of the contract.

"I wish to state here that [illegible] Minister of Aviation and the Director General of the Nigerian Airspace Management Agency (NAMA) should suspend [illegible] actions on the contract until they appear before us to clarify the issues being raised by the contractor.

"If they fail to appear before us as they did today without any excuse whatsoever, I can assure you that further actions would be taken against them," Tuggar said.

In one of the petitions lodged against the contract, the House committee was asked to investigate the reasons why the NAMA and the Federal Ministry of Aviation awarded the contract at the cost of 17.9 million euros when another firm made a bid of 9.5 million euros and had the requisite technology and expertise to execute the contract.

However, a representative of the Bureau of Public Procurement (BPP) Mr. [illegible] explained that [illegible] responsibility [illegible] the [illegible] only to [illegible] the [illegible] Ministry of Aviation [illegible] financial and technical bidding procedure [illegible] award of the contract. [illegible] Odizie further explained that the delay in the award was not the fault of the agency as it only got the request for certification in August, 2009.

TWO-MINUTE BRIEFING

NEWS

Nigeria to Relaunch Communication Satellite Next Yea[r]

Nigeria is to re-launch its communication satellite de-orbite[d] on November 10, 2008 when it developed a technical problem, a[n] official has said. The China-built NigComSat-1 developed [a] South Solar Array Drive Assembly anomaly, leading to its de-orbiting.

Page [illegible]

EDITORIAL

Governors' Birthday Parties

High society birthday parties are not peculiar to Nigeria. The world over, the high and mighty throw lavish parties to mark the day of their birth. It is the right of individuals, for whatever reasons, to spend a fortune on ceremonies to mark their achievements and milestones, especially if such actions do not impinge on the rights of others. But then, like in many other aspects of our national life, what ordinarily should be treated as a respectable social activity is now being drenched in excesses.

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POLITICS

Voters' Register: A Rally and its Fanfare

In yet another round of successful rally, Save Nigeria Group took the nation by storm last Wednesday, when it assembled an army of activists and opposition leaders to reject the current voters' register. The group organised the rally in collaboration with Coalition of Democrats for Electoral Reform (CODER).

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FEATURES

NYSC: As Stakeholders Strategise on Way Forward

All the stakeholders that matter were at the conference, which included other partners. The NYSC Director-General, Brigadier-General Maharazu Tsiga, chaired it while the Deputy Governor, Mr. Sunday Onyebuchi, represented the Enugu State Governor, Sullivan Iheanacho Chime who was unavoidably absent. Earlier, the governor noted that: "participants should recognise the inevitability of change and ensure that relevant changes in NYSC are carried out in its operations to enable the scheme meet the challenges of the present democratic dispensation."

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BUSINESS

Lull in Business, As Investors Await PIB Passage

Despite efforts by the Nigerian government to modify Petroleum Industry Bill (PIB) amid concerns expressed by International Oil Companies (IOCs) and other stakeholders, investments in the Nigerian oil and gas industry is currently at a low ebb. This is due owing to the uncertainty over the PIB, and delay in its passage. Sources in the Petroleum Ministry, who spoke to THISDAY weekend, said though some potential investors have been expressing interests in oil and gas projects, not much commitment has been expressed by the foreign oil and gas companies because they are waiting to see whether the provision in the PIB will be favourable to them or not.

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INTERNATIONAL

AGOA: Expert Says High Capital Cost Affects Nigeria

A [illegible] from the United States, Mr. Thomas O'Keefe has disclosed that the constraint faced in getting Nigeria to take full advantage of the African Growth and Opportunity Act (AGOA) is the [illegible] of capital needed to commence business. "The reality is that the amount of money required to start a business is really high in Nigeria. Unlike other African countries where you need like 4 per cent capital to start a business, here in Nigeria you need about 80 per cent capital. Which is relatively high."

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SPORTS

METU *Targets* BOLT

Nigeria's latest 'King of Tracks', Obinna Metu, is already looking beyond his recent win in the 100 metres men final race at the just concluded Mobil Athletics Championship held in Calabar, hoping to use the forthcoming Commonwealth Games in New Delhi, India to make his statement of intent in that direction. Metu, who tore pre-race prediction into shreds in history-making at the championship, by coasting home comfortably at 10.25secs, disclosed that he has matured.

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EXH 39

Halliburton, Technip to Pay $338m to Settle US Bribery Charges

Global Engineering firm Technip S.A. has agreed to pay $338 million for scheming to bribe government officials in Nigeria, the United States Justice Department said yesterday.

