Extension of The Pension Reform Act To State Public Service and Private Sector Employments: Overreaching The Legislative Powers of The National Assembly*

Abstract

The Nigerian federation, as in most other federations, there is a constant war of attrition between the Federal and State law-making bodies over their respective legislative powers. Here, it is the National Assembly that more often than not takes the offensive. It not infrequently embarks upon needless legislative expansionism, thereby upsetting the delicate balance of power entrenched in the Constitution. This work examines the legitimacy of the extension of the operation of the Pension Reform Act, 2014 enacted by the National Assembly to the public service of the States and private sector employments against the backdrop of the constitutional provisions conferring on the National Assembly the power to make laws with respect to pensions. It posits that such extensions are unconstitutional, for the power to legislate on the pensions of State public servants as well as private sector employees falls roundly within the residual legislative powers of the States.

Introduction

The Pension Reform Act (PRA) was first enacted in 2004. Recently, it was repealed and re-enacted as Pension Reform Act (PRA) 2014, which came into force on July 1, 2014. Prior to the emergence of the PRA, the

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defined benefit scheme[1] was operated in both federal and state public service in Nigeria. However, each of the two tiers of public service[2] was governed by pension legislation enacted by the National Assembly and States Houses of Assembly, respectively.[3] As for the private sector of the economy, the Nigeria Social Insurance Trust Fund Act obligated employers and employees to contribute to the Fund established thereby from which employees were to be paid retirement pension benefit, retirement grant, survivors benefit, death grant, invalidity benefit, invalidity grant or such other benefit as may be approved from time to time.[4] The statutory obligation to contribute to the Nigeria Social Insurance Trust Fund was imposed without prejudice to the right of private sector organizations to set up superannuation funds or some other kinds of pension schemes for their employees.[5]

With the enactment of PRA, contributory pension scheme was introduced for the first time in the history of public service in Nigeria. The 2004 Act was made applicable to employees in the federal public service as well as those in private sector organizations that have at least five employees[6] but (rightly, of course) not to employees in the public service of the States.

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[1] For the distinction between the defined benefit and defined contribution schemes, see G Moffatt, "Pension Funds: A Fragmentation of Trust Law", (1993) 56 *M.L.R.* 471 at 473; Parker and Mellows: *The Modern Law of Trusts*, 8th ed. by AJ Oakley, (London: Sweet & Maxwell, 2003), 508 – 12; Hanbury & Martin, *Modern Equity*, 17th ed. by JE Martin, (London: Sweet & Maxwell, 2005), 478 – 80.

[2] S. 318 (1) of the Constitution of the Federal Republic of Nigeria 1999 (hereinafter referred to as "the Constitution") defines "public service of the Federation" to include service in the Federal Capital Territory Administration and its area councils, while "public service of a State" is defined to include service in any of its local government councils.

[3] For example, see the Pensions Act, Cap. P4, Laws of the Federation of Nigeria, 2004; Police and other Agencies Pensions Offices (Establishment, etc) Act, Cap. P20, Laws of the Federation of Nigeria, 2004 and Police (Pension Rights of Inspector-General of Police) Act, Cap. P21, Laws of the Federation of Nigeria, 2004, all of which were repealed by s. 99 of PRA. See also the pre-2004 Pensions Laws of the various States, e.g., Pensions Law, Cap. P3, Laws of Lagos State, 2003; Pensions Law, Cap. 102, Laws of Anambra State, 1991.

[4] Cap. N88, Laws of the Federation of Nigeria, 2004. The constitutionality of this enactment is equally questionable.

[5] Public servants are exempted from the operation of the Act.

[6] See s. 10 (3) of the Act.

[7] S. 1 (2).

The extension of the operation of the Act to private sector employments generated controversy as to whether or not the National Assembly transgressed the bounds of its legislative authority. Whilst the last word is yet to be said on the matter, the 2014 Act, which replaces the 2004 Act, has gone even further to extend its tentacles to employees in the public service of the States. The question that arises from the foregoing is: From whence does the National Assembly derive the power to enact laws regulating the pension rights of employees in the public service of the States and private sector organizations?

