REFORMING NIGERIA'S INSOLVENCY LAW: A TOOL FOR PROMOTING ACCESS TO CREDIT

EDEM NYEMACHI ANDAH

SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
KENT LAW SCHOOL, UNIVERSITY OF KENT
MARCH, 2011

ABSTRACT

This thesis examined Nigeria's insolvency law as a tool for promoting access to credit. It reviewed relevant literature to show the method of capital formation and access to credit in Nigeria's pre-colonial and colonial period. In the pre-colonial era, it showed that the indigenous credit system was unwritten; investment was in cash crops and personal labour. With the introduction of colonialism and banking systems, the indigenous credit institutions acquired some modern/innovative methods such as documentation of credit agreements, introduction of interest/high interest rates and forcible collection of debts. Colonialism also brought in its wake, legal transplantation.

A record study formed part of the thesis. It adopted the survey method, using oral tradition, interviews and questionnaires to collect data. The population consisted of those who had utilized indigenous credit in Nigeria, using Rivers State as a case study. A sample of sixty participants was drawn from small and medium sized business owners. Only thirty-three responses were retrieved and analyzed. The result showed that there were doubts as to whether the indigenous credit arrangements can raise huge capital; most credits raised were not focused on production. It also showed that until the present day, the indigenous credit system was patronized by educated persons like university employees, and that professional money lenders were creations of colonialism, while indigenous money lending predated colonialism. The result also showed that whereas fifty-four percent had not obtained credit from banks or financial institutions, forty-two percent had obtained credit from indigenous credit sources. Also fifty-one percent of those that had not obtained loans from indigenous sources claimed that it was not due to accessibility problems, but due to the extortionist tendencies of the money lenders. It also identified that the desire to meet social responsibilities and to 'survive' has inflamed the need to create wealth sometimes through 'get rich quick schemes' which in turn has affected credit and enterprise. The thesis identified mechanisms adopted by the indigenous creditors to recover debts as: community action, extended family system, the Nigerian Police and juju shrine and witchcraft. It noted the inadequacy of Nigeria's insolvency laws and advocated reforms which it stressed would serve as a collective debt recovery tool and also afford debtors the opportunity of a fresh start. It also recommended that there should be specialized insolvency law education and the use of intermediaries to facilitate education of Nigerians as to their rights and responsibilities as it pertains to insolvency issues.

ACKNOWLEDGEMENTS

I would like to acknowledge the Almighty God for His grace upon my life and during the period of my PhD research. He was and still is my source of strength and my inspiration.

I would like to thank my husband Gideon Onofeghara for all his love and support as I worked on my thesis. I could not have done it without your support especially at home and with our daughter. My beautiful daughter Efe Olivia was a major source of inspiration and strength to me and I would like to thank her for her love and for putting up with me as I carried out my research. I would also like to acknowledge and thank my parents Mr Olu and Dr (Mrs) Njiole Andah for all their love and their support in making my PhD research possible. Not only did they take on the responsibility for my tuition for the duration of my study, but they also read draft chapters and made suggestions which were most invaluable to me. I am also grateful to them for all the encouragement and support I received from them, such as taking time off from work to be present at my daughter's birth and to help care for her. Even such simple things as the almost daily telephone calls to lift my spirits cannot go unrecognized. I could not have come this far without their unwavering support. I am also grateful to my sister Funmilayo Andah and my brother Bassey Andah for their love, encouragement and support. I thank Funmilayo for giving me my first tutorial on how to write a PhD thesis and for reading my first chapter and making useful comments. You are the best sister anyone could ask for. I am blessed to have you all as my family.

I would like to acknowledge my supervisor Dr Robin Mackenzie for the prompt manner in which she read and made comments on my draft chapters. I am particularly grateful for the way she assisted me with legal resources that were most relevant to my thesis and for directing me to appropriate resources. I would like to thank her for always being willing to discuss future career and research plans with me and for supporting applications I made in that direction.

I am immensely grateful to Dr Eric C. Amadi, Dr Joseph B. Vipene both of the Rivers State University of Science and Technology and Dr. Vincent Asuru of the Rivers State University of Education for taking part in the thesis survey and for sharing their extensive knowledge on the nature and operation of indigenous credit arrangements. I am also grateful to Mr Gift Osarobey for his detailed description of indigenous credit arrangements. I thank Mr Solomon Nwachukwu for his dedication in typing and sending correspondences between my parents and myself. My cousin Edemawan Andah was one of my first respondents and she was very knowledgeable about the loans offered by Non-

Governmental Organizations. I am grateful to every respondent that took part in the survey and for the willingness they showed in sharing their experience of credit with me. I would like to thank my friend Hope Ogunmwonyi (nee Krukru) who whilst studying for her Masters at the Kent Law School in Canterbury would willingly collect resources from the Library, information from the Postgraduate Office, etc for me and send to my address.

During the period of my PhD research I took up volunteering at the Medway Citizens Advice Bureau and was later offered a part-time job as a Welfare Benefits and Money Advice Caseworker and I would like to acknowledge the Bureau for the experience they allowed me to gain in the area of personal insolvency and welfare benefits law. In particular, I would like to acknowledge Hilary Burford, Senior Welfare Benefits Caseworker whose passion for welfare benefits rights and its role in maximizing income for families with debts has opened up to me new research plans. I would also like to thank her for constantly pushing me to get done with my thesis.

I cannot fail to acknowledge Lynn Risbridger for the prompt way she dealt with all my enquiries and clarified issues for me. It never failed to amaze me how she always remembered my name.

DEDICATION

For Efe Olivia with all my love;

Thank you for teaching me to be strong by your unconditional love.

TABLE OF CONTENTS **PAGES**

LIST OF ABBREVIATIONS

CAB	Citizens Advice Bureau
CABx	Citizens Advice Bureaux
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters Act
CBN	Central Bank of Nigeria
ILR	Insolvency Law Regime
MFB	Microfinance Banks
NAPEP	National Poverty Eradication Programme
NBC	National Bankruptcy Conference
NGO	Non Governmental Organization
SEC	Securities Exchange Commission
SME	Small and Medium Sized Enterprise
SMIEIS	Small and Medium Industries Equity Investment
Scheme	
UK	United Kingdom
UNCITRAL	United Nations Commission on International
Trade Law	
US	United States

TABLE OF LEGISLATION

Law Reform Commission Act 1990

Nigerian Deposit Insurance Corporation Act 1990

Nigerian Law Reform Commission Act 1990

Securities and Exchange Commission Guidelines on Mergers, Acquisitions and Combinations

CHAPTER ONE

INTRODUCTION

> The advantage of so delinking is that the person or people in question give themselves the opportunity to take proper stock of their relationship with their erstwhile colonial masters, now self-proclaimed friends...and really study themselves closely and critically so as to derive whatever their pool of historical knowledge has to offer the planning process.
>
> Professor Bassey Andah[1]

This thesis is aimed at studying how to promote access to credit for small and medium sized enterprises (SMEs) in Nigeria. In most economies, SMEs are not only great in number but are also responsible for driving innovation and competition. In Europe for example, it has been stated that SMEs represent 99 percent of all enterprises in the European Union and provide around 65 million jobs.[2] In Nigeria as well it has been suggested that SMEs represent 70 percent of the population.[3] Providing SME finance and support is thus an important area of economic policy for many countries. The issue of access to credit is therefore a topical one and has been studied from different perspectives.[4] In

---

[1] This quotation is taken from an inaugural lecture delivered on 19 November 1985 by Professor Bassey Andah. It was titled, No past! No present! No future! Anthropological Education and African Revolution Conference, 26-27.

[2] http://ec.europa.eu/enterprise/enterprise_policy/sme_definition/index_en.htm (last accessed 14 July 2011).

[3] M. A. Olaitan, Finance for Small and Medium Enterprises: Nigeria's Agricultural Credit Guarantee Scheme Fund, (2006) Vol. 3 No.2 *Journal of International Farm Management*, 2.

[4] See for instance, Xavier Gine, Access to Capital in Rural Thailand: An Estimated Model of Formal vs. Informal Credit, 2-3. This article was last accessed via the internet at

contrast to these various approaches to the issue of access to credit, this thesis approaches the issue of access to credit by arguing that in the case of Nigeria, insolvency law reform is necessary and can be effective as a tool for integrating the formal and informal credit sectors in Nigeria with a view to promoting access to credit for SMEs.

On the issue of access to finance and financial exclusion, a World Bank study found that less than five percent of businesses had access to loans, another survey revealed that 74 percent of the Nigerian population had never had a bank account and that this figure rose to 86 percent in rural areas of

---

http://siteresources.worldbank.org/DEC/Resources/Access_to_Capital_in_Rural_Thailand_WP.pdf on 14 July 2011. There the author summarized some of the literature on the issue of access to credit in a diverse credit sector thus:

> The literature has taken two distinct approaches to modelling the coexistence of formal and informal lenders. The first assumes that only informal lenders have access to institutional credit who then re-lend to poorer borrowers. The work by Hoff and Stiglitz (1997), Bose (1998) and Floro and Ray (1996) follow this approach. The second considers formal institutions competing directly with informal lenders. In this strand, several theoretical explanations have been offered to explain why some households decide to resort to multiple creditors. Bell et al. (1997) argue that an imposed limit on the amount of credit that formal institutions can grant may trigger some constrained borrowers to turn to the informal sector for additional credit. For the particular case of India, Kochar (1997) evaluates the empirical plausibility of this argument and finds little evidence of credit constraints. Jain (1999) and Conning (1996, 1998) postulate that if informal lenders have an informational advantage, formal lenders will screen borrowers by partially financing the project, thus forcing the borrower to resort to an informal lender. This way, banks ensure that the project will be monitored.

Gine himself seeks to understand the mechanism underlying access to credit when multiple lenders coexist. He studies the relationship between formal and informal credit in Thailand and argues that whilst a formal credit institution relies exclusively on the existing legal system to enforce contracts informal creditors may resort to other methods. He identifies two features that are crucial in rural financial markets namely limited enforceability of contracts by formal credit institutions and transaction costs incurred in obtaining formal credit. He constructs and estimates a model based on these two features and the results at that time reveal that 'while the cost of accessing credit from a formal institution are estimated at US$30, informal lenders are accessible at no cost' and that 'although this fixed cost of access to formal finance is not uniform across households, it is relatively small. He therefore concludes that it is the limited ability of banks to enforce contracts more than fixed transaction costs that is crucial in understanding the issue of access to credit in a diverse credit sector such as that found in Thailand.

Nigeria, and only seven percent had ever taken out a loan.[5] The picture painted is one of low levels of access to formal financial services and very patent and large-scale financial exclusion. Many Nigerians are therefore left to resort wholly to the unregulated informal credit sector. The vision of the Nigerian government is to improve access to credit not only for SMEs but also for the Nigerian population in order for Nigeria's SME sector to rank as one of the most productive SME sector among emerging countries by 2020.[6]

However for law to be effective in achieving the integration of credit markets in Nigeria, such law needs to be properly drafted and implemented. The thesis argues that a properly drafted law is one that is rooted in the social realities of the people for whose benefit it is made. According to Hernando de Soto:

> The law must be compatible with how people arrange their lives. The way law stays alive is by remaining in touch with social contracts pieced together among real people on the ground.[7]
>
> Creating an integrated system is not about drafting laws and regulations that look good on paper, but rather about designing norms that are rooted in people's beliefs and are

[5] See UK Parliamentary website for a summary of these statistics and in particular the activities of the UK's Department for International Development (DFID) in supporting the Enhancing Financial Innovation and Access for the Poor Project (EFINA) with £9.2 million over the period 2007-2012; http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmintdev/840/84006.htm#n90 last accessed on 14 July 2011.

[6] See generally, The Report of the Vision 2020 National Technical Working Group on Small and Medium Enterprises (SMEs) via the internet at http://www.npc.gov.ng/downloads/Small%20&%20Medium%20Enterprises%20Report.pdf , in particular, 19 (last accessed 23 October 2009, however the link was inaccessible on 14 July 2011).

[7] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Bantam, 2000), 111-112.

thus more likely to be obeyed and enforced.[8]

Hernando de Soto clearly puts forward the argument that laws that are not rooted in people's beliefs are less likely to be effective. For example, Nigeria's Bankruptcy Act 1979 which borrowed extensively from English legislation is rarely if at all used. This is not because Nigerians are more prudent than other people all over the world and therefore less likely to petition for bankruptcy or have their creditors' petition for bankruptcy. On the contrary, it is the bankruptcy stigma in existence in Nigeria that has been held partly responsible for this. It appears as though cultural beliefs and attitudes do not agree with the concept of a declared bankrupt. It has even been suggested that to declare bankruptcy is seen as an opportunity to escape from one's liabilities and a person who does that is more than likely to be treated as a social outcast.[9] This is a typical example of how a colonially influenced law is foisted on an indigenous people without regard for their social realities.

This research demonstrates the difficulties with legal transplantation of foreign laws in countries where the 'moral economy' is not immediately compatible with the laws which are to be transplanted.[10] Take for instance the approach of current English and American insolvency legislation to corporate rescue and personal insolvency; this can best be described as being characterised by second chances and fresh financial starts. The Administration

---

[8] *ibid* 166

[9] Akinwunmi & Busari Legal Practitioners, Insolvency Practice in Nigeria-The Nigerian Experience, 3, last accessed via the internet at http://www.akinwunmibusari.com/images/documents/Insolvency%20Practice%20in%20Africa%20-%20The%20Nigerian%20Experience.pdf on 13 July 2011.

[10] Chapter 4 will elucidate more on what is meant by the moral economy of Nigeria.

procedure in the United Kingdom as well as the Chapter 11 procedure in the United States both share the same purpose, that is, the rescue of a viable business in temporary financial difficulty. Similarly, bankruptcy procedures in both the United Kingdom and the United States are characterised by reducing the impact of financial failure on the honest but unlucky debtor and encouraging a second chance, that is, a fresh start.[11]

Whilst it is the policy of the Nigerian government to foster entrepreneurship, this may prove challenging to accomplish without the government addressing the stigma associated with business failure as well as certain aspects of the moral economy of Nigeria that hinder entrepreneurial activity by restricting access to credit generally. With the lack of rescue procedures and with legal practitioners in Nigeria over-reliant on the winding-up procedure, as well as the under-utilization of the bankruptcy procedure (the first bankruptcy proceeding was only initiated in 1992), the impact of aspects of the moral economy of Nigeria that influence negative social attitudes as well as the stigma associated with business failure on insolvency practice and procedure in Nigeria are issues that cannot be ignored and must be tackled. The ease in accessing credit for SMEs, the impact of the moral economy of Nigeria on small businesses as well as the benefits of a second chance/fresh start approach in insolvency law are all important topics that this thesis engages with

[11] See generally Lorraine Conway, *A Comparison: Company Rescue under UK Administration and US Chapter 11*, accessed via the internet at http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-05527.pdf on 14 July 2011; Department of Trade and Industry (now Department of Business Innovation and Skills), *Insolvency –A Second Chance*, 2001, Cm 5234 last accessed at http://www.insolvency.gov.uk/cwp/cm5234.pdf on 14 July 2011.

and makes recommendations for, all with a view to fostering entrepreneurial activity.