It said the Paris-based company conducted the alleged bribery scheme to obtain more than $6 billion in contracts to build the Nigerian Liquefied Natural Gas (NLNG) in Bonny Island of Rivers State.

By Ejiofor Alike with agency report

Technip was part of a four-company joint venture that included US firm Kellogg Brown & Root Incorporated.

The Federal Government awarded four contracts to the joint venture from 1995 to 2004.

Under the settlement, Technip has agreed to pay a $240 million criminal penalty and the Justice Department has filed a deferred prosecution agreement and a criminal information resolving charges of conspiracy and of violating the Foreign Corrupt Practices Act.

The company will pay $98 million to settle a related civil complaint by the Securities and Exchange Commission.

Technip authorised the hiring of two agents to pay bribes to Nigerian government officials, according to court papers in the case.

The court papers stated that a senior executive of Technip, KBR's former CEO, Albert "Jack" Stanley, and others asked public servants at critical junctures in the project to designate a representative with whom the Joint venture could negotiate the payment of bribes.

The engineering subsidiary of Halliburton Co., Kellog Brown

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2011: Babangida to Set up Offices in 32 States

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THISDAY

Furore over Nigeria at 50 Summit in London

•NLC, AC fault conference •Nnaji promises faster power reforms

The Nigeria at 50 summit taking place in London is generating ripples at home with the Organised Labour, opposition political parties and politicians querying the rationale behind it.

THISDAY learnt the summit is a business and investment forum. President Goodluck Jonathan had been expected to lead dozens of ministers, state governors and government officials to the conference, where they were due to address issues from bank and power sector reforms to eradicating counterfeit drugs.

From Chuks Okocha in Abuja and Linda Ikeji in Lagos

But the President and most of the delegation pulled out amid criticism of profligacy over the planned trip, which would have come days after he returned from a G20 summit in Toronto.

The Nigerian Labour Congress (NLC) condemned the two-day conference, saying the summit is irrational and unnecessary.

Elder statesman Alhaji Tanko Yakassai and the Action Congress (AC) also described it as a waste of scarce national resources.

NLC President Comrade Adbulwaheed Omar in a statement lamented that "huge resources at both federal and state levels have been wasted on travel expenses for a project that has no relation to transformation, urged President Jonathan to discourage every act of frivolity and use the resources to fund people-oriented projects and policies.

"Is the two-day event sponsored by the United Kingdom on the condition that it must hold in London? Are travel expenses and logistics of the

Continued on Pg. 6

Details on pg. 55

Oil Spill: We've Failed, Says Shell

By Chika Amanze-Nwachukwu with agency report

For the first time, oil giant Shell yesterday admitted that oil companies are not doing enough to deal with oil spills in their areas of operation.

The company also said it was not ignorant of its obligation under the Nigerian law to clean up oil spills, but that it would not jeopardise the safety of its staff because of the law.

Speaking at the Fortune Global Forum in Cape Town, South Africa, Chief Executive Officer of Shell, Peter Voser, said oil industries must come together to be better prepared in the future to deal with spills.

The Shell boss who was responding to criticisms raised at the Global Forum that Shell and other oil majors were not doing enough to clean up oil spills in Nigeria, said the complex situation in the country makes it difficult for the company to properly deal with

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PPA Reads Riot Act to Abia Gov

From Chuks Okocha in Abuja and Emmanuel Ugiya in Umuahia

The on-going conflict between Abia State Governor Theodore Orji and his party, the Progressive Peoples Alliance (PPA) came to a head yesterday when the party ordered him to pay all outstanding salaries to civil servants and to the Deputy Governor Chris Akaeze latest by August this year, an action that is seen as the beginning of a plot to oust him from power.

But reacting to the party, the Chief Press Secretary to the governor Mr. Kingsley Ememuwa said the PPA did not give Orji any chance to defend himself against issues that were raised.

Orji has also dissolved the cabinet, the second time since he became the chief executive.

PPA's order was given yesterday in Abuja by the National Chairman Mr. Lazy Ikoh, while announcing the resolution of the National Working Committee (NWC) to sanction

Ikoh who chaired the party

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Group Managing Director, Mobil Oil Nigeria Plc, Mr. Nebojsa Aralij flanked by Executive Director, Institutional Banking, Mr. Nnamdi Anammah (L) and Executive Director, Retail Management, Mr. Isaac Alofoje (r), at the media briefing on the bank's activities for the First Quarter 2010 in Lagos yesterday PHOTO: Akhere Ajah