Provisions of the Constitution

The provisions of the Constitution which have been cited in support of the National Assembly's supposed omnipotence in this matter of pension legislation include the following:

Section 4 –

(1) The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.

(2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.

(3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.

(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say –

(a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

(5) If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void.

Section 16 (2) (d) – The state shall direct its policy towards ensuring that old age care and pensions are provided for all citizens.

Part 1 of the Second Schedule (Exclusive Legislative List) –
Item 10 – Commercial and industrial monopolies, combines and trusts.
Item 19 – Designation of securities in which trust funds may be invested.
Item 32 – Incorporation, regulation and winding up of bodies corporate, other than co-operative societies, local government councils and bodies corporate established directly by any Law enacted by a House of Assembly of a State.
Item 33 – Insurance.
Item 34 – Labour, including trade unions, industrial relations; conditions, safety and welfare of labour; industrial disputes; prescribing a national minimum wage for the Federation or any part thereof; and industrial arbitrations.
Item 44 – Pensions, gratuities and other like benefits payable out of the Consolidated Revenue Fund or any other public funds of the Federation.
Item 60 (a) – The establishment and regulation of authorities for the Federation or any part thereof to promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution.
Item 67 – Any other matter with respect to which the National Assembly has power to make laws in accordance with the provisions of this Constitution.
Item 68 – Any matter incidental or supplementary to any matter mentioned elsewhere in this list.

Power to Enact Pension Legislation vis-à-vis Employees in the Public Service of the States
In the scheme of apportionment of legislative powers between the Federal and State Governments under the Constitution, both have the powers to make laws with respect to the pension rights of their respective employees. By the combined force of section 4 (2) and (3) together with item 44 in Part 1 of the Second Schedule to the Constitution, the National Assembly has the exclusive power to enact laws concerning "pensions, gratuities

and other like benefits payable out of the Consolidated Revenue Fund[8] or any other public funds of the Federation". Accordingly, in *Central Bank of Nigeria v. Jacob Oladele Amao & Ors*,[9] the Supreme Court held that the Federal Government has the competence to make laws and regulations governing the pension and other retirement benefits of employees of the appellant, they being in the public service of the Federation within the meaning of section 318 (1) of the Constitution. On the other hand, the power to make laws with respect to the pensions of employees in the public service of the States, which are defrayable from the Consolidated Revenue Fund of the States,[10] falls within the residual legislative powers of the States by virtue of section 4 (7) (a) of the Constitution that empowers their Houses of Assembly to make laws with respect to any matter not included in the Exclusive Legislative List.

It follows, therefore, that the provisions of PRA ought not to be applicable to employees of States and Local Governments. Here, the time-honoured saying, "He who pays the piper calls the tune", applies. Support for this view can be found in *Abdullahi v. Military Administrator, Kaduna State*,[11] where the Supreme Court, affirming the decision of the Court of Appeal,[12] held that the (now repealed) Pensions Act, Cap. 346, Laws of the Federation of Nigeria, 1990 and Act No. 102 of 1979, being federal statutes, applied only to civilian employees in the public service of the Federation and not to employees in the Kaduna State public service from which the appellant retired.

In exercise of their constitutional powers, accordingly, 18 out of the 36 States had enacted laws establishing the contributory pension scheme, as at 31 December, 2011, while others were still in the process of doing so.[13] It is, however, significant to note that trusts fall under the Exclusive Legislative List, and so does the designation of securities in which trust funds may be invested.[14] The Constitution, therefore, seems to have created

[8] Established by s. 80 (1) of the Constitution.
[9] (2010) 16 NWLR (pt. 1219) 271.
[10] Established by s. 120 (1) of the Constitution.
[11] (2009) 15 NWLR (pt. 1165) 417.
[12] Reported in (2004) 5 NWLR (pt. 866) 232.
[13] See the 2011 Annual Report of the National Pension Commission (PenCom).
[14] Items 10 and 19 in Part 1 of the Second Schedule to the Constitution.

an anomalous situation where the States have the power to legislate with respect to pension rights of their employees but lack the competence to legislate with respect to pension fund trusts (including the management and investment thereof). Apparently for this reason, in designing the template of Pensions Law[15] for the States, PenCom carefully omitted the provisions of PRA pertaining to pension fund management and investment. Thus, even though a State can enact Pensions Law setting up contributory pension schemes for the employees of the State and its Local Government Councils, the investment of pension fund assets held under such schemes has to comply with the provisions of PRA and any regulation made by PenCom.