Colonialism by its very definition is all-pervasive, meaning the economic, political and social policies by which colonies are governed. It manifests itself in many ways: through government, language and also through law.[12] Breaking free from the clutches of colonialism does not only mean an opportunity in self-governance but surely must mean everything that self-determination embodies. Certainly that includes the ability to determine laws that capture the essence of the independent people and not merely to borrow or copy or inherit the laws of former colonialists. In popular parlance, it is often said that if one must copy a thing then one must 'own' it. This means, for example, that if a law is copied (or borrowed) by a former colony from its former colonialists after the experience of colonization one should not be left in doubt that the law in question has now attained an identity of its own separate from that of the law's precursor. This self-determination of law itself does not necessarily mean changing the law in its entirety simply to show that the people are now independent, (change for the sake of change) but what is referred to is, law reform that is born out of a desire to forge an independent destiny.[13] Mr

[12] According to one commentator, 'the three most explicit inculcations: (were) cultural, religious and economic'. As examples, this same commentator cites the colonial practice of 'indirect rule' by the English colonialists in Nigeria which literally upset already existing cultural structures of ruling, the introduction of Christianity, and the commercial exploitation of natural resources including oil. See Nnamdi Ihuegbu, Colonialism and Independence: Nigeria as a Case Study, last accessed via the internet at http://www.southernct.edu/organizations/hcr/2002/nonfiction/colonialism.htm on 14 July 2011.

[13] The issue of a national identity is one that has been a sticking point for Nigeria for a very long time. According to Nnamdi Ihegbu in n 12 above, 'British Colonialism made Nigeria, joining diverse peoples and regions in an artificial political entity; the British, it is said, created a country called Nigeria, not a nation'.

Justice Miller expressed this type of law reform as 'adapting legal principles to new and varying exigencies'.[14]

The English were one of such colonialists. The untold misery that was inflicted on the conquered nations through their quest for world domination and imperialism notwithstanding, the English have made immense contributions to the world such as their contribution of the English language as a world wide accepted lingua franca.[15] Most noticeably, law and legal traditions in Commonwealth countries and elsewhere have not only been infused with English forms and style but in certain cases have literally been borrowed from the English.[16] While this might have worked for these colonies during the period of colonization and perhaps even in the early days of their independence, changes occurring within these societies dictate that they begin the process of reform to birth a complete autonomous national identity. The contribution by the English to the development of law in former colonies (e.g. Nigeria, America) was sufficient in early post-independent years; however, former colonies that have not already began the process of reforming aspects of their law to effectively suit their current society must begin to do so in order to fashion out a destiny for themselves. Anything less than this will be a form of neo-colonialism which must be discouraged.

---

[14] The phrase was taken from a quote by Mr Justice Miller as found in Charles Warren, *Bankruptcy in US History*, (Cambridge: Harvard University Press, 1935), 4.

[15] See generally David Crystal, *English as Global Language* (Cambridge: Cambridge University Press, 2003).

[16] See Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, last accessed on 14 July 2011 at http://www.law.usyd.edu.au/slr/slr30_3/Tamanaha.pdf, 382 where the author refers to the results of colonization as a 'hodgepodge of coexisting legal institutions and norms operating side by side with various points of overlap, conflict and mutual influence'. See also (2008) 30 *Sydney Law Review*, where the article appears.

This thesis studies the post-colony that is Nigeria, where transplanted foreign credit institutions and indigenous credit institutions coexist with 'points of overlap, conflict and mutual influence'.[17] SMEs in Nigeria access credit from both types of credit institutions with apparent difficulties and this is credit that is crucial for encouraging enterprise. As all creditors are motivated by the expectation that when loans are made they will be repaid, arguably efficient debt recovery processes are likely to encourage creditors to make more credit available to these businesses. As a result this thesis argues that a reformed insolvency law regime could serve as an important tool for debt recovery for lenders and as a bridge between the transplanted foreign credit institutions and the indigenous credit institutions. The thesis also argues that insolvency law in Nigeria needs reforming so that the policy prescriptions behind the insolvency law reflect an understanding of the combination of pre-colonial traditional norms and colonial elements that relate to credit in Nigeria. Arguably the benefits of reforming Nigeria's insolvency law will include a modern insolvency law for Nigeria that is in touch with current international developments and is utilized more effectively and efficiently, increased competition between the indigenous and formal credit sectors, increased access to credit in Nigeria for SMEs which should in turn achieve an increase in entrepreneurial activities. Some of the arguments which this thesis will proffer as justification for these expected benefits include the arguments that: the local banks in Nigeria have extended credit (albeit the levels of credit are being queried in this thesis) and are able to offer services to a segment of the

[17] *ibid*

population which had previously not been catered for by the foreign banks during the period of colonialism; the indigenous credit sector is able to extend credit to small businesses and therefore fill the gaps in the credit sector; both indigenous and formal credit sectors are also able to offer services which the government banks and various government initiatives seemed incapable of offering. In other words, there is no reason why the formal and informal sector cannot and should not be integrated with a view to improving access to credit levels.

Thus this thesis will attempt to provide answers to the following questions:

RQ1. What impact does the legacy of colonialism have on credit institutions and the provision or availability of credit for SMEs in Nigeria?

The thesis attempts to answer whether English-style laws and institutions imposed on Nigeria at the time of colonialism and subsequently imbibed post-colonialism have been a drawback to the availability of credit in Nigeria. In other words, this research draws upon postcolonial perspectives and examines the relationship between traditional mechanisms and expectations of credit and the colonial regulation of credit and how all of these impact on the ability of SMEs to access credit in Nigeria. In an attempt to answer this question, indigenous credit institutions will be compared with banks as sources of credit to the economy.

RQ2. What impact will insolvency law reforms have on the provision or availability of credit for SMEs in Nigeria?

This thesis studies the postcolonial regulation of insolvency in Nigeria and the potential contributions insolvency law can make towards improving access to credit for SMEs. In order to gain answers to this research question, this thesis studies the sequence of interactions i.e. from access to credit, encountering financial distress and the response of insolvency law to debt. A major premise of the argument has already been explained that is, that for law to be effective it must be rooted in the social realities of the people for who it is made. The choice of insolvency law as a tool for integrating Nigeria's credit markets thereby improving access to credit for SMEs is underscored by the fact that there is a sequence of interactions that kicks in when we contemplate improving access to credit in Nigeria. That is from access to credit, there will be instances where financial distress is encountered and instances of inability to pay debts as well. Insolvency law needs to properly drafted and administered if it is to respond effectively to this sequence of interactions. The response of insolvency law to debt, underscores why insolvency law has been identified by this study as being a worthwhile recipient of reform efforts.

Another reason for the choice of insolvency law is the fact that Nigeria does not have a developed insolvency practice. As will be shown in the thesis, the Bankruptcy Act 1990 which deals with individual insolvency is rarely utilized, and the Companies and Allied Matters Act 1990 (CAMA) which deals with insolvency of companies and contains provisions for winding up and arrangements and compromises has as its main thrust the liquidation of companies in distress. Whereas liquidation is now seen as the last resort in

many jurisdictions, it is the first resort in Nigerian corporate insolvency law practice.

In this chapter, using the United States of America as a case study, the development and reform of insolvency law is studied not least because of the unique nature of United States (US) insolvency law but primarily because parallels can be drawn from the US that bear similarity to the focus of this study in Nigeria.[18] For instance, Nigeria and the US both shared a common colonial administrator – that is England. Furthermore, in this introductory chapter the multiplicity of competing views within the US which served as the backdrop for the development of insolvency law can be analogized to the apparent conflict between foreign credit institutions and indigenous credit institutions in Nigeria. The case study therefore considers the approach or the

---

[18] In the thesis the terms America and the US are used interchangeably. Again it must be noted that there is a doctrine of exceptionalism that is applied by the US. According to Henry Schwarz:

> American exceptionalism claims, in short, that the history of America is fundamentally different from that of Europe, and especially that of England from which most of its early settlers came, in that history began anew with the entry of white settlers into North America. White settlers, on this view did not reproduce the rigid hierarchies of religion and social class that pertained in England and from which they reportedly fled. Instead, the settlements they created were said to be egalitarian, inclusive structures that benefited from strong interaction with the native populations, thus resulting in utopian communities of tolerance and diversity.

(See Henry Schwarz and Sangeeta Ray (Eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000), 9).

However as Donald E. Pease states, 'prior to the US declaration of independence, Great Britain included the United States among the settler colonies in the anglo-american empire'. See Donald E. Pease, US Imperialism: Global Dominance without Colonies, 209, in Henry Schwarz and Sangeeta Ray (Eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000). Therefore, the thesis researcher is treating the US as being a former British colony. Further justification for the inclusion of this US case study given this doctrine of exceptionalism will be considered in the next chapter.

strategies used in the US for dealing with the multiplicity of conflicting and competing views in the area of bankruptcy.[19] Thus this case study on the US will serve as a microcosm of a much larger study on Nigeria by focusing on conflicts between competing institutions, strategies for dealing with these conflicts and the actors who fuel such conflicts. The case study also focuses on the response of insolvency law to financial distress, the relationship between insolvency law, entrepreneurship and economic development.

Chapter Two discusses the theoretical underpinnings for this thesis. It identifies postcolonialism as the theory of choice and discusses the critical nature of postcolonialism and its ability to cross disciplines. Chapter Two therefore attempts to cross postcolonialism with a number of concepts/theories thereby creating a 'framework of theories' which influence this thesis and the perspective taken by the thesis researcher. It engages with some of the discourses of postcolonialism and attempts to establish the relevance of postcolonialism to this thesis because of its ability to critically consider 'colonial structures' that have influenced Nigeria's credit markets today.

Chapter Three is a review of some of the literature relevant to this thesis. The themes explored in this review include issues of indigenous credit institutions in the pre-colonial and colonial eras in Nigeria, the impact of colonialism on credit institutions in Nigeria, legal imperialism and consequently legal pluralism, law and institutional reform as well as the role and purpose of insolvency law. On indigenous credit institutions, the works of

[19] The terms bankruptcy and insolvency are used simultaneously throughout the thesis to reflect the usage in different jurisdictions.

several authors are compared and contrasted wherein they describe at length the nature of some indigenous credit institutions, the impact of colonialism on these institutions, colonial policies relating to credit as well as the introduction of western credit institutions during the colonial era. In addition, concepts of values (or value system) and issues of production (or productivity) and also of exploitation are canvassed. With regards to legal imperialism, the literature reviewed describes the legacy of colonial legislation in former colonies and focuses on law reform particularly in the area of insolvency law in the US. Policy issues, such as how insolvency law should and does function as well as reform issues dealing with how and why insolvency law is reformed are reviewed in the US context. Finally Chapter Three reviews literature on institutional change which argue that the study of colonial policies is capable of producing insights into institutional reforms and that institutional change is key to promoting economic growth and development.

Chapter Four brings home the lessons of Chapter One to the Nigerian situation. In Chapter Four, attitudes, beliefs and values surrounding credit in Nigeria are explored with the aid of a survey and it is argued that the broadly recognizable social norms that are identifiable in Nigeria are the product of a combination of pre-colonial traditional norms and colonial elements. Also explored are issues of accessibility and exploitation in credit markets in Nigeria and the role of financial services regulation policy and postcolonial theory in promoting understanding of amongst other things accessibility of financial services.

In Chapter Five, the role and purpose of insolvency law as well as different institutional frameworks for insolvency systems and what contributions these frameworks can make towards improving access to credit for SMEs are considered. What would be a 'good' insolvency law regime for Nigeria and the potential contributions that reforming Nigeria's insolvency law can make towards improving access to credit for SMEs and economic development are also considered. Therefore the current insolvency regime in Nigeria is examined in order to examine some potential areas for reform. On the issue of the purpose of insolvency law, there is an ongoing normative and prescriptive debate as to the goals of insolvency law. There are different views as to which goals insolvency law reflects, which goals insolvency law ought to target and differences over how insolvency law should be implemented to achieve its goals.[20] For instance, Thomas Jackson proposes that the only goal corporate insolvency law advances is the maximization of returns to creditors in the event of financial distress of a corporation.[21] In other words, corporate insolvency law is a collective debt collection mechanism utilized when financial distress occurs. Other scholars argue that when financial distress occurs, corporate insolvency law reflects other goals such as 'the distribution of proceeds in a fair and equitable manner', 'the recognition of the interests of groups in society apart from the debtor and its creditors', 'the preservation of

[20] For a summary of the different views as to which goals insolvency reflects see John Armour, The Law and Economics of Corporate Insolvency: A Review, 9-10, last accessed on 14 July 2011 at http://www.cbr.cam.ac.uk/pdf/wp197.pdf.

[21] See generally Thomas H. Jackson, *The Logics and Limits of Bankruptcy Law*, (Cambridge Mass.: Harvard University Press, 1986); Douglas G. Baird and Thomas H. Jackson (1984) 51 *University of Chicago Law Review*, 97-130.

viable commercial enterprises'.[22] On the other hand, law and economics scholars operate on the premise that the goal of insolvency law is to minimize the costs of financial distress.[23] Everyone however agrees that a 'good' insolvency system is a necessary element which provides a cushion for the risks involved in operating a credit economy by providing a collective and orderly process for the collection of debts. The crux of the debate therefore seems to be whether insolvency law should do just that or more. Therefore in Chapter Five, attention is given to the ongoing debate as to the proper function or functions of a 'good' insolvency system and Nigeria's insolvency system is evaluated in light of the foregoing in order to determine what can be considered a 'good' insolvency system for Nigeria, and the improvements that can be made to the system that will reap among other benefits improved access to credit for SMEs.

In comparing between indigenous credit institutions and formal banks in Nigeria as sources of credit in the country, Chapter Four reveals some of the difficulties that SMEs face in accessing credit from both sectors. Prominent amongst these are the unwillingness of the formal banking sector to take the risk of lending to SMEs and the debt recovery methods of lenders in the indigenous credit sector. Therefore Chapter Five considers in a comparative sense what solutions or benefits a 'good' insolvency law system will proffer for both sectors of credit with regards to the problems of accessing credit that are highlighted in Chapter Four bearing in mind the function and purpose of insolvency law that are debated.

---

[22] n 20 above, 10.

[23] See n 20 above for a concise summary of the law and economics literature on the goal of insolvency law.

Chapter Six considers particular areas of the insolvency regimes of the US and England with the expectation that insights can be gained from studying these models which would in turn be useful in the reform agenda intended for Nigeria's insolvency law. However, following from Chapter Four, it is argued that the prevailing realities in the US and England place different demands on the insolvency regimes of those countries and as such whilst useful insights are to be gained from studying these insolvency law models, care must be taken so as not to borrow from these models without regard for the prevailing Nigerian situation.