Curiously enough, the new PRA has now extended the application of the federal pension statute to State and Local Government employees. This new twist unquestionably constitutes a flagrant encroachment upon the constitutional powers of the States. State Governments might not take it lying low, more so, considering the fact that most of them have just recently succumbed to arm-twisting by PenCom by enacting their respective Pensions Laws which are meant to be consistent with the template produced by PenCom.

Indeed, the absurdities in the recent centralization of pension legislation are clearly manifest in the following provisions of the new PRA, among others:

(a) Section 12, which provides that the contributions of the Federal Government and Federal Capital Territory Administration to the retirement benefits of their employees shall be a charge on the Consolidated Revenue Fund of the Federation and Revenue Fund of the Federal Capital Territory, respectively, says nothing about the contributions of the State and Local Governments and no provision in that regard is made elsewhere in the Act.

(b) Section 15, which provides for the issuance of Federal Government Retirement Benefits Bonds and Federal Capital Territory Retirement Benefits Bonds, to cater for the accrued retirement benefits of their respective employees under the pre-

[15] Available at www.pencom.gov.ng (last accessed on 10 March, 2014).

existing unfunded defined benefit schemes, says nothing about State and Local Government employees under similar circumstances and no other provision in the Act caters for them.

(c) Part IX, with the dubious heading "Transitional Provisions for the Public Sector", is restricted to employees in the public service of the Federation including the Federal Capital Territory. In summary, the provisions are for the establishment of Federal Government Retirement Benefits Bond Redemption Fund and Federal Capital Territory Retirement Benefits Bond Redemption Fund as well as the newly introduced Federal Government Pension Transitional Arrangements Directorate and Federal Capital Territory Pension Transitional Arrangements Directorate to replace the Pension Department established by the 2004 Act. Further, section 117 (7) of the Act provides for the transfer of all the pension funds and assets hitherto held by boards of trustees under the old pension statutes repealed by the section[16] to the Federal Government Pension Transitional Arrangements Directorate or Federal Capital Territory Pension Transitional Arrangements Directorate, as may be appropriate. These transitional provisions are meant to cater for employees in the public service of the Federation who are exempted from the contributory pension scheme under section 5 of the Act and are still under the pre-PRA pension schemes. There are no parallel transitional provisions in respect of employees in the public service of the States including the Local Government Councils. Meanwhile, appropriate transitional provisions for the private sector have been made in Part X of the Act.

The question is: For State and Local Government employees in similar situations, which law will govern these issues? Indeed, it

[16] All the enactments which s. 117 (2) of the Act purports to repeal had earlier been repealed by s. 99 (1) of the 2004 Act. So, too, the boards of trustees established under those repealed enactments were dissolved by s. 99 (2) of the former Act and the pension funds and assets held by them were transferred to the Pension Department established under s. 30 thereof. As the saying goes, 'You can't skin an animal twice'. It is therefore wrong to purport to repeal enactments which are no longer in the country's statute books and dissolve boards which had earlier been statutorily dissolved. In our view, the right approach is to repeal only the 2004 Act (which is done by s. 117 (1) of the new Act) and to transfer the pension funds and assets held by the existing Pension Department to the newly created institutions.

appears that their fate is now hanging in the balance. There lies the incongruity in the National Assembly intruding into the regulation of the pension rights of employees in the public service of the States when it can neither set up the necessary institutional framework and apparatus at the State and Local Government levels nor appropriate funds for the implementation of the enactment.

Power to Enact Pension Legislation vis-à-vis Employees in the Private Sector

As earlier acknowledged, the scope of operation of PRA extends to private sector employments. In this writer's view, the imposition of the provisions of PRA on private sector organizations is unconstitutional. Commenting on the provisions of the 2004 Act, one learned writer,[17] however, argues otherwise. According to him, a holistic reading of the entire provisions of the Constitution[18] suggests that the National Assembly has the power to legislate with respect to private sector pensions. The key points of his argument can be summarized as follows:

1. That item 32 in the Exclusive Legislative List gives the National Assembly the power to legislate with respect to the incorporation, regulation and winding up of companies, including companies dealing with pension funds; hence section 15 of the Act[19] conferred the power of regulating pension companies on PenCom.