In Chapter Seven, the conclusions made by the thesis researcher and the recommendations suggested are put forward. It is hoped that these conclusions and recommendations will offer insight to any prospective reform agenda set for Nigeria's insolvency law regime.

CASE STUDY

Commerce is defined as all forms of trade and services.[24] The development of a country is intrinsically linked to commerce; and if one were to measure the prosperity of a country, the yardstick of measurement would be in commercial terms. For example, in seeking to understand how America prospered as a country, Warren draws our attention to the role that commerce played in its progress. According to him, 'the country was greatly indebted to commerce for

[24] See Oxford Mini Reference Dictionary, (Oxford: Oxford University Press, 1995).

its rapid advancement and prosperity'.[25] But America was not always a commercial country and in fact early America was for the most part an agrarian society.[26] As a result, there were many who believed that agriculture and not commerce was the source of America's wealth. They were encouraged by what has been described as the 'agrarian myth', a myth which was based on and perpetuated by the belief in the ideal of the 'noncommercial, nonpecuniary, self-sufficient aspect of American farm life'.[27] According to Hofstader, even though this agrarian myth corresponded with many of the agricultural realities of eighteenth century America, there was no doubt that colonial agriculture still had commercial elements.[28] This case study considers the multiplicity of views mainly backing commerce or agriculture, the bankruptcy debates that were engaged in against the backdrop of the competing views, the actors that fuelled the conflict (and therefore the debates on federal bankruptcy legislation), and the strategies for dealing with the conflicts or strategies for law reform.

1.1 THE COMPETING VIEWS

An understanding of how American commerce emerged and developed will require a journey back in time. By 1650 the English were a dominant presence in the American colonies. At the early stages of settlement, the colonies lived a

---

[25] Charles Warren, *Bankruptcy in U.S. History*, (Cambridge: Harvard University Press, 1935), 35-36.
[26] R. Hofstader, *The Age of Reform: From Bryan to FDR* (New York: Random House, 1955), 23.
[27] *ibid*
[28] *ibid* 36

life of subsistence producing only what they needed to survive. When they relied on outside support, for instance to build beachheads along the shores of the Atlantic, the result was that they had to produce more than they needed in order to sell and repay what they had borrowed. Foreign credit to the colonies came from the Dutch and the French but principally from the English. This dependence on credit threw open the doors to commerce in the colonies. Credit was the harbinger of a 'steady commercialization of life' that saw the colonists being drawn into all forms of trade including commercial agriculture, maritime trade and even speculation. The result in commercial terms was the growth of domestic and foreign trade, the transportation revolution, the growth of cotton, wheat and tobacco markets, the development of the western frontiers and ultimately the prosperity of the country. [29]

As commerce flourished within the country, 'instrumentalities of commerce'[30] – i.e. corporations – would also arrive on the scene. The first of these were the railroads which were one of America's first large corporations.[31] These corporations would impact not only commerce but also insolvency law as will be shown later on. The appearance of rail transportation went a long way in boosting commerce as produce from all areas became available to many cities and towns that had hitherto not benefited from it. The railroads were not only a useful mode of transportation in the early nineteenth century but they

---

[29] Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (Madison: State Historical Society of Wisconsin, 1974), 6-8.
[30] n 25 above, 4.
[31] David Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2004), 48.

were also a vital part of other industries such as the coal and steel industries.[32]

Another industry that emerged alongside the railroad industry was the investment-banking industry. The investment banks acted as middlemen between private investors and the railroads providing the much needed finance for the expansion of the railroad industry. They were able to do this by selling railroad securities to investors.[33] With time, this industry would encompass other forms of investors and corporations.

Apart from the industries mentioned above, the consumer credit industry also witnessed phenomenal growth and expansion in the US during this period. This industry has made significant contribution to commerce which has come in the form of loans and instalment sales even though on the downside there has been an increase in the amount of outstanding consumer credit and a sharp rise in the number of bankruptcies.[34]

The various commercial enterprises that were undertaken could be explored at length in this case study but suffice it to say that commerce played a role in the advancement and prosperity of the American people. However so also had agriculture and this prompted Jefferson to ask, 'is commerce so much the basis of the existence of the US...on the contrary are we not almost [entirely] agricultural?'.[35] Nevertheless as has been described above, agrarian

---

[32] S.J. Lubben, 'Railroad Receiverships and Modern Bankruptcy Theory' (2004) 89 *Cornell Law Review* 1439.

[33] For a discussion on the emergence of the railroad and investment bank industries in America see n 31 above, Chapter 2.

[34] See generally n 31 above, Chapter 7 for a discussion on the rise in consumer credit and bankruptcy filings.

[35] Quote taken from n 31 above, 3 and referenced as Drew R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America, (Chapel Hill: University of North Carolina Press, 1980), 181-182 (quoting Ford, ed., Writings of Jefferson, 6:145).

views such as Jefferson's were 'by the late nineteenth century...swimming against the tide of history: the trend of the nation was commercial rather than agricultural, and urban rather than rural'.[36] These competing views as to whether it was commerce or agriculture that fuelled America's prosperity cut across geographical lines. Whereas strong views about the role of commerce were held by the commercial north-eastern states in America, by contrast agrarian views were promoted by the south and west of America. In relation to politics, the geographical divide between proponents of commerce and those of agriculture also cut across party lines. This was reflected in the fact that north-eastern Federalists held strong views about commerce and south and western Jeffersonians were agrarian supporters.[37] It was against this backdrop of competing views that the ensuing bankruptcy debates that raged in nineteenth century America would occur.

1.2 BANKRUPTCY DEBATES

'Wherever there is extensive commerce, extensive credit must necessarily be given'; and it follows that any society that accepts credit as necessary for its existence also accepts the debt that inevitably follows and often times the inability to pay debts.[38] Such a society will determine the law and processes of debt recovery and for dealing with those who default on their obligations as

[36] n 31, 38.
[37] n 27 above, 26.
[38] n 25 above, 17.

well as insolvency laws.[39]

Insolvency law is that body of law that concerns itself with the inability of persons whether individual or corporate to pay debts as and when due and certain matters that transpire thereafter. In this study, the term insolvency law is used in the generic sense to also include US bankruptcy law; and both terms will be used interchangeably in this case study and throughout this research.

Colonialism meant that not only did the American colonies depend so much on the British for their credit but that they were also heavily reliant on the British for their laws relating to insolvency. Perhaps, because the dependence on British credit continued even after the American Revolution, this might explain why American lawmakers were in no hurry to make changes to early American insolvency laws which were literally 'lifted' right out of the pages of English insolvency law.[40] Although a case of the piper dictating the tune of the law for which he had paid for with his capital, this is not to say that insolvency law in America was continuously lifted from English law with no input on the part of the Americans. Far from it; for insolvency law in America would eventually attain an identity of its own as will be shown.

The power to make laws on insolvency derives from the American Constitution in what is known as the Bankruptcy clause. The Bankruptcy clause is found in Article 1, Section 8 of the American Constitution and provides that Congress may pass 'uniform laws on the subject of bankruptcies'. This clause is inserted immediately after the power to regulate commerce revealing what

[39] n 25 above, 3.
[40] The 1800, 1841, 1867 Acts took much inspiration from English law.

may be evidence of a relationship between commerce and bankruptcy.[41] James Madison believed that the arrangement of the clauses was more than a mere coincidence and argued that 'the power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce'.[42] Warren also suggests that even though there is no evidence as to the meaning and scope of the bankruptcy clause that it is 'highly probable that the attention of the framers was chiefly centred on bankruptcy in its relation to commerce'.[43] What is however certain is that anyone considering present day US Bankruptcy Law will be apt to describe it as embodying a policy of national relief for every class of debtor and creditor. In the beginning though, bankruptcy law developed for the regulation of traders for commercial purposes.

The American Constitution uses the word bankruptcy as opposed to insolvency and this was the subject of much debate. Some lawmakers were of the opinion that the drafters of the bankruptcy clause had intended to preserve the distinction in earlier English Law i.e. between 'bankruptcy' and 'insolvency' laws where bankruptcy law applied only to traders and insolvency law which was designed to help debtors. Perhaps not wanting to attach any 'colonial' interpretation to the term 'bankruptcy' as used in the bankruptcy clause but in order to give it a meaning that was necessary for the country's needs, the American Supreme Court eventually gave a more expansive interpretation. With their interpretation, the term 'bankruptcy' became 'a short

[41] See United States Constitution Article 1 Section 8 Clauses 4 and 5.
[42] Madison's quotation is taken from n 31 above, 23 where Skeel makes reference to its origins in *The Federalist No. 42* which was written by James Madison.
[43] n 25 above, 7.

hand that referred to any legislation designed to deal with financial distress'. According to Senator Thomas H. Benson:

> We are to use our granted powers, according to the circumstances of our own country, and according to the genius of our republican institutions, and according to the progress of events and the expansion of light and knowledge among ourselves....[44]

The Americans seemed ready to shed any colonial legislative encumbrance and leave the past behind.

The Bankruptcy clause allows for the enactment of both federal and state laws. However, at the beginning state laws held centre stage with the state legislatures passing different insolvency laws. Difficulties arose for conducting commerce across state lines as a result of these different state laws and calls for a national bankruptcy law came to the forefront with the hope that it would:

> standardize rules and procedures throughout the country and put all lenders and borrowers, foreign as well as American, on an equal basis... (And) not deprive the states of their control over debtor-creditor relations.[45]

The aforementioned belief in agriculture as the source of America's wealth would be demonstrated in the fierce opposition that was put up by members of the agricultural class against the enactment of a national bankruptcy law which

---

[44] For a discussion on the expansive interpretation of the term 'bankruptcy' see n 31 above, 27; n 25 above, 5-8.
[45] n 25 above, 17.

they believed could only further the interests of the commercial class.[46] Eventually however it was views like this that triumphed:

> true interests of agriculture cannot be opposed to those of commerce...these two great interests mutually support each other. Show me a regulation by which commerce is to be advanced... and you show me that by which agriculture is to be promoted. Embarrass your shipping interest and the farmer feels the increased freight in the diminution of his produce. Impose heavy duties upon imports and he pays an additional price for his supplies ... and the planter finds his produce left upon his hands. (Furthermore) whatever encourages commerce is beneficial to agriculture. They go hand in hand....If the merchant is unsuccessful, the farmer can have no ready market for this surplus product. [47]

This logic must have proved effective because by 1800 America had enacted its first national bankruptcy law.

The nineteenth century saw bankruptcy law evolving even further. This development was however not the result of commerce flourishing. On the contrary, bankruptcy laws enacted in this century were the product of periods of 'existing stagnation of commerce'.[48] For instance the 1792 Panic, which was the product of widespread speculation in every kind of corporation, and the commercial losses of 1799, resulted in the 1800 Bankruptcy Law. Likewise, commercial disturbances between 1806 and 1840 led to the enactment of the

---

[46] Men like Albert Gallatin of Pennsylvania, Abraham Baldwin of Georgia, and William Gordon of New Hampshire, felt that agricultural interests were more important in the country's development than commercial interests and could not be served by a law they saw as purely commercial.

[47] n 25 above, 35.

[48] The term 'existing stagnation of commerce' can be found in n 25 above, 18.

1841 Bankruptcy Act; and the 1867 Bankruptcy Act was also the result of the Panic of 1857.

Another major contribution of commerce to insolvency law in America was in the development of corporate reorganization techniques. The origins of reorganization are said to have resulted from the activities of the nineteenth century railroad corporations. At that time the railroad corporations had appeared on the scene and were looking to expand. The railroads had raised the finance needed for expansion by selling mortgage bonds underwritten by investment banks to private investors. The Panics of 1857, 1873 and 1893 brought with it a barrage of railroad insolvencies as railroads were unable to meet their obligations under the mortgage bonds that had financed their expansion. Before the end of the nineteenth century about one-third of all the railroads had failed. According to Skeel:

> the periodic collapse of the railroads led to the first true reorganizations-which were called equity receiverships (and) when Congress finally added a meaningful corporate reorganization option to the Bankruptcy Act in the 1930s, it took all its cues from the railroad receivership techniques that had long been used in the courts.[49]

At the beginning, the bankruptcy clause did not play any role in dealing with the railroad insolvencies of the nineteenth century. The obstacles to the use of the bankruptcy clause stemmed from the difficulty in construing congress's authority to enact insolvency laws affecting the railroad

[49] n 31 above, 48.

corporations, which were seen as creatures of state laws, coupled with opposition from interest groups (managers of the railroad corporations and the investment banks) which were sceptical of congressional intervention in corporate insolvencies. State power was also limited in dealing with the railroad insolvencies considering that the railroads ran across state lines making state regulation of the railroads difficult to contend with. Even the Bankruptcy Acts of 1800, 1841, 1867 and 1898 were incapable of dealing effectively with the reorganization of large corporations such as the railroads. The 1800 and 1841 Acts contained no corporate insolvency provisions in the first instance; and the 1867 Act, which was the first bankruptcy law to include corporations, 'assumed that bankrupt corporations would simply be shut down and their assets liquidated'.[50] Even the addition of a composition option for corporations in 1874 did little to assist in the corporate reorganization of the railroads as the addition was beneficial only to small businesses.

By the 1930s Congress added a corporate reorganization option to the Bankruptcy Act. It was from the railroad receivership techniques, which had been developed in the courts in the nineteenth century, that the corporate reorganization option in the Bankruptcy Act took its substance. With the help of insolvency legislation, the equity receivership option for corporations had come to stay albeit in an evolved fashion.[51] Receivership in itself is not a pure

---

[50] n 31 above, 54.

[51] See n 31 above, 56 where Skeel states 'that the standard reorganization device was derived from long-standing foundations in the common law, which courts then developed into a reorganization framework that looked almost nothing like the structure that had stood on the original foundation', see also n 32 above, 1425 where Lubben states that 'equity receiverships were more like workouts, with all their acknowledged limitations, than Chapter 11 or other forms of bankruptcy reorganization'.

insolvency procedure. It is actually a method by which a secured creditor enforces his security. It is however considered as one of the various insolvency procedures because even though the receiver's main duty is to the secured creditor, the interests of creditors are protected as the receiver owes a duty to the company which indirectly affects the company's creditors. Even though one view is that, 'railroad receivership offers a poor example of effective corporate reorganization' there is no doubt that the railroad receiverships played a huge role in the development of modern day reorganization techniques.[52]

Thus far it has been established that credit was necessary for the support of commerce which played a major role in the development of the US, and also that it is necessary that the provision or availability of such credit be protected and ensured by the existence of bankruptcy law which is necessary to maintain healthy debtor-creditor relations. Also it has been shown that throughout the nineteenth century in the US, there were several bankruptcy debates that would eventually lead to the enactment of permanent federal bankruptcy legislation. The debates were the result of a multiplicity of competing views and positions for and against federal bankruptcy legislation that cut across not only geographical lines but also party/political lines. Lawmakers from the commercial north-eastern states viewed federal bankruptcy as essential to the promotion of commercial enterprise. South-westerners feared that northern creditors would use federal bankruptcy law as a collection device to displace southern farmers; therefore they opposed federal bankruptcy legislation. On party lines, again south-western Jeffersonian Republicans (later Democratic

[52] n 32 above, 1423.