2. That pension funds are trust funds, and item 19 in the Exclusive Legislative List gives the National Assembly the power to legislate with respect to designation of securities in which trust funds may be invested; hence the Act makes provisions regulating the investment of pension funds.

3. That pension business is a form of group life insurance,[20] and item 33 in the Exclusive Legislative List gives the National Assembly the power to legislate with respect to insurance.

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[17] JUK Igwe, "Nigerian Pension System: Reforms and Challenges", [2007] 1 (2) *Law & Investment Journal* 74 at 92-97; JUK Igwe, "Competence of the National Assembly to Legislate on Pension for the Private Sector and Constitutional Matters Associated therewith", [2007]1 (4) *Law & Investment Journal* 11.

[18] Citing s. 4 and items 12, 19, 24, 32, 33, 34, 44, 59, 62, 67 and 68 in Part 1 of the Second Schedule.

[19] Equivalent to s. 18 (c) of the 2014 Act.

[20] Referring to the classification contained in s. 2 (2) (b) of the Insurance Act, Cap. I17, Laws of the Federation of Nigeria, 2004.

4. That item 68 in the Exclusive Legislative List gives the National Assembly the power to legislate on any matter incidental or supplementary to any matter mentioned in that List; hence the regulation of private sector pensions could be subsumed under this provision.

With due respect, all these arguments beg the real question which is whether the National Assembly has the constitutional power to make laws governing the pension rights of employees other than those in the public service of the Federation. The first argument is fundamentally flawed in that the incorporation, regulation and winding up of companies have nothing to do with the terms and conditions of service of the employees of such companies, including their pension rights. The legislative power derivable from the said item 32 to make laws regarding the "regulation" of companies has to do with merely their operations. For instance, the Federal Public Service Rules do not apply to employees of private companies, and, as already judicially affirmed,[21] the Pensions Act and other federal pension statutes in force prior to PRA were inapplicable to employees of companies other than those in the public service of the Federation. Section 15 of the 2004 Act, which is cited by the learned writer in support of his argument, gave PenCom the power of regulating the operations of pension companies, and not the pension rights of their employees (except those of them which have five or more employees thus falling within the scope of section 1 (2) (b) of the Act). Moreover, the Corporate Affairs Commission, which was established by an Act of the National Assembly pursuant to the said item 32 to regulate the operations of companies generally, has nothing to do with the regulation of the salaries and pensions of the employees of companies.

By the same token, the second argument stems from the learned writer's failure to differentiate between the two issues of regulating pension rights and regulating the investment of pension trust funds. The former encapsulates such issues as the type of pension scheme (whether defined contribution or defined benefit scheme), the rate of contribution to a defined contribution scheme or quantum of defined benefit, as the case may be,

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[21] See *Abdullahi v. Military Administrator, Kaduna State* (2009) 15 NWLR (pt. 1165) 417, discussed above.

the criteria of eligibility for pension, and so forth. Clearly, these issues are distinct from the issue of securities in which pension trust funds can be invested which falls within the exclusive legislative domain of the National Assembly. As already observed, the Constitution seems to have created an incongruous situation where the States have the power to legislate on pension rights of their employees but lack the competence to legislate on the investment of their employees' pension funds, if held under trusts. However, it is instructive to note that it is not compulsory that pension funds must be held under trusts.[22] Indeed, in an unfunded defined benefit scheme, there is no pension trust fund to invest; hence there is no scope for the invocation of the legislative powers derivable from items 10 and 19 in the Exclusive Legislative List.