Republicans and then Democrats) were opponents of federal bankruptcy legislation whereas north-eastern Federalists (later Whigs and then Republicans) were advocates of federal bankruptcy legislation. David Skeel draws an analogy between the multiplicity of competing views about federal bankruptcy which resulted in the bankruptcy debates of the nineteenth century and the voting irregularity that is known as cycling.[53] Legislative cycling is a phenomenon that is said to occur when lawmakers or decision makers hold a multiplicity of views and vote based on their views resulting in irrational or unstable outcomes. Skeel concludes that the multiplicity of views on bankruptcy contributed to Congress's inability to reach a stable outcome on federal bankruptcy legislation throughout the nineteenth century.

1.3 INTEREST GROUPS

According to Brian Z. Tamanaha, competing interests and conflicting normative systems can coexist however not without clashes, and that when there are clashes among normative systems they are often fuelled by interested parties who will defend and exert their power to maintain their interests.[54] In this thesis the role of interest group analysis is to highlight the fact that competing interests and conflicting normative systems can balance out to

[53] See n 31 above, 28-34, where Skeel makes reference to the path breaking book by Kenneth Arrow in which he 'demonstrated that no voting institution based on democratic principles can guarantee that voting irregularities of this sort will not arise. If everyone has an equal vote, and every option is available, the voting process may lead to chronically unstable results.' See also generally, Kenneth Arrow, Social Choice and Individual Values (New York: John Wiley & Sons, 1951).

[54] n 16 above, 400-401, 409-410.

produce good policy, in this case good bankruptcy policy. This is demonstrated below in the case of the United States. The interest group analysis also identifies lawyers among others as key stakeholders whose interests can serve to produce good bankruptcy policy and administration.

In the case of the US, the culmination of the nineteenth century bankruptcy debates with the enactment of the first permanent federal bankruptcy legislation was fuelled by interested parties namely the commercial organizations who supported federal bankruptcy legislation and therefore lobbied for it and the agrarian and populist movements who opposed federal bankruptcy legislation and lobbied against it. In fact Skeel notes that the most important development prior to the 1898 Bankruptcy Act was the emergence of commercial trade groups throughout the US.[55] For example, the National Organization of Members of Commercial Bodies was formed for the primary purpose of promoting federal bankruptcy legislation. This body proceeded to commission a federal judge from Massachusetts by name John Lowell to draft a proposed bankruptcy bill. This draft bill would come to be known as the Lowell Bill and would serve as the 'legislative template for their lobbying throughout the

[55] See n 31 above, 35-37 where Skeel states: Based on a study of 129 commercial organizations for which formation information is available, Hansen found that seventy-four were first formed in the 1880s or 1890s. Thirty-four dated to the 1870s, eleven to the 1860, and only eight predated 1860. Skeel also states that: A useful yardstick for measuring the role of creditor groups throughout the legislative process is the letters, known as 'memorials', that interested parties sent to Congress to support or oppose federal bankruptcy legislation. Memorials were nineteenth-century interest groups' principal mechanism for weighing in on proposed legislation in the absence of (or in addition to) legislative hearings. For most of the nineteenth century, the missives concerning bankruptcy almost always came from states or cities. By the 1890s, the authorship of the memorials looked entirely different. Rather than states and other governmental bodies, it was chambers of commerce, boards of trade, and other commercial organizations who filled lawmakers' mailboxes with their views.

1880s'.[56]

But the role of the creditor interest groups was only one side of the picture as the pro-debtor groups put up a resistance through the lobbying of agrarian and populist movements. Arguably these pro-debtor groups were not as organized as the creditor groups and they did not send memorials to the US Congress or develop specific legislative proposals, however farmers did engage in coordinated lobbying and lawmakers from farm states promoted their views.[57] The 1898 federal Bankruptcy Act is therefore the result of some concessions between pro-creditor and pro-debtor interest groups.[58]

Apart from these two interest groups, another key interest group in the US bankruptcy story is the Bar. Bankruptcy provided work for lawyers both ways as they either represented debtors or creditors. In fact according to Skeel, whilst debtor groups and creditor groups were obvious stakeholders in the bankruptcy law debates of the nineteenth century, bankruptcy lawyers and other bankruptcy professionals have a strong interest in bankruptcy law and they are the ones who have most influenced its development in the century leading up to

---

[56] See n 31 above, 36. The creditor groups would later commission a St. Louis attorney by name Jay Torrey to produce a revised bill when the Lowell bill failed. Jay Torrey became the public face of the creditor groups and Skeel notes that both supporters and opponents of bankruptcy legislation would make reference to Torrey's tireless role.

[57] n 31 above 38-39. If Jay Torrey was the public face of the creditor groups, then men such as Representative Bailey of Texas and Senator Stewart of Nevada provided a public face for pro-debtor groups.

[58] See n 31 above 37-38. According to David Skeel, whilst the organization and influence of the commercial interest groups was immense, they certainly did not get all they wanted in the 1898 Act as they had to make some concessions. According to Skeel, a consideration of English insolvency law developments of the same period which saw the introduction of a system with an administrative character and was very tough on debtors highlighted the limits of the commercial organizations influence which was unsuccessful in achieving a similar system in the US.

the 1898 Act.[59]

Skeel traces the evolution of the Bar as an interest group in Bankruptcy matters in the US. He writes about the 'Reorganization Bar' which developed alongside the growth of corporate reorganization techniques. As has been stated earlier on, corporate reorganization in the US traces its history back to the railroad receivership techniques that had long been in use by the courts before the addition of a corporate reorganization option in the US Bankruptcy Act of 1930. Although receivership is not a 'pure' insolvency procedure in the true sense of things, it often has bearing on insolvency and this is demonstrated in the fact that most insolvency texts will make reference to it in one way or the other. The railroads were America's first great corporations and when they started to fail in the 1800s, something had to be done to rescue them. Unfortunately, the earlier US bankruptcy laws were insufficient to deal with the failures of the railroads as they either assumed that these distressed corporations would simply be liquidated or they simply catered for small businesses. The equity receivership developed as a response to deal with the distressed railroad industry.[60] And in all of these happenings, the receivership

---

[59] n 31 above, 81.

[60] See n 31 above, Chapter 2 where Skeel gives an expansive description about the failures of the railroad industry and the use of the equity receivership to deal with the problems faced by that industry. He states:

> Here is how it worked. The classic equity receiverships involved moderately large railroads-railroads whose tracks crossed several state lines, and which had issued common stock, preferred stock, and several different mortgage bonds to raise money over the years. If the railroad encountered financial distress and failed to make the requisite interest payments on its bonds, a creditor would first file a 'creditor bill' asking the court to appoint a receiver to oversee the defaulting railroad's property. The principal reason for appointing a receiver was that putting the receiver in place technically shifted control of the railroad's assets to the receiver and out of the reach of prying creditors. If a creditor tried to obtain a lien against railroad property, for

bar was instrumental in facilitating the reorganization of the railroads and in creating the device known as the receiver's certificate.

According to Skeel, whilst on the one hand there was the reorganization bar, there was also the distinct and separate bankruptcy bar. However both the reorganization bar and the general bankruptcy bar share 'federalism' as an important theme and defining factor in their evolution. The bankruptcy bar has been acknowledged as having exercised great influence over the development of bankruptcy law in the US. This 'broad-based influence' ranges from their contribution to the various bankruptcy hearings that have taken place in the development of bankruptcy law, the lobbying of bankruptcy professionals through their national groups and other interest groups, the drafting of the bankruptcy laws itself, etc. In fact the bankruptcy bar has also been credited with being responsible for thwarting 'efforts to establish a governmental overseer in bankruptcy'.[61] Later in this Chapter, we will encounter the several bankruptcy commissions consisting of lawyers, judges and law academics which played a major role in the reform of US bankruptcy legislation. Prominent amongst these was the National Bankruptcy Conference which was a stakeholder in bankruptcy reform. From the foregoing, one can see that the

---

instance, the receiver would simply ask the court for an injunction. To analogize to current bankruptcy law, appointing a receiver pursuant to a creditor's bill served the same purpose, though in a more limited way, as the automatic stay does now. It forced most creditors to halt their collection efforts and provided a breathing space for the parties to try to work out plan of reorganization. The next step was to file a second 'bill', the foreclosure bill. In form, the foreclosure bill asked the court to schedule a sale of the property (solemnly invoking the liquidation-oriented language of traditional foreclosure law, of course). In reality, the sale would be put off for months, often years, while the parties negotiated over the terms of a reorganization plan.

[61] See n 31 above, 89.

apart from creditor and debtor groups, the American Bar (whether the Reorganization Bar or the General Bankruptcy Bar) was a key interest group in bankruptcy matters in the US and consequently fuelled the conflict that led to the enactment of the first permanent bankruptcy legislation in the US.

According to Carruthers and Halliday, because bankruptcy legislation is 'infrequent, seemingly non-ideological, not of great electoral interest, and highly technical, it appears to be a site particularly amenable to professional dominance'. They however qualify this statement by explaining that although bankruptcy law-making in the nineteenth century was linked to economic crises and generated strong political interest, with significant regional differences in orientations to the law, by 1978 however there was comparatively little economic pressure or political controversy and, under these conditions, professionals thrived'. [62] This they say is because technical legislation in law and finance has attributes conducive to dominance by professions. And so for instance, the 1978 US Bankruptcy Code was shaped among others by professionals- in this case, lawyers. The Commission on the Bankruptcy Laws of the United States established by the US Congress in 1970 to investigate practices and recommend changes in the content and administration of individual and corporate bankruptcy law was made up of members who had been, or still were, practicing lawyers and judges; lawyer-legislators occupied all seats in the House and Senate subcommittees which managed the legislation; and in fact professionals who were almost entirely lawyers and

[62] Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*, (Oxford: Oxford University Press, 1998), 74-75.

judges permeated every stage of the reforms that led to the 1978 US Bankruptcy Code.[63]

1.4 STRATEGIES FOR LAW REFORM

From the time of the early stirrings of commerce in colonial America to the present, insolvency law has come a long way. Whether the result of depending on English credit or not, the fact remains that early insolvency laws in America borrowed much from English law.[64] Nevertheless, by the end of the nineteenth century American insolvency law began to have a voice of its own, distinguishing it from English law. Since then reforms in US insolvency law have taken place quite virulently. The different periods of reform to US insolvency law as outlined below depicts this quite clearly.

Nineteenth century

As earlier mentioned nineteenth century America was troubled with several financial distresses, endured numerous legislative debates on bankruptcy law and produced four separate pieces of bankruptcy legislation. History shows that every time there was a financial crisis or business depression American lawmakers were quick to engage in debates at Congress

---

[63] *ibid* 86- 102 Other groups, again made up of lawyers and involved in the passage of the 1978 US Bankruptcy Code include, The National Bankruptcy Conference, National Conference of Bankruptcy Referees, Commercial Law League, and Judicial Conference of the United States.
[64] n 40 above.

and the result was bankruptcy laws.[65] Apparently, one followed the other: financial crisis, legislative debates and bankruptcy law. It was a period of instability in commerce and bankruptcy law. It might seem odd to some that the American legislators had to wait for financial crisis before bringing about reform in insolvency law but what this study wishes to focus on is the appropriate response to what was considered a problem, and that is, legislative debates in order to enact insolvency laws to combat financial distress.

The legislative debates on bankruptcy which dotted the landscape of the nineteenth century spanned almost a century.[66] This was a century of bankruptcy legislation being on the top of the agenda for the lawmakers. This suggests the importance that America as a country attributed to bankruptcy matters and its legislation. According to Skeel, 'to recite the dates of passage and repeal of the nineteenth century bankruptcy laws cannot even begin to suggest the urgency and importance that attended lawmakers' deliberations on bankruptcy'.[67] The focus of the debates was primarily on whether it was necessary to have a national bankruptcy law as the states already had their different insolvency laws. These debates saw the lawmakers divide along geographical and political lines. The proponents for national bankruptcy legislation were Federalists (later Whigs, and then Republicans) from the commercial north-east. Whereas opponents of national bankruptcy legislation, who were spurred on by the belief that local debtors were better served by state

[65] The word 'quick' is used in a figurative sense and in no way to suggest that the lawmakers acted in undue haste.
[66] There were ninety-eight years between the first federal bankruptcy law in 1800 and the 1898 Act.
[67] n 31 above, 25.

regulation, were Jeffersonian Republicans (later Democratic Republicans, and then Democrats) from the agrarian south and west.[68]

These debates never seemed to reach a stable conclusion until the Bankruptcy Act of 1898 when the instability apparently came to an end.[69] At this juncture, it is pertinent to establish that the instability in legislation that resulted during this period was not the result of *having* legislative debates on bankruptcy. Rather the instability has been attributed to the multiplicity of views which were held by lawmakers.[70]

To have devoted so many years, and debated so virulently on bankruptcy, is proof to those who might require proof that bankruptcy was (and still is) top of America's agenda because of the role it has to play in the advancement and prosperity of the country.[71]

1930s

The first sets of bankruptcy reform came in the period described as the New Deal era. The New Deal was the term used by US President Roosevelt to describe the programmes his administration inaugurated in response to the Great Depression of the 1930s. These programmes had a three-pronged approach to tackling the problems that had come as a result of the Great

---

[68] The description of the division of the lawmakers along geographical and political lines is taken from n 31 above, 26.
[69] n 31 above, 24.
[70] n 31 above, 28 where Skeel contends that when lawmakers 'hold a multiplicity of views on a single subject...their voting may lead to irrational or unstable outcomes'.
[71] On 14 April 2005, the 109th United States Congress once again passed another Act namely the Bankruptcy Abuse Prevention and Consumer Protection Act 2005 also providing for significant changes in US Bankruptcy law.

Depression namely: relief, recovery and reform.[72] Prompted by the Donovan and Thacher reports of 1931 and 1932 respectively Congress would ultimately swing into action to reform bankruptcy law. The Donovan report had been instigated by bankruptcy malpractices and in particular the abuse and misuse of proxies in the appointment of trustees in bankruptcies which had characterized New York State. By the time of the conclusion of the Donovan investigation, its report revealed a 'wide-ranging conspiracy to control bankruptcy administration'.[73]

The Donovan report was quickly followed by the Thacher report, which was 'an exhaustive investigation into the whole question of bankruptcy law and practice'[74] and revealed much the same thing as the Donovan report that had gone before it. In addition to the indictment on widespread malpractices, the Thacher report also concluded that the payments to creditor under the Bankruptcy Act of 1898 were small and that debtors were given discharges so freely. The Thacher report accordingly proposed a reform package, which sought to expand the administrative process of bankruptcy much in the same way as the English system. From the reform package, the principal proposals that survived Congress deliberations include the provisions made for individual and farmer rehabilitation, the first codification of railroad reorganization, and the incorporation of large-scale corporate reorganization.[75] However, the

---

[72] Fiona Venn, *The New Deal* (Edinburgh: Edinburgh University Press, 1998), 1, the term 'new deal' was first used by President Roosevelt in his speech to the Democratic Convention in 1932.

[73] n 31 above, 77.

[74] *ibid*

[75] The proposal made for individual and farmer rehabilitation, as well as the first codification of railroad reorganization were subsequently added to the 1933 Act; the incorporation of large

section calling for the expansion of the administrative process of bankruptcy met with stiff opposition from many interested parties that by the time the bankruptcy reform package made its way to Congress in 1933 and 1934 it had been discarded.

According to Skeel, arguments against the administrative proposals of the reform package were put forward by bankruptcy professionals. These professionals argued that if America shifted towards an administrative system of bankruptcy like the English, then like their English counterparts the role which bankruptcy professionals had played and the services which they had offered since the 1898 Act would have been greatly diminished.[76] Whatever the motive behind the opposition to the administrative reforms that came in the 1930s the outcome was the defeat of the move towards an English-style bankruptcy law in America.

It was not long before cracks were exposed in the 1933 and 1934 Acts requiring reform once again. The cracks revealed technical issues such as concerned jurisdiction and trustee authority. The National Bankruptcy Conference, a body formed to perfect bankruptcy law in collaboration with a certain Representative Chandler of Tennessee would put forward a bill (the Chandler bill) which was later on supported by the Securities Exchange Commission (SEC) to bring about sweeping reform to bankruptcy law. The Chandler Act was passed in 1938 and brought about extensive reform since the 1898 Act. In particular was the enactment of Chapter X which saw to it that in

---

scale corporate reorganization was included in the 1934 Act.

[76] For a discussion on the New Deal reforms see n 31 above, Chapter 3; see generally n 72 above, which offers a chronological introduction to the new deal.

the event of a firm filing for bankruptcy, power was vested in an independent trustee to take over the firm's business activities and also to formulate a reorganization plan for the firm. Chapter X was a significant reform introduced by the Chandler Act because it provided for extensive government oversight, which had hitherto been absent. Before Chapter X, the managers of a bankrupt firm continued to run the firm's business activities and its bankers handled the formulation of the firm's reorganization plans.

Also striking about the bankruptcy reforms of the 1930s was that they occurred not in isolation but alongside reforms that were taking place in other sectors of finance. For instance other New Deal reforms occurred in the banking sector by way of the Glass-Steagall Act of 1933, and in securities by way of the Securities Act of 1933 and Securities Exchange Act of 1934. The New Deal reforms were not introduced as a unified package but that they came as a concerted effort to deal with financial distress is not in doubt.[77]

1970s

By the 1970s another reform package was afoot once again. The US Congress had set up a Bankruptcy Commission in 1970 with the mandate to conduct wide-ranging study into bankruptcy law and by 1973 the Commission had submitted its report which included a proposal to steer bankruptcy towards an English-style administrative framework with the establishment of a bankruptcy

[77] This 'divide and conquer' approach to the New Deal reforms in the finance sector is mentioned in n 31 above, 107-109.

agency known as the United States Bankruptcy Administration. This proposal was thwarted after stiff opposition once again from bankruptcy professionals (judges and lawyers) who envisaged that the introduction of an administrative style system would cause a loss of their status and positions. Thus the bankruptcy administrator proposal of the 1970s reform package was defeated just as it had been in the 1930s. The existing system was however reformed by the enactment of the 1978 Bankruptcy Code, which introduced new structural and consumer reforms and expanded bankruptcy scope in general.

One major reform introduced by the 1978 Code came by way of Chapter 11. Chapter X of the 1938 Chandler Act had taken away power from the firm's managers and vested in an independent trustee and as a result had become a bane for many publicly held firms which were required to use that Chapter. In response, these firms had found ways of avoiding Chapter X and instead began filing under Chapter XI of the Chandler Act as there were no restrictions to its access and the firm's managers could still retain control of the business. The problems created by Chapter X of the Chandler Act were put to rest by the introduction of Chapter 11 of the 1978 Bankruptcy Code. Chapter 11 left the firm's managers in control of the firm's business and even though the office of a US Trustee was created, the role of the US Trustee was significantly limited than that of the independent trustee created under Chapter X of the Chandler Act.

That bankruptcy reform takes precedence in the legal imagination of America is quite evident from the foregoing but even more so in the formation

of bankruptcy commissions that would serve as a strident voice for reform throughout the various periods. The first of these bodies is the National Bankruptcy Conference (NBC), which was formed in the 1930s at the behest of Congress. The NBC consisted of leading bankruptcy scholars and practitioners and had as its mission the perfecting of bankruptcy law. This body played a major role in the drafting of the Chandler Act of 1938 and still continues to be a major resource to Congress in the reform of bankruptcy law.[78] Then in the 1970s, a National Bankruptcy Commission was set up by Congress and according to its 1973 report:

> The Commission was charged with considering the basic philosophy of bankruptcy, its causes, possible alternatives to the present system of bankruptcy administration, the applicability of advanced management techniques to administration of the Act, and such other matters as the Commission should deem relevant to its assigned mission. [79]

This 1970 Commission was largely responsible for the enactment of the 1978 Act. Its successor was the 1994 National Bankruptcy Review Commission, which was created to:

> investigate and study issues relating to the Bankruptcy Code; solicit divergent views of parties concerned with the operation of the bankruptcy system; evaluate the advisability of proposals with respect to such issues; and prepare a report to be

[78] See NBC mission statement on www.nationalbankruptcyconference.org (last accessed 14 July 2011).
[79] Report of the Commission on the Bankruptcy Laws of the United States, (1973) H.R. Doc. No. 93-137, at 1.

submitted to the President, Congress and the Chief Justice not later than two years after the date of the first meeting which took place on October 20, 1995.[80]

Recent Reforms

According to Skeel the story of US bankruptcy law in the twenty-first century starts with the creation of the National Bankruptcy Review Commission by the US Congress in 1994. This body was created to conduct a sweeping study into US bankruptcy law and recommend changes.[81] Prior to the creation of the 1994 National Bankruptcy Review Commission, numerous debates between consumer creditors who favoured tightening US bankruptcy law and in particular the bankruptcy discharge on the one hand, and the groups (consumer interest lawyers, law professors, and the consumer bankruptcy bar) that resisted the efforts by consumer creditors to tighten the bankruptcy discharge had resulted in the 1984 amendments to 1978 US Bankruptcy Code. The 1984 amendments authorized the bankruptcy court to dismiss the debtor's Chapter 7 petition if the petition constituted a substantial abuse, and made provision that debtors commit all of their disposable income to repaying creditors for at least 3 years.[82] The 1997 Report of the National Bankruptcy Review Commission would make consumer recommendations that would prove to be controversial because of its pro-debtor lean and the fact that the Commission's recommendations did not call for the tightening of bankruptcy

[80] See Bankruptcy Reform Act 1994, s 603.
[81] n 31 above, 187.
[82] n 31 above, 197. The 1984 amendments would be followed by even more amendments in 1994 that were largely designed to overturn controversial court decisions.

law in spite of the increase in bankruptcy filings following the enactment of the 1978 US Bankruptcy Code.[83] On the other hand, the consumer credit industry would seek to introduce legislation in sharp disagreement to and to pre-empt the recommendations of the 1997 Report of the National Bankruptcy Review Commission.[84] Unlike the Commission's Report that would reject calls for means testing, the proposed legislation proposed precluding debtors from filing under Chapter 7 if they were capable of making payments under Chapter 13; prohibiting debtors from discharging debts that were incurred shortly before bankruptcy; as well as provision for credit counselling before filing for bankruptcy and after bankruptcy. Although unsuccessful in 1997, the bill proposed by the credit industry was eventually passed into law in 2005 as the Bankruptcy Abuse Prevention and Consumer Protection Act.

Perhaps the enactment of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act can be described as the most significant recent legislative change to take place in US Bankruptcy law given the changes it made to business and consumer bankruptcies in the US. Prior to the 2005 US Bankruptcy Reforms, as the amount of consumer credit skyrocketed so also did the number of bankruptcy filings and unfortunately, it appeared that the 1978 US Bankruptcy Code had been unsuccessful in stemming the tide of bankruptcy filings.[85] The debates that would take place over the reform of

---

[83] n 31 above, 187. Bankruptcy filings skyrocketed following the enactment of the 1978 Code.
[84] *ibid* See also Judith Benderson, Introduction: A History of the Bankruptcy Abuse Prevention and Consumer Protection Act 0f 2005, in (2006) 54 *Bankruptcy Abuse Prevention and Consumer Protection Act 0f 2005*, 1 last accessed on 14 July 2011 at http://www.justice.gov/usao/eousa/foia_reading_room/usab5404.pdf.
[85] n 31 above, 190.

bankruptcy law in the US from the time of the establishment of the 1994 Commission to the enactment of the 2005 US Bankruptcy Reforms would be focused on curbing the perceived abuse of bankruptcy.

For example, the Chapter 11 system was criticized for being fraught with inefficiency, in particular high failure rates and excessive delays. So for instance the 2005 Bankruptcy Amendments impose strict time limits for confirming a plan of reorganization and this time can only be extended upon justification of the likely success of the case. The 2005 US Bankruptcy Reforms also made amendments to the Chapter 7 system and there is now no longer an automatic right to file under Chapter 7; rather debtors must undergo a means test. It is also now more difficult to shelter financial assets using the 'homestead exemption'. Furthermore whereas prior to the 2005 US Bankruptcy Reform, debtors filing under Chapter 13 could propose how much they could repay, they must now use part of their post-bankruptcy earnings to repay their debts for the next five years. As a result it has been argued that the 2005 US Bankruptcy reform has significantly reduced the level of protection offered to small businesses under the bankruptcy 'insurance policy'.[86] However it appears that although the 2005 US Bankruptcy Reforms have significantly reduced the so called bankruptcy 'insurance policy', it is believed that lenders will now be more willing to extend business loans to small business owners as a result of the reduction in the insurance that US bankruptcy now offers.[87]

---

[86] Michelle J. White, Bankruptcy and Small Business- Lessons from the US and Recent Reforms, 22, last accessed via the internet at http://weber.ucsd.edu/~miwhite/dice-white-final.pdf on 14 July 2011.

[87] *ibid* 25

These recent reforms in US bankruptcy law demonstrate as previous reforms had done, that enacting and reforming bankruptcy law in the US continues to reflect a balancing act between the interests of creditor groups and debtor and debtor advocates and that this balancing act is played out still within the context of the US federalist's structure. As Skeel puts it, the battle lines have remained the same; debtors remain closely allied with Democrats and the Senate, whereas creditors are allied with Republicans and the House.[88]

US approach to international insolvency

Global commerce or international commerce is a term used to describe the inter-connectivity of commerce all over the world. The growth of and increase in the activities of multinationals has contributed much to this phenomenon called global commerce. The difficulties of regulating multinationals within a political system of independent nation states are worsened by the problems created by the insolvency of such multinationals (i.e. international insolvencies).

International insolvencies have serious legal implications for the insolvency framework of the different nation states involved and raise serious conflict of laws issues. Some of the issues raised include questions regarding choice of law and choice of forum. Two conflict of laws theories have been propounded to deal with the implications of international insolvencies namely the doctrines of universalism (or unity) and territoriality (or pluralism).

[88] n 31 above, 210.

Universalism requires an insolvency judgment obtained at the domicile of the insolvent individual or at the principal place of business of the insolvent corporation to be recognized everywhere. Under the doctrine of territoriality however there is no such requirement that foreign judgments are recognized everywhere. On the contrary, the doctrine of territoriality provides that countries can conduct insolvency proceedings according to their own insolvency laws without regard for foreign judgments.

The US, in its treatment of international insolvencies endorsed the doctrine of universalism through the enactment of sections 304-306 of the 1978 US Bankruptcy Code. Section 304 allowed foreign representatives to file ancillary cases in US bankruptcy courts. This section has now been repealed by the addition of Chapter 15, which deals with Ancillary and Cross-Border Cases to the Bankruptcy Code. Chapter 15 is the domestic adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, which seeks to harmonize the legal regime of cross-border insolvencies.[89] According to one commentator,

> While Section 304 and Chapter 15 may have similar goals, a major difference between the two is that the language of Section 304 was primarily discretionary (as opposed to the mandatory language of many of the provisions of Chapter 15). Section 304 did not require the courts to grant any particular relief; it merely stated the court "may" grant the relief enumerated in the section. This discretionary language resulted in a wide variety of decisions under the old law, some maintaining territoriality, and others

[89] See the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Pub. L. No. 109-8, S. 802.

embracing universalism.[90]

Perhaps the discretionary language of the old section 304 may explain why even though the 1978 Bankruptcy Code appeared to endorse universalism, the American courts operated a policy of non-recognition of foreign judgments causing one commentator to sum the US approach in the following words:

> Where a foreign judgment is concerned, the courts have adopted the plurality theory; where a domestic bankruptcy is concerned, Congress seems to demand universal recognition.[91]

In other words, the conflict between territoriality and universalism was represented in the case law. So for instance the US courts appeared to apply the doctrine of territoriality to foreign judgments and universalism to its domestic judgments.[92] That is to say that the US does not operate a complete framework for universalism. In fact it has been stated that even with the enactment of Chapter 15, which adopts the UNCITRAL Model Law on Cross-Border Insolvency, it represents only a significant step towards universalism but it is not full universalism.[93]

---

[90] See John J. Chung, The New Chapter 15 of the Bankruptcy Code, (2007) 27 Nw. J. Intl. L. & Bus. 89.

[91] See J. Honsberger, Conflict of Laws and the Bankruptcy Reform Act of 1978 (1980) *30 Case Western Reserve Law Review*, 636.

[92] See Bryan Stark, Chapter 15 and the Advancement of International Cooperation in Cross-Border Bankruptcy Proceedings in (2006) 6 *Richmond Journal of Global Law and Business*, 212. See generally, Evelyn H. Biery et al., A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, (2005) 47 B.C. L. REV. 23, 30–31 for a debate as to whether or not section 304 actually embodied universalism.

[93] n 90 above, 101-103, where Chung states:

SUMMARY

Colonialism left the American colonies not only dependent on the British for credit but also heavily reliant on British insolvency laws. However, more interesting is the constant shift away from English-style insolvency law towards a unique US bankruptcy law. Proposals to bring US bankruptcy law in conformity or near conformity to English-style insolvency law were quickly stymied in the 1930s and also in the 1970s. This can only be described as a shift from the legislation of its former colonizer to independent legislation.

Furthermore, the earlier distinction between 'bankruptcy' and 'insolvency' in English law, where bankruptcy law applied only to traders and insolvency law

---

> Unable to obtain the whole loaf of universalism, perhaps they are happy with the half loaf of Chapter 15, knowing that it represents a significant step toward the ultimate goal of universalism. This interpretation finds support in the expert and matter-of-fact scholarship of universalism's proponents. The proponents openly acknowledge that it was too much of a challenge to move the United States and other nations to full universalism. The delegates who agreed upon the Model Law knew they had to operate within practical constraints. For example, the reason why a model law was generated (rather than a treaty, for example) was because it would have been too difficult to achieve consensus over anything more substantial than a model law. This also explains why the Model Law does not attempt to substantively unify the different bankruptcy laws around the world; there never would have been agreement. Appreciating the historic resistance to universalism, its proponents set more modest goals for the Model Law. Thus, the purpose of the Model Law is to advance universalism incrementally, by gradually introducing the acceptance of outcome differences in transnational insolvencies. The gradual process permits "acclimation" to universalism.
>
> Chung goes on to state:
>
> Despite the clear aim of the Model Law, it apparently was presented to Congress as a benign model of cooperation that was not universalistic. Only its supporters were permitted to testify before Congress. The entire process was an exercise in universalism "through the back door". Thus, there are two messages concerning Chapter 15, and the content of the message depends on the audience. For Congress, the message was: Chapter 15 is about cooperation; there is no universalism in the legislation. When the audience is comprised of internationalists, the message is: Chapter 15 is a significant step toward eventual and inevitable universalism.

was designed to help debtors has been done away with and a more expansive interpretation given to bankruptcy as referring to any legislation dealing with financial distress. Thus US bankruptcy law has evolved from a law mainly for the regulation of individual traders and merchants to a law that now caters for large corporations and embodies a policy of national relief for every class of debtor and creditor.

The case study on the US explored the issue of pluralism. It showed that every stage of US bankruptcy law evolution has been in accordance with the necessities of managing competing views and conflicts on the issue of bankruptcy. It also reveals how stakeholders or interested parties to an issue can influence laws and as a result legislation becomes an effective tool for managing pluralism. In the following chapters, the lessons of this chapter will be interpreted as it pertains to the competing and conflicting world of the credit sector in Nigeria, the influence of its stakeholders and the role insolvency law may be able to play in these matters.

In view of the thesis research questions, this chapter demonstrated that the legacy of colonialism did impact on credit institutions as evidenced by the fact that the American colonies became heavily reliant on credit for their development. The case study also demonstrated that as credit was important for commerce and economic development in the US, it was also necessary that the provision or availability of credit be protected and ensured by the existence of bankruptcy law, hence the necessity of US bankruptcy law reforms. In the next chapter, the focus will be on defining and describing the postcolonial

perspective taken by this thesis.

CHAPTER TWO

THEORETICAL FRAMEWORK

In Chapter One, it was stated that the thesis draws upon postcolonial perspectives in seeking answers to the research questions posed. Therefore, in this chapter the theoretical foundations within which this thesis is grounded are discussed. Postcolonial theory has been identified as the theory of choice and it is pertinent that a consideration of the terminologies relating to postcolonial theory and which are used in the thesis is embarked on. It is also necessary to proffer justification where required as to the choice of postcolonial theory for this thesis. Thus this chapter will attempt to create a framework of some theories that cross with postcolonial theory and which influence the thesis, determine the perspective taken by the thesis and form the thesis researcher's understanding of how things are connected.

2.1 POSTCOLONIAL PERSPECTIVE: TERMINOLOGY AND DEFINITIONAL MATTERS

This thesis looks at the issue of accessibility to credit for SMES and the contributions insolvency law reform can make to this issue through the lens of a postcolonial perspective. What then is a postcolonial perspective and what clarity can this bring to the issue of accessibility to credit for SMEs in Nigeria or insolvency law reform for that matter?

There are considerable difficulties in attempting to define the term postcolonial theory, not least because of the ability of postcolonial discourses to form 'conceptual alliances' with various other theories 'thus generating a new discourse of postcolonialism'.[1] Another commentator makes reference to the fact that the term itself has different variations: postcolonialism, postcoloniality, postcolonial studies, postcolonial theory, etc, and this adds to the difficulty in defining the concept.[2]

According to Henry Schwarz Postcolonial studies as a field can be described in several ways. From the historical perspective it involves the movement for national liberation that ended Europe's political domination of the globe. This movement culminated in the emergence of South Asia, 'the jewel in the crown' of the British Empire as an independent region in 1947, and by 1987 membership of independent nation states of the United Nations had risen to 160.[3]

When postcolonial studies limits itself to the specific events of political freedom from colonial or imperial domination, it also marks a distinct subfield of certain disciplinary divisions. The so-called Third World that arose as a political entity following the Bandung Conference on non-alignment has been studied extensively by scholars in disciplines such as Economics, International Relations, Government, History and Literature.[4]

---

[1] See Ato Quayson and David Theo Goldberg, Introduction: Scale and Sensibility, in David Theo Goldberg and Ato Quayson (eds.), *Relocating Postcolonialism*, (Oxford: Blackwell Publishers: 2002), xvi.

[2] Neil Larsen, Imperialism, Colonialism, Postcolonialism, in Henry Schwarz and Sangeeta Ray (eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000), 23.

[3] Henry Schwarz, Mission Impossible: Introducing Postcolonial Studies in the US Academy, in Henry Schwarz and Sangeeta Ray (eds.), *A Companion to Postcolonial Studies*, 1 in n 2 above.

[4] *ibid*

> In a larger historical temporality, postcolonial studies also considers the *longue duree* of European expansion, exploration, and conquest during the so-called Renaissance or Early Modern era of European history.[5]
>
> In this perspective, postcolonial studies expands its purview not only historically but disciplinarily.[6]

Schwarz concludes that the term postcolonial does not have a stable definition and offers a general definition of postcolonial as referring to:

> The historic struggle against European colonialism and the emergence of new political and cultural actors in the world stage during the second half of the twentieth century.[7]

Putting to one side the difficulties in construing postcolonialism given its ability to cross disciplines and the difficulties in limiting it to 'strictly historicist explanations', there are certain terminologies which occur in postcolonial discourse and which are used in this thesis to various degrees and which ought to be defined for the sake of adding clarity to what is conceived when the thesis makes reference to postcolonialism. For example, Neil Larsen posits that the terms colonialism and imperialism are spoken or used almost routinely in relation to postcolonialism and indeed in

---

[5] n 3 above, 2.

[6] n 3 above, 3. See also 4-5, where Schwarz also refers to a 'third historical horizon' wherein 'postcolonial studies can examine recurring patterns and processes of violence against neighbours and distant peoples over long periods of time'. He goes on to state:

> In this disciplinary configuration post colonial studies is allied with Peace Studies, Women's and Gender Studies, World Systems theory, certain strains of Anthropology and Theology, and other diverse projects for the transformation of knowledge into action that attempt to change the present by analyzing the global and local consequences of the European domination of the globe.

[7] n 3 above, 1.

this thesis they occur at different instances and so in order for this thesis to attempt charting the territory of postcolonialism, it is likely that one would chart the meaning of these additional terms.[8]

According to Neil Larsen, to undertake a historical sequence of the terminology imperialism, colonialism and postcolonialism (or as Larsen states is the more appropriate sequence: colonialism, imperialism, postcolonialism), is itself a problematic undertaking.[9] Whatever the case, an attempt to consider what these terms mean or what they refer to in order to understand what a postcolonial perspective is taken to mean in this thesis will be carried out in a 'vaguely historical sequence'.

Imperialism is rooted in the historical events of the First World War in 1914, and the Russian Revolution of 1917.[10] It signals an unequal relationship between states whereby the dominant state exerts power over the subordinate state.[11] The purpose of such political interference is the transfer of economic surplus from the subordinated to the dominant state.[12]

Lenin also advanced a general theory of imperialism as the highest stage of capitalism, but as will be shown later on, today such reference is now seen as largely anachronistic.[13]

---

[8] n 2 above, 23. Neil Larsen also refers to the variations of the terminology, i.e. postcolonialism, postcoloniality, postcolonial studies, postcolonial theory, etc.

[9] n 1 above, 23. Larsen states that the: Genealogy of 'imperialism, colonialism, postcolonialism' begins with the first great global crisis of capitalism in the late nineteenth century (1873-95) and is therefore an interval of the *modern.* (Thus the genealogical sequence in which 'colonialism' follows on 'imperialism'- if not the superficial chronology- is the more accurate one after all.)

[10] See n 3 above, 28.

[11] Ronald John Johnston, *The Dictionary of Human Geography* (Oxford: Blackwell Publishers, 4th ed, 2000), 375.

[12] See Ankie Hoogvelt, Globalisation, Imperialism and Exclusion, in Tunde Zack-Williams, Diane Frost and Alex Thompson (Eds.), *Africa in Crisis, New Challenges and Possibilities* (London: Pluto Press, 2002), 19.

[13] n 2 above, 29.

Generally, colonialism refers to the period when territories in Europe exercised authority in other territories in other parts of the world. It also refers to the policies (political, economic and social) by which these territories for instance in Europe controlled their colonies in other territories. There are various reasons or explanations that have been advanced to explain the imposition of colonialism in places such as Africa otherwise known as the 'Scramble for or the Partition of Africa'. Both European and African historians and scholars have reached a consensus that the scramble was a product of both internal and external factors.[14] Some of these factors include mercantile demand, Anglo-French rivalries which led to the notion of balance of power, and increasing political stability resulting from the wars in the African frontier.

Boahen himself not being entirely satisfied with the arguments proffered by these historians believes that the causes of the scramble rather could be traced to the economic, political and social forces operating in Europe during the last two or three decades of the nineteenth century.[15]

As can be expected there are different sides to the same issue. As the foregoing shows there is a debate as to whether the imposition of the colonial system in places such as Africa was due to internal factors present in Africa for instance or external factors present in Europe. In a similar vein, there are also those who would argue that the benefits and advantages of colonialism far outweigh any disadvantages there might be. And on the other hand, the critics would point to the numerous examples of exploitation that colonialism wreaked.

---

[14] See A. Adu Boahen, *African Perspectives on Colonialism* (Baltimore: John Hopkins University Press, 1987), 28.
[15] *ibid* 29.

For apologists of colonialism, colonialism reduced the economic gap between Africa and the West and laid the seeds of the intellectual and material development in Africans. Colonialism they would argue also did away with barbaric practices such as pagan worship and cannibalism and introduced formal education, modern medicine, modern communications, exportable agricultural crops and the creation of new industries as well as more efficient forms of political and economic organization. To the apologists, it was Africa's inadequacies that made colonization necessary and the outcome of post-independence self-rule suggests that the withdrawal by the colonial powers was premature.

On the other hand, critics of colonialism maintain that colonial rule left Africans poorer than they were before it began. They argue that colonialism in Africa was designed and structured to leave Africa permanently dependent on the West. As a result not only was Africa exploited but its capacity to develop was undermined.[16]

Perhaps this explains why when looking at the problems of Africa, it has been asserted that there tends to be two perspectives on the causes of the ills of Africa (whether it is famine, poverty, debt, violence, etc). Ankie Hoogvelt summarises what she refers to as these 'two broad theoretical perspectives'. She refers to those who made reference to external factors on the one hand, and those who made reference to internal factors on the other hand and argues that what is striking about the two approaches is the

[16] See Tunde Obadina, The Myth of Neo-colonialism, last accessed on 15 July 2011 at http://www.afbis.com/analysis/neo-colonialism.html .

absence of a discourse of imperialism, although the two sets of approaches are interlinked and feed of each other.[17]

This thesis does not take a one-sided view of the issues in questions but rather takes a balanced view of the factors both internal and external that affect access to credit in Nigeria. For instance in the thesis colonial policies of exclusion which could be regarded as external factors as well as internal factors such as corruption and values regarding money are treated side by side. The attitude of this thesis however is that postcolonialism is useful and relevant when discussing both external and internal factors affecting access to credit in Nigeria because of its ability to link these factors to the historical event, structures and policies of colonialism in Nigeria.

Neo-colonialism is another term that occurs in postcolonial discourse. Larsen posits that the term postcolonial may be nothing other than a euphemism for 'third world' which was an earlier used terminology and likewise he states that:

> There may, in the end, be no particularly good reason for saying 'postcolonial' - as distinct from the prior habit of referring to the 'neo-colonial' - and yet be quite good ones for not saying third world.[18]

In tracing the history and use of the term, one commentator has stated that the idea behind the term neo-colonialism is Lenin's. Lenin is of the view that imperialism is the ultimate stage of capitalism, in which the giant

---

[17] n 12 above, 15-17.
[18] n 2 above, 25.

companies took over some territories in search of markets. A clash of interests among the imperialists usually resulted into wars. Lenin and his followers argued that the imperialists would no more surrender control over their territories than the capitalists would allow the working class or its vanguard, the Communist Party to come to power within their own countries.[19]

In other words, this commentator posits that neo-colonialism is merely an extension of the term imperialism. In a similar vein, Tejumola Olaniyan makes the link between economic dependence and neo-colonialism when he states that:

> Since the wave of decolonization in Africa in the 1960s, colonialism has often been invoked more in the context of considerations of the continued economic exploitation and underdevelopment of erstwhile colonized regions. That was how 'neocolonialism' came into currency as a description of politically independent countries that are still deeply tied to the economic apron-strings of Europe and America.[20]

Crozier argues that because history failed to conform to Leninist predictions and Western imperial powers divested themselves of colonies (whether voluntarily or not), Communists tried to make history conform to their theories and that one way that they attempted this was by words; hence the word 'neo-colonialism' was born.[21] Crozier also confirms neo-colonialism's communist origin and posits that its use by Asian and African nationalists,

---

[19] Brian Crozier, *Neo-Colonialism* (London: The Bodley Head, William Clowes and Sons Ltd., 1964), 7.
[20] See Tejumola Olaniyan, Africa: Varied Colonial Legacies, 270, in *A Companion to Postcolonial Studies* in n 2 above.
[21] n 19 above, 10-11.

albeit for non-communist ends is actually inimical to Asian or African national aspirations as it furthers Soviet or Chinese objectives.[22] He goes further to explain that a country does not become truly independent merely because an imperialist power has conferred sovereignty on it or because it has become a member state of the United Nations. Even though it has relinquished political power to the country in question, the imperialist country can still exercise its control in some other ways such as economic, military or cultural. These stratagems are used by the imperialists to perpetuate their dominance, thereby instituting neo-colonialism.[23]

One thread that runs through the foregoing about the nature of neo-colonialism is the dependency of some countries on Western 'imperialist' countries'. Following on from this theme of dependency which the commentators above have raised, one can see how the dependence on nations such as Nigeria on foreign countries like England not only for economic aid but also for their laws can be considered as a form of neo-colonialism. And that is why this thesis makes reference to the continued dependence on Nigeria on England for its laws as a form of neo-colonialism. Neo-colonialism is the attempt to perpetuate colonialism even after independence. And arguably neo-colonialism can accomplish the same objectives that were achieved by colonialism. The United States has been described as one of the foremost neo-colonialists. Evidence of this is taken from its involvements in various places all over the world.[24] It is likely that its ongoing 'military campaigns' in such places as Iraq and Afghanistan

---

[22] n 19 above, 10.
[23] n 19 above, 15- 16.
[24] See Kwame Nkrumah, Neocolonialism, The Last Stage of Imperialism, at http://www.marxists.org/subject/africa/nkrumah/neo-colonialism/ch01.htm last accessed on 15 July 2011.

may even provide fodder for those who wish to argue the case that the US is a prominent neo-colonialist.

2.2 THE CASE FOR A US CASE STUDY IN THIS THESIS

The idea that the US is a prominent neo-colonialist appears to be at odds or even inappropriate with the use of the US as a case study to showcase the manner in which the US as an English colony and a postcolony dealt with the twin issues of credit and the reform of insolvency law. In other words, should a study conducted within a postcolonial context have as its case study, America, given the fact that the 'pervasive tradition of American exceptionalism that has characterized much scholarly study'[25] in the US claims that the history of America is fundamentally different from England and that the fundamental beliefs in justice, democracy and equal opportunity are considered uniquely and exceptional American values?

What then is US exceptionalism and is there in actual fact a great divide between postcolonial studies and US exceptionalism (or other ethnic studies in the US) such that would warrant the US case study in this thesis being considered an aberration?[26] Donald E. Pease states that:

> US exceptionalism is a political doctrine as well as a regulatory ideal assigned responsibility for defining, supporting, and transmitting the US national identity.[27]

---

[25] n 3 above, 9.

[26] n 3 above, 9 on the discussion as to whether there is a divide between postcolonial studies and other ethnic studies in the US.

[27] Donald E. Pease, US Imperialism: Global Dominance without Colonies, 203, in Henry Schwarz and Sangeeta Ray (Eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000).

The doctrine of exceptionalism considers as exceptional in US political economy that European institutions such as feudalism, monarchical rule and colonial territories are absent from its history. While it can be said that the state was constituted in opposition to monarchical rule and rejected feudalism, its relation to colonialism is more complicated. The complications did not arise from the fact that such colonies existed but rather from the state's representation of their political status as exceptions. So much so that the doctrine of exceptionalism regulated how citizens responded to the historical existence of US colonies by characterizing them as exceptions to the norm.[28]

Given the earlier assertion referred to by one commentator that the US is a prominent neo-colonialist, and coupled with this concept of US exceptionalism which would have US citizens believe in the conviction that US colonies are absent from its history or are 'exceptions', one might decry the suitability of a study conducted within a postcolonial context having a case study on the US. In justification of the inclusion of a US case study in this thesis, it is arguable that despite the doctrinal limits between postcolonialism and US exceptionalism, both engage in discourses that have to do with the concept of *nation*.

In discussing the terminology which one encounters within postcolonial studies, and in particular imperialism, colonialism and postcolonialism, Larsen posits that imperialism, colonialism and postcolonialism are in variant but broadly overlapping ways: things done to,

---

[28] *ibid* 204

said of, opposed to, and embraced by nations.[29] Thus the most crucial concept becomes the 'nation'.

Likewise, the concept of nation is also very important to the doctrine of US exceptionalism and it has been heralded for its usefulness in 'integrating diverse peoples into a single national project that effectively neutralizes people's differences'.[30] According to Donald E. Pease the doctrine of US exceptionalism has functioned as a regulatory ideal invoked by institutions assigned the responsibility for defining, supporting, transmitting, administering, and reproducing the US national identity.[31] To be able to do this, the US exceptionalism doctrine operates in three different dimensions namely: as a normative presupposition, as a historical paradigm and as a national narrative. These have enabled the paradigm to link imperial events to the norms that had already interpreted them as exceptions.

Therefore, whilst the choice of America as a case study might appear to be controversial in a postcolonial study given the doctrine of US exceptionalism, arguably it is acceptable given that both traverse the same issue of nation. Therefore the US case study in this thesis is appropriate and justifiable because it demonstrates among other things the process of integrating divergent views about insolvency law into a national bankruptcy law, a process that can only be described as a national project.

From the foregoing, it means that that the postcolonial perspective in which this thesis is written means that it will traverse in varying degrees, the

---

[29] n 2 above, 26.
[30] n 3 above, 9.
[31] n 27 above, 209.

aforementioned concepts such as imperialism, colonialism (and its concomitant, legal imperialism) and neo-colonialism, hence the need for an understanding of the terminology. The foregoing also shows the importance of exploitation, exclusion and nation as some of the topical issues in postcolonial discourse.[32]

2.3 THE DISCOURSES OF POSTCOLONIALISM: NATION, EXPLOITATION, EXCLUSION AND ECONOMICS

As earlier stated the concept of nation is a prominent postcolonial discourse. The issue of a national identity itself is one that has been a contentious area for Nigeria for a very long time. According to Nnamdi Ihegbu, 'British Colonialism made Nigeria, joining diverse peoples and regions in an artificial political entity; the British, it is said, created a country called Nigeria, not a nation'.[33] The diversity that exists in Nigeria is exemplified by the choice of sample for the empirical survey carried out by this thesis. The choice of sample for the empirical study in this thesis is Port Harcourt. Port Harcourt is the capital city of Rivers State and is home to various ethnic groups represented by the 23 local governments in Rivers State as well as Nigerians of other ethnic background from the various parts of Nigeria as a result of the commercial opportunities it offers. In this thesis,

---

[32] Consider for example the exploitation by the *oppressor* nations of the *oppressed* nations as constructed under imperialism. See Larsen in n 2 above, 29 for reference to such terminology.

[33] Nnamdi Ihegbu, Colonialism and Independence: Nigeria as a Case Study, at http://www.southernct.edu/organizations/hcr/2002/nonfiction/colonialism.htm last accessed on 15 July 2011.

the concept of nation is explored through the mechanism of the concept of 'a moral economy of borrowing in Nigeria'. The contribution of this thesis to the ongoing postcolonial discourses on nation, national identity, etc, is the attempt at engaging in a national project of identifying a 'moral economy of borrowing in Nigeria' by seeking to encapsulate the attitudes and values that affect credit in Nigeria. The aim of such a study on the moral economy of borrowing in Nigeria is to provide law reformers in Nigeria with valuable information that can assist in defining policy prescriptions for Nigeria's insolvency law regime.

Again in this thesis, the postcolonial discourse of exploitation is explored by way of considering such issues as the high interest rates of credit and disreputable debt recovery methods during the colonial and postcolonial eras in Nigeria. Chapter Three will show that high interest rates and forcible collection of debts were prominent features of money lending in colonial Nigeria. It is pertinent to point out that the issue of high interest rates is not only considered to be a feature of colonialism but has also been described as a method of neo-colonialism. Supporting the view that the high rate of interest is another technique of neo-colonialism, Kwame Nkrumah claimed that in 1961, the interest rates on almost three-quarters of the loans offered by the major imperialist powers amounted to more than five percent, and in some cases up to seven or eight percent while the call-in periods of such loans have been burdensomely short.[34]

Apart from exploitation, exclusion is another topical issue that reoccurs in postcolonial discourse. Many of the systems of administration of

[34] See n 24 above.

colonial governments operated in such a manner that Africans were excluded from actual governance; for instance, the French abolished many of the traditional ruling dynasties. And even where existing traditional rulers were used in governance at the local level, for instance as was the case under the British system of indirect rule, a system of systematic exclusion still operated as only certain Africans (e.g. those that were educated, or from a certain tribal grouping, etc) were appointed to serve at the local level in colonial governments.[35] Exclusion was not only at the governance level, exclusion under colonial systems was also experienced in the social arena, whereby social amenities such as hospitals, electricity, piped water, dispensaries. And yet it was partly to fund these services that direct and indirect taxation was imposed on Africans.[36]

The thesis tackles the issue of exclusion by exploring financial exclusion and showing how a system of financial exclusion was embarked on by the Colonialists during the colonial era in Nigeria through its policies and structures and how this was sustained in the independence era. According to the European Commission:

> Financial Exclusion refers to a process whereby people encounter difficulties accessing and/or using financial services and products in the mainstream market that are appropriate to their needs and enable them to lead a normal social life in the society in which they belong.[37]

---

[35] In the words of Jean-Paul Sartre, 'the European elite undertook to manufacture a native elite'. See the preface to Frantz Fanon, *The Wretched of the Earth*, (London: Penguin Books; 1967), 7.

[36] n 14 above, 59.

[37] See the Financial Services Provision and Prevention of Financial Exclusion manuscript at http://www.scribd.com/doc/46148457/Financial-Exclusion-Study-En (last accessed 15 July 2011). See also Kenneth Amaeshi et al in, Financial Exclusion and Strategic and Strategic Corporate Responsibility: A Missing Link in Sustainable Finance Discourse?, last

In looking at improving access to credit for SMEs in Nigeria, this thesis engages with this issue of financial exclusion and explores it from a postcolonial perspective by making the connection between postcolonialism and financial services regulation demonstrating what was earlier stated about the ability of postcolonialism to cross disciplines. In other words, the thesis attempts a postcolonial critique of financial services regulation and in order to focus this critique it centres its attention on the role of a financial services regulator using the United Kingdom as an example.

---

accessed at http://www.nottingham.ac.uk/nubs/ICCSR/research.php?action=single&id=30 on 15 July 2011. Here the authors summarize some of the literature on financial exclusion as well as some of the causes of financial exclusion. They state:

> Financial exclusion is also not a new social construct. It has been dealt with extensively in the broader social science and particularly in development studies literature (e.g. Rogaly, 1998; Matin et al., 2002; Halder and Mosley, 2004). It forms an integral component of a much wider concept of social exclusion and could be defined in many different ways; but its key characteristic is the inability of some customer segments to access necessary financial services in an appropriate form, which might relate to the targeting choices of the financial service providers, as not all customer segments that experience financial exclusion are of no interest (Panigyrakis et al, 2002). The extant literature on financial exclusion shows that its existence is founded on varied socio-economic factors with very complex interactions. Some of these interacting variables include low income, lack of access, price and design of financial products, religion, cultural background, unemployment and illiteracy (Kempson and Whyley, 1999). Notwithstanding, the predominance of each of these socio-economic variables in financial exclusion debates could arguably differ from country to country. In the United Kingdom for instance, Kempson and Whyley (1999) found that '...lack of education does not lead directly to low levels of use of financial products; (while) it does so by increasing the likelihood of a low income' (p.7). This also is in line with Delvin (2005), which shows that the most consistent and significant influences on financial exclusion [in that order] are employment status, household income, and housing tenure, closely followed by marital status, age, and level of academic qualification.
>
> These findings are not surprising since the percentage of illiterates above the age of fifteen in the UK is nil (World Bank, 2004). They may not necessarily apply in a developing country, like Nigeria, where the level of illiteracy is up to 35% of a population of about 130 million (World Bank, 2004). While low income or poverty is usually the most frequently mentioned driver of financial exclusion (Howell, 2005), there is a cause and effect circularity between financial exclusion and financial hardship or poverty. In other words, the consequences of poverty – lack of access to basic education, ill health, unemployment, and so on – could as well constitute major causes of financial exclusion.

In the United Kingdom where the Financial Services Authority (FSA) is the financial services regulator, it sets out its aims as follows: promoting efficient orderly and fair markets; helping retail consumers achieve a fair deal; and improving business capability and effectiveness. Its statutory objectives are maintaining market confidence, promoting public awareness, securing consumer protection and reduction of financial crimes.[38] Although the FSA does not have a statutory objective to address the issue of financial exclusion, it has stated that without understanding the causes and impact of financial exclusion then the regulatory body runs the risk of excluding some of those who are the in most need of the protection offered by its regulatory regime.[39] In fact according to a Review by the FSA, there are key areas where regulation, or its interpretation, can play a part in financial inclusion.[40] In particular, it states:

> Also important, from a standpoint of financial inclusion, is the level of regulation required by fledgling not-for-profit organisations, such as credit unions, rotating savings and credit associations in minority ethnic communities and the proposed community banks. Indeed, the community bank initiatives in Portsmouth and Salford were delayed by the complexities of ensuring regulatory compliance with the FSA (Kempson and Jones, 2000). Again, the need is for regulation that widens access, while providing consumers with an adequate level of protection.[41]

---

[38] See FSA website at http://www.fsa.gov.uk for an outline of these aims and objectives (last accessed 15 July 2011).
[39] See Elaine Kempson, Claire Whyley, John Caskey, and Sharon Collard, Financial Services Authority In or Out? Financial Exclusion: A Literature and Research Review, at http://www.fsa.gov.uk/pubs/consumer-research/crpr03.pdf (last accessed 15 July 2011), particularly the foreword to the review by Christine Farnish wherein she justifies the need for the FSA to apply an understanding of financial exclusion in its exercise of its statutory objectives.
[40] *ibid* 88
[41] *ibid*

Let us now consider a plausible justification for the application of postcolonial theory or a postcolonial perspective to the issue of financial exclusion or financial inclusion as it concerns this thesis; that is the accessibility of credit for SMEs in Nigeria.

Economic analysis has been applied to the issue of financial services regulation.[42] On the other hand, postcolonial scholarship and economics have been merged in a broad way that challenges and hopefully enriches them both.[43] Would it therefore not be fair to say that postcolonial theory

---

[42] Consider for instance the main arguments for and against investor protection regulation from an economic analysis point of view, that have been summarised by one commentator:

> The thesis for regulation concludes that the proper mode of action for the elimination of qualitative uncertainty is twofold. On the one hand, to put in place conduct of business regulation and, on the other hand, to entrust the regulator with powers of supervision of the way business with consumers is conducted and monitoring of compliance as well as with powers of enforcement in case of contravention from rules. As the argument goes, by imposing standards and rules of conduct of business more information would be available and consequently retail investors would be in better position to make efficient choices. Similarly, it is desirable to entrust the regulator with the task to monitor the firm's behaviour and enforce claims in case of misconduct, since this would relieve consumers from the huge economic burden of monitoring and enforcement. It is further pointed out that the policy choice to reinforce the role of the regulator in the marketplace would preserve market confidence, strengthen sound competition and in the long run encourage economic growth (Llewellyn, 1999, p. 26). Regulation is not costless. It is strongly asserted, however, that its benefits will override the anticipated costs (Briault, 2003; Franks et al., 2003, pp. 270-2).
>
> The thesis against regulation concludes that it is competition and not protective policies that further consumer welfare (Vickers, 2002). While cases of market failure and their consequences have been overstated, several other problems have passed rather unnoticed. For example, no proper attention has been given to various instances of governmental failure, the limitations of regulatory standards to deliver public policy objectives and the competence of a specialist public agency to know in beforehand what suits best for each consumer. Clearly, market dynamics that could work for the benefit of consumers have not been fully exploited but rather suffocated. In their view, a shift in attitude and a change of focus would serve consumer interests better.
>
> Specifically, the arguments demonstrated above consider the economic rationale for investor protection regulation either on the basis of cost-benefit analysis or on the basis of regulatory impact assessment (Alfon and Andrews, 1999).