As for the third argument, with due respect, it also misses the point. What has the regulation of insurance business (assuming, without conceding, that it encompasses the business of pension fund managers) got to do with the pension rights of employees? The regulation of insurance business is akin to the regulation of the operations of companies, and both are isolated issues having little or no bearing on the issue in contention. Be that as it may, it is submitted that whatever romance (if any) that might have hitherto existed between pension and insurance businesses in Nigeria came to an end with the emergence of PRA which has established distinct and exclusive regulatory framework for pension operations. Thus, whereas the National Insurance Commission regulates insurance business, PenCom controls pension operations, to the mutual exclusion of each other. Besides, the fact that there is neither apparent symbiosis nor point of convergence between the provisions of the PRA and Insurance Act leaves no room for doubt that the two statutes deal with separate unrelated issues. It seems, therefore, the height of legerdemain to stretch the power to regulate insurance, pursuant to item 33 of the Exclusive Legislative List, to the extent of encompassing the power to regulate the type of pension scheme, rate of contribution, eligibility for pension, allowable pension fund investments and other matters provided for in PRA.

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[22] *Air Jamaica Ltd v. Charlton* [1999] 1 WLR 1399. For the alternative instrumentalities utilized in Continental Europe, see D. Hayton, "English Trusts and their Commercial Counterparts in Continental Europe", in D Hayton (ed.), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds*, (Kluwer Law International, 2002), 47 – 48.

On the last point, it is respectfully submitted that the argument founded upon the omnibus provision in item 68 in Part 1 of the Second Schedule flies in the face of reason. That provision is analogous to what is prosaically referred to as the "incidental or ancillary objects clause" usually contained in the memorandum of association of limited liability companies. But every company lawyer knows how notoriously difficult it is to establish that an activity which is not expressly authorized by the objects clause of a company falls under the incidental or ancillary objects so as to escape being struck down on the score of the *ultra vires* doctrine. In the context of the division of legislative powers between the Federal and State legislatures under the Constitution, it is even more difficult to convince anyone that a matter not specifically within the purview of the National Assembly's legislative powers can be appropriated to it by a mere reference to item 68 in the Exclusive Legislative List, when the Constitution has yielded to the State legislatures any matter not included in that List or in the Concurrent Legislative List. Thus, it cannot be seriously argued that private sector pension is a matter incidental or supplementary to the matters mentioned in item 44 in the Exclusive Legislative List, *i.e.*, "pensions, gratuities and other like benefits payable out of the Consolidated Revenue Fund or any other public funds of the Federation". If such argument were valid, it would mean that the power to legislate with respect to the pensions of State and Local Government employees (which is also not contained in either the Exclusive or Concurrent Legislative List) equally falls under item 68. In my view, that is not the correct position of the law. Indeed, it has been held that the legislative powers of the National Assembly exclude the power to make laws for Local Governments.[23] The principle has been equally settled that where legislative power is claimed under "any other matter" by virtue of section 4 (4) (b) of the Constitution, it must be clear beyond dispute that such power exists in relation to a particular matter.[24]

In further defence of his position, the learned commentator expressed the view that since the coming into force of PRA, the pensions of Federal Government employees are no longer payable out of the Consolidated Revenue Fund of the Federation, as their pension funds "are now being privately managed by pension fund managers and held in trust by pension

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[23] *A-G of Abia State v. A-G of the Federation* (2002) 6 NWLR (pt. 763) 264.

[24] *A-G of Lagos State v. A-G of the Federation* (2003) 12 NWLR (pt. 833) 1.

fund custodians".[25] Again, it is submitted, with respect, that this view is clearly mistaken. The question is: from whence cometh the pension funds under the new scheme? Under both the old and new PRA,[26] each of the employer and employee is obligated to contribute a certain percentage of the employee's monthly emoluments, which contributions are transferred to private pension fund managers. A follow-up question is: from whence does the contribution of the Federal Government (as an employer) come? The answer is to be found in the clear and unambiguous provision of section 12 (1) of the 2014 Act (*in pari materia* with section 11 (8) of the 2004 Act), which stipulates that the contributions of the Federal Government to the retirement benefits of employees of the Public Service of the Federation shall be a charge on the Consolidated Revenue Fund of the Federation. Likewise, section 12 (2) of the 2014 Act provides that the contributions of the Federal Capital Territory Administration to the retirement benefits of employees of the Federal Capital Territory shall be a charge on the Revenue Fund of the Federal Capital Territory.

It is quite intriguing that the learned commentator failed to advance any argument in justification of the non-inclusion of the employees of States, Local Governments and private sector organizations having less than five employees from the operation of the 2004 Act. Surely, all the points he marshalled in defence of the National Assembly's unwarranted incursion into the arena of private pension rights could have been extended to these other categories of employees.

With regard to the provision of item 34 in the Exclusive Legislative List, which Igwe merely cited without expounding, it seems clear that not much support for his position can be drawn from that provision. As set out above, the provision empowers the National Assembly to make laws with respect to labour, including trade unions, industrial relations; conditions, safety and welfare of labour; industrial disputes; prescribing a national minimum wage for the Federation or any part thereof; and industrial arbitrations.

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[25] Igwe, "Competence of the National Assembly to Legislate on Pension for the Private Sector and Constitutional Matters Associated therewith", note 18 above, at 17.

[26] S. 9 (1) of the 2004 Act stated minimum contributions of seven and a half per cent apiece, while s. 4 (1) of the 2014 Act stipulates minimum contributions of 10 per cent by the employer and eight per cent by the employee.

Any attempt to embark on an all-inclusive interpretation of the provision so as to bring pension under it would be defeated by at least two Latin maxims that are not infrequently called in aid in the interpretation of statutes, to wit: *generalia specialibus non derogant*[27] and *expressum facit cessare tacitum*.[28] Thus, although the general expression "conditions, safety and welfare of labour" might be broadly construed to encompass pension, a specific provision has been made for pension in item 44 in the same Exclusive Legislative List, showing that the framers of the Constitution did not intend that pension should fall under item 34. Moreover, the specific mention of other aspects of labour matters in item 34 presupposes the exclusion of pension which is not mentioned therein.

In interpreting this provision, it seems legitimate to draw inspiration from decided cases in which other provisions of the Constitution pertaining to the legislative powers of the National and State Assemblies have been settled. For instance, whilst it is beyond question that the National Assembly has the power to make laws with respect to land use by virtue of section 315 of the Constitution and item 67 in the Exclusive Legislative List,[29] in *A-G of Lagos State v. A-G of the Federation*,[30] it was held that since there is no mention of urban and regional planning or physical development control of land in the Exclusive or Concurrent Legislative List, the National Assembly has no power to legislate on the matter; hence it falls under the residual powers of the State House of Assembly. And, in *Okogie v. A-G of Lagos State*,[31] it was held that the establishment and running of primary schools by a private person is an "economic activity" within the context of the provision of section 16 of the Constitution, and does not fall under the rubric of "educational objectives" enshrined in section 18.

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[27] Generalities do not derogate from particular provisions.
[28] What is expressed makes what is implied to cease.
[29] S. 315 (5) (d) of the Constitution incorporates by reference the Land Use Act (which was promulgated as a Decree in 1978) as an "existing law" that cannot be altered or repealed except in accordance with the provisions of s. 9 (2) of the Constitution; and s. 315 (6) further states that the Act and other enactments mentioned in s. 315 (5) shall continue to have effect as Federal enactments, and as if they related to matters included in the Exclusive Legislative List.
[30] (2003) 12 NWLR (pt. 833) 1.
[31] (1981) 2 NCLR 337.

In a test case instituted by an originating summons soon after the enactment of the 2004 Act, *Agricultural and Allied Workers Union of Nigeria & Ors v. A-G of the Federation*,[32] the plaintiffs prayed the Federal High Court for a declaration that sections 1 (2), 2 (a), 2 (c), 9 (1) (c), 20 (a), 39, 40 and 44 of the Act were unconstitutional and, therefore, null and void insofar as they made the contributory pension scheme under the Act applicable to the private sector. The declaration was refused, the court upholding the validity of the legislation *vis-à-vis* private sector employments. However, the *ratio decidendi* of the case is, to say the least, startling. As the court put it, "it is incidental or supplemental[33] for the National Assembly to enact law that will enable the National Pensions (sic) Commission to enforce the observance of the fundamental objectives and directive principles of State policy", part of which is enshrined in section 16 (2) (d) of the Constitution. This view, it is respectfully submitted, is tantamount to a naked misreading of the express provisions of the Constitution under which the court purportedly proceeded.