See Andromachi Georgosouli, The Debate over the Economic Rationale for Investor Protection: A Critical Appraisal, (2007) Vol. 15 Iss. 3 *Journal of Financial Regulation and Compliance*, 236-249.

[43] See generally, Eiman O. Zein-Elabdin and S. Charusheela (eds.), *Postcolonialism meets Economics*, (London: Routledge, 2004).

which can be merged with economic analysis can also be applied to the issue of financial exclusion (or inclusion) following from the earlier statements that financial services regulation can play an important part in financial inclusion and that economic analysis is also relevant to financial services regulation.

On the other hand, another argument is that just as the concept of financial exclusion is contemplated from the perspective of financial services regulation or the interpretation of financial services regulation, postcolonial theory can equally play a part in financial inclusion as it challenges (in the case of this thesis) the exclusion of indigenous people from the formal credit markets by colonial policy and structures. From the foregoing, generally financial exclusion is primarily concerned with the issue of lack of access to financial services and some of the causes of financial exclusion are identified as lack of access to basic education, unemployment, housing tenure, etc. Similarly a policy of neo-colonialism may foster or perpetuate 'exclusion' whether directly or indirectly. Take for instance Ankie Hoogvelt's reference to 'the exclusion in the age of globalisation'. She posits that Africa's marginalization 'may be conceptualised as a process of *exclusion*'. She considers the information technology revolution which has transformed the infrastructure of production, management and communication elsewhere in the world and the globalization that this has promoted and concludes that there is going to be exclusion of people, regions and societies from participation in the newest international division if they do not possess the requisite infrastructure. She adds that sub-Saharan Africa is the switch-off region of the world in terms

of network capability and network connectivity. For her the upshot is that Africa's firms and labours are alienated from the workings of the new global economy, while Africa's elite are integrated into the global networks of wealth, power, information and communication.[44]

Hoogvelt goes on to state that:

> The fusion of telecommunications and computer information systems releases a whole new species of human activity for commodification and indeed, for internationalisation.[45]

She then argues that it is through this age of globalization and the 'commodification of intangibles' that capitalism finds its expansionist urges fulfilled and that this is how Africa will be excluded from the latest phase of world capitalist development. Hoogvelt also conceives the connectivity of discourses of exclusion and imperialism.

She states that:

> Imperialism may be described as *any* deliberate transnational *political* interference for the purpose of mobilisation, extraction and *external* transfer *of economic surplus* from one political territory to another.[46]

Imperialism itself shows both the political nature of the interference and its economic advantage while at the same time it lends credence to the fact that

---

[44] n 12 above, 17.
[45] n 12 above, 19.
[46] *ibid*

it is a two-sided process in which one side benefits at the expense of the other.[47]

Hoogvelt concludes that in this age of globalization where infrastructural capacity determines the ability or 'capacity to work as a unit in real time on a planetary scale', and the western lifestyle and conditions of socio-economic well-being 'depend on environmental plunder and pauperisation in large parts of the world, including Africa'[48], 'neither globalisation nor exclusion transcend or negates the phenomenon of imperialism'.[49] In other words they are intertwined in many ways. Taking a leaf from Hoogvelt's argument of exclusion as being an 'external factor', this thesis will attempt to show that exclusion (and in fact exploitation as well) can also be conceptualized as an 'internal factor' in postcolonial discourses and not only an external factor.

Furthermore on the issue of exploitation and exclusion, the thesis argues that colonial structures in Nigeria greatly influenced the culture of Nigerians as pertains to attitudes towards borrowing as well as accessibility of credit. Consider as relevant, the argument of Jean Braucher which will now be discussed, that both structure and culture affect the issue of overindebtedness. It is arguable and the thesis researcher will argue that likewise both structure and culture influence the issue of accessibility of credit.

Jean Braucher posits that it is structure that sets the conditions for culture and therefore it is a false dichotomy to see structural and cultural

---

[47] n 12 above, 22.
[48] n 12 above, 26.
[49] n 12 above, 19.

explanations of overindebtedness as in conflict.[50] Braucher cites such structures as sophisticated business models, the regulatory environment including limits on interest rates, creditors' remedies and data sharing as affecting the supply of credit of consumer credit.[51] In relation to culture, Braucher posits that structural change affects not only consumer culture but also the culture of creditors. Braucher demonstrates how changes in structure influences changes in consumer culture, by describing how the virtue of thrift which was deeply rooted in American culture from the colonial period and how the stigma of debt that was equally strong in that period gradually gave way to a willingness to satisfy one's desires using credit rather than savings.[52] Structures such as those that encouraged lending at high interest rates and which evaded usury restrictions, legalization of small loans and licensing of small loan companies, the retailing, advertising and credit industries; Braucher posits have all contributed to a transformative change in cultural attitudes. In the case of changes in creditor culture, Braucher further posits that in order for investors to make the most profitable investments in a very competitive market, creditors have had to become sophisticated in the techniques of subprime marketing, underwriting and collection or lose out to those who

[50] See Jean Braucher, Theories of Overindebtedness: Interaction of Structure and Culture, (2006) 7 *Theoretical Inquiries in Law*, 325.

[51] Braucher also cites structures such as job loss, divorce, illness, wage stagnation, changes in household expenses etc as driving the demand for consumer credit. Although Braucher's arguments are directed towards consumer credit, it would still be relevant. Braucher also argues that 'bankruptcy law, to the extent it limits creditors' ability to collect, presumably has some depressive effect on supply'. This does not run contrary to the grain of a major premise of this thesis which is that 'As all creditors are motivated by the expectation that when loans are made they will be repaid, arguably efficient debt recovery processes are likely to encourage creditors to make more credit available to these businesses'. This is because as Braucher states the depressive effect of bankruptcy law on supply of credit 'is much smaller than the effect of other forms of regulation, particularly interest rate regulation and general limits on debt collection behaviour and recovery from income of debtors and, to a lesser extent, recovery from assets'.

[52] n 50 above, 337.

do.[53] In other words, creditor culture is driven by structures such as market forces and the regulatory environment.[54] As a result, Braucher states that creditors have developed methods designed to appeal to minority populations that have been excluded from traditional banking and consumer culture. However what may seem as democratization of credit to the creditors could also be looked at as cultural exploitation, which results in redistribution from the poor and from minorities to creditors' investors. In fact racial minorities continue to use the subprime market even when they could get credit from conventional lenders because financial habits and practices are difficult to change.[55]

In a similar vein to Braucher's arguments that structures influence culture, this thesis takes the view that colonial structures have influenced not only indigenous culture of borrowing but also the creditor culture as well. As Chapter Three will show, colonial policy and structures influenced a creditor culture of excluding indigenous people from formal financial services whilst at the same time perpetuating another creditor culture of exploitation by driving indigenous borrowers deeper into indigenous credit markets that had themselves been so greatly influenced by colonial structural changes. Chapter Four on 'Understanding the Moral Economy of Borrowing in Nigeria' explores the extent to which colonial structures influenced attitudes and values towards borrowing in Nigeria.

Thus far, the discourses of postcolonialism (i.e. nation, exploitation and exclusion) which will be explored in this thesis have been highlighted. One other discourse that arises in this thesis is that of economics. As it has

[53] n 50 above, 336.
[54] n 50 above, 336.
[55] n 50 above, 335.

been earlier stated, postcolonialism and economics scholarship have been merged in ways that challenge and enrich both. It has been posited that the combined assumptions of maximizing behaviour, market equilibrium and stable preferences form the heart of economic approach[56] and that economics is epistemologically comfortable with the notion of colonialism and imperial domination and can thus be soundly characterized as a colonial discourse.[57] As a postcolonial discourse, economics is raised in this thesis when discussing efficiency considerations of insolvency law given the various other debt recovery mechanisms including indigenous debt recovery methods.

Therefore this thesis looks at the accessibility of credit for SMEs and the role of insolvency law through a postcolonial theory lens that considers that the discourses of nation, exploitation, exclusion and even economics are all relevant.

2.4 POSTCOLONIALISM AND THE LAW

In this thesis, the relationship between postcolonial theory and the law is contemplated. For instance, one concept that this thesis will traverse when it considers the sources of law in Nigeria and in particular insolvency law, and which has been described as a concomitant of colonialism is 'legal imperialism'. In his works, Schmidhauser considers the impact colonialism has had on the legal systems of colonized countries and legal education. He

[56] See n 43 above, 2 where reference is made to Febrero, Ramon and Schwartz (eds.), The Essence of Becker (Stanford: Hoover Institution, 1995), xl in which they cite Becker.
[57] n 43 above 2-3, where reference is made to instances where individual economists have opposed European colonialism based on efficiency considerations and the desire to spare imperial countries the financial 'burden' of maintaining colonies.

identifies legal imperialism as the concomitant of external manifestations of power such as military conquest and colonialism and establishes that legal imperialism has continued to persist in former colonies so much so that their legal cultures have remained dependent on their former colonizers albeit at varying levels.[58]

In the introductory chapter it was stated that a major premise of this thesis is the argument that as all creditors are motivated by the expectation that when loans are made they will be repaid, arguably efficient debt recovery processes are likely to encourage creditors to make more credit available to these businesses and as a reformed insolvency law regime could serve as an important tool for debt recovery for lenders and as a bridge between the transplanted foreign credit institutions and the indigenous credit institutions in existence in Nigeria. Therefore, in making a critical analysis of insolvency law in Nigeria, this thesis will examine the concept of legal imperialism and legal transplantation in particular, the 'reception' of English insolvency law into Nigerian law as well as the effects of the wholesale transplant of US insolvency law in other territories. The thesis will argue that such wholesale transplants will result in new forms of imperialism and colonialism, especially where care is not taken to ensure that cultural understandings of concepts are similar. Support for this premise can be seen in arguments such as that by Eve Darian-Smith who

---

[58] John R. Schmidhauser, Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems (1992) Vol. 13, No. 3, *International Political Science Review*, 321-334 or via the internet at http://ips.sagepub.com/cgi/content/abstract/13/3/321 (last accessed 15 July 2011); See also John R. Schmidhauser, European Origins of Legal Imperialism and its Legacy in Legal Education in Former Colonial Regions (1997) Vol. 18, No. 3, *International Political Science Review*, 337-351 or via the internet at http://ips.sagepub.com/cgi/content/abstract/18/3/337 (last accessed 15 July 2011). See Chapter Three of this thesis for a further exploration of this concept of legal imperialism.

posits that the globalization of law is still based on stereotypical images of East and West that perpetuate colonial hierarchies and asymmetric power relations.[59] Eve Darian-Smith compares the Western legal concept of intellectual property with Chinese legal culture and observes that there is a conflict between the Western ideology of 'possessive individualism' and Chinese 'views of collective property rights and the relationship of the individual to society'. She concludes that this highlights how globalization of legal processes 'both actively ignores the significance of local/regional cultural practices that give meaning to abstract legal concepts, and downplays the struggles for economic and cultural power that underlie a capitalist ideology of globalization'.[60] In a similar vein, this thesis will show how differences in cultural understanding of credit and debt has resulted in a failure of the Bankruptcy Act in Nigeria and the challenges that such differences in cultural understandings has posed for transplanting US insolvency law in other parts of the world.

SUMMARY

This chapter attempted to define what is meant by postcolonial theory. It conceded that there are difficulties in construing the term but highlighted amongst other things the critical nature of postcolonial theory, its ability to form conceptual alliances with various other theories, as well as some of the topical issues in postcolonial discourse.

---

[59] Eve Darian-Smith, Myths of East and West: Intellectual Property Law in Postcolonial Hong Kong, 294, in David Theo Goldberg and Ato Quayson (Eds.) *Relocating Postcolonialism*, (Blackwell Publishers Ltd: 2002).
[60] *ibid* 298

In the next chapter, this ability of postcolonial theory to cross disciplines and bring together such issues as nation, exploitation, exclusion, culture and law is demonstrated in discussing in a critical manner such issues as the impact of colonialism on indigenous credit institutions in Nigeria, the introduction of foreign credit institutions and legal imperialism.

CHAPTER THREE

COLONIALISM AND CREDIT INSTITUTIONS IN NIGERIA

Credit spans the entire spectrum of life and in every country there are linkages between credit and the economy. In pre-colonial Nigeria, credit functioned under indigenous institutions that relied extensively on trust and fostered mutual confidence between the creditor and debtor. The advent of British colonial rule in Nigeria foisted on the country Western European-styled institutional reforms that impacted credit through the introduction of financial institutions such as banks, contract and contract enforcement mechanisms as well as insolvency law.

For example, the introduction of banking systems in Nigeria has had a phenomenal impact on indigenous credit institutions as banks have now become a source of credit and liquidity to the Nigerian economy where once only these indigenous credit arrangements existed. Despite its inherent instability, the banking sector remains a predominant source of credit and liquidity for a country's economy making it in the best interest of every country to ensure its stability.[1] Adequate capitalization, supervisory oversight by the

[1] Banking insolvency is not unique; on the contrary banking insolvency is natural in an industry that is 'inherently unstable' as evidenced by the Asian banking crisis, the European banking crisis and the American banking crisis. The Nigerian banking sector itself has been plagued with an array of problems that have resulted in the distress and failure of one too many banks. Prominent among the problems of failed and distressed banks in Nigeria has been the issue with non-performing loans. In a paper by Martin Brownbridge, The Causes of Financial Distress in Local Banks in Africa and Implications for Prudential Policy, at

regulating authority, and prudential rules, etc (the so called entry regime and prudential regulation of banks) are all tools used for ensuring the proper functioning of the sector.[2] In addition to prudential reforms, the current Nigerian banking reforms package proposes the revision and updating of relevant laws and drafting of new ones to achieve the effective operation of the banking industry. This begs the question: how about the effective operation of the credit industry as a whole (i.e. both formal and indigenous sources of credit)? In particular, how can the revision and updating of relevant laws and the drafting of new ones achieve the effective operation of the credit industry as a whole? This thesis aims to study how reforming insolvency law in particular would improve access to credit that would benefit SMEs and in so doing encourage economic development. In other words the scope of the thesis is restricted to how insolvency law reform can achieve the effective operation of

---

http://www.unctad.org/en/docs/dp_132.en.pdf (last accessed 15 July 2011), he surveys four African countries in Sub-Saharan Africa of which Nigeria was one and concluded that a substantial number of banks in those Sub-Saharan African countries have failed mainly because of non-performing loans and that the problem of poor loan quality has its roots in the problems of moral hazard and adverse selection. Until the 1980s or early 1990s when entry requirements were revised, he states that the regulatory barriers to entry had been low and that the growth of local banks was mainly due to this during this period. However he acknowledges that the growth and expansion of the banking sector in the countries he surveyed was not only encouraged by low entry requirements at one point but also by other reasons such as the fact that investors in the banking sector saw that there were gaps in