In the first place, there is a world of difference between old age pension, which is provided for in section 16 (2) (d) of the Constitution, and occupational pension, which was the issue before the court (and which is also the theme of the present discourse). Put succinctly, the former is a paternalistic gesture or *ex gratia* payment to be provided by the state as part of the social welfare benefits to her citizens, which is not linked to any employment at all. The pension rights contemplated by section 16 (2) (d) of the Constitution are designed to enure to the benefit of citizens only, whereas the contributory pension scheme provided for by PRA applies to all employees of the specified categories regardless of whether they are citizens or foreigners. It is apparently the conflation of these two distinct legal concepts that led the court into what is patently an erroneous decision. As this writer observed elsewhere,[34] till date, no machinery has been put

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[32] Suit No. FHC/L/CS/788/04 (Unreported), Federal High Court, Lagos, Judgment delivered by Okeke, J. on 4 May, 2006.

[33] Referring to item 68 in Part 1 of the Second Schedule to the Constitution.

[34] LOC Chukwu, "Extended Family System as Social Protection for the Elderly: A Fast-Evanescing Concept in Nigeria", (revised version of a paper presented at the 14th World Conference of the International Society of Family Law in Lyon, France on 22 July, 2011) in H. Fulchiron (ed.), *Solidarities between Generations*, (Brussels: Groupe De Boeck, 2013), 883 – 97.

in place for the realization of the "fundamental objective of State policy" to provide old age pension to the senior citizens. If and when the appropriate legal framework is established, the obligation to provide old age pension shall, of course, be borne by the Government and not by private persons as employers of labour. Thus, by analogy, it has been held that the educational objectives enshrined in section 18 of the Constitution as part of the Fundamental Objectives and Directive Principles of State Policy constitute a directive to Government and not to private persons.[35]

Indeed, section 6 (6) (c) of the Constitution declares in no uncertain terms that the provisions of Chapter II of the Constitution (under which section 16 falls) are non-justiciable. Curiously enough, it was submitted on behalf of the Attorney-General of the Federation (of all persons) that section 16 (2) (d) of the Constitution is justiciable and that "item 60A read together with section 4 (2) and section 16 (2) (d) imposes a duty on the Federal Government to make laws through the National Assembly for the establishment of uniform contributory scheme for all citizens public or private sector inclusive" (emphasis added). Clearly, this submission, which the learned judge adopted as a basis for the decision, flies in the face of the clear provision of section 6 (6) (c) of the Constitution and prior court decisions stoutly reinforcing the non-justiciability of the provisions of Chapter II of the Constitution.[36] For the avoidance of doubt, section 6 (6) (c) of the Constitution provides that the judicial powers of the State –

> ... shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

So also the Attorney-General's submission accords with neither the spirit nor the letter of PRA, for it cannot, by any stretch of legal sophistry, be said that the Act was enacted "for the establishment of uniform contributory scheme for all citizens public or private sector inclusive". Clearly, section 1 (1) of the 2004 Act[37] stated that there shall be established for any

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[35] *Okogie & Ors v. A-G of Lagos State* (1981) 2 NCLR 337.

[36] E.g., see *Okogie & Ors v. A-G of Lagos State,* (supra); *A-G of Ondo State v. A-G of the Federation* (2002) 9 NWLR (Pt. 772) 222. Intriguingly, those decisions were cited by neither the counsel who appeared in the case nor the court.

[37] Equivalent to s. 3(1) of the 2014 Act.

employment in the Federal Republic of Nigeria a contributory pension scheme for payment of retirement benefits of employees to whom the scheme applies. And section 1 (2)[38] made certain the class of persons to whom the contributory pension scheme applies, to wit: employees in the public service of the Federation or Federal Capital Territory and any private sector organization in which there are five[39] or more employees. This class neither encompasses all citizens nor excludes non-citizens. Apart from this class of persons to whom the scheme applies compulsorily, section 9 (4) of the Act,[40] however, affords some leeway for "any person who is *not* ordinarily covered under section 1 of this Act or any person exempted under sub-section (1) of section 8 ... to make *voluntary* contributions under the Scheme".[41] As for voluntary contributors, they cannot be heard to complain, because of the principle of *volenti non fit injuria*. And, of course, they are free to opt out of the scheme. The kernel of the issue before the court was the question as to the constitutionality or otherwise of imposing the scheme willy-nilly on the plaintiffs, who belonged to the private sector.

Taking a critical look at the wording of the court's ruling, one is impelled to ask the following pertinent questions: How does PRA, which deals only with occupational pension, "enable the National Pensions Commission to enforce the observance of the fundamental objectives and directive principles of State policy" pertaining to old age pension? Is it the responsibility of private persons to observe the fundamental objectives and directive principles of state policy to provide social protection by way of old age pension to fellow citizens? Does old age pension, as provided for in section 16 (2) (d) of the Constitution, fall under the contributory pension scheme established by PRA, with the necessary implication of no entitlement without contribution? Why did the 2004 Act not extend its tentacles to employees in the public service of the States and private sector organizations in which there are less than five employees – are they excluded from the welfare benefits envisaged by section 16 (2) (d) of the Constitution? As between the National and State Assemblies,

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[38] Equivalent to s. 2 (1) of the 2014 Act.
[39] The number has been increased to 15 by s. 2 (2) of the 2014 Act.
[40] Equivalent to s. 4 (3) of the 2014 Act.
[41] Italics supplied for emphasis.

which one has the power to legislate on their pension rights? Again, going by the Attorney-General's submission, since section 16 (2) (d) of the Constitution is justiciable and it imposes a duty on the Federal Government, how far can the teeming population of aged citizens go in enforcing their section 16 (2) (d) pension rights, even with the enactment of PRA? Unfortunately, the answers to these vexed questions may have to await another judicial decision.

All the same, it is respectfully submitted that, insofar as the court decided that the Fundamental Objectives and Directive Principles of State Policy enshrined in Chapter II of the Constitution are justiciable as such and impose a legally enforceable duty on the Federal Government, that decision, by no means, represents the law. The correct legal position seems to be as stated by Uwaifo, JSC, in *A-G of Ondo State v. A-G of the Federation*[42] thus:

As to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of our Constitution, section 6 (6) says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them, the nature of the consequences of which having to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But the Directive Principles (or some of them) can be made justiciable by legislation.

In this writer's view, PRA was never designed to make the provision of section 16 (2) (d) of the Constitution justiciable and, to all intents and purposes, it has not achieved such a goal.

Conclusion

From the foregoing, it seems safe to conclude that, by virtue of section 4 (7) (a) of the Constitution, the power to enact laws regulating all private sector pension schemes as well as State and Local Government pension

[42] (2002) 9 NWLR (pt. 772) 222 at 382.

schemes falls under the residual powers of State legislatures, as those categories of pensions are not mentioned anywhere in the Exclusive or Concurrent Legislative List.[43] Accordingly, it is submitted that by extending the operation of the Pension Reform Act to the public service of the States and private sector employments, the National Assembly has over-stepped its legislative boundary. To that extent, it is further submitted, the legislation is unconstitutional, null and void. It is quite unfortunate that the court which had an early opportunity to declare it as such in *Agricultural and Allied Workers Union of Nigeria & Ors v. A-G of the Federation*[44] bungled the chance. Rather than persist in the obvious constitutional infraction, the National Assembly should, as a matter of urgency, remedy it.

Furthermore, the constitutional anomaly whereby the States have the power to legislate with respect to pension rights of their employees but lack the competence to legislate with respect to pension fund trusts calls for an urgent amendment of the Constitution. This could be effected by either transferring trusts and the designation of securities in which trust funds may be invested from the Exclusive Legislative List (Part 1) to the Concurrent Legislative List (Part II) in the Second Schedule (which seems preferable) or making a specific exception for pension fund trusts under the present provisions of items 10 and 19 in Part 1 of the Second Schedule. That would enable the States to exercise the full amplitude of their constitutional powers to regulate the pension rights of their employees and matters incidental thereto.

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[43] See, again, *A-G of Abia State v. A-G of the Federation* (2002) 6 NWLR (pt. 763) 264; *A-G of Lagos State v. A-G of the Federation* (2003) 12 NWLR (pt. 833) 1.

[44] Above, note 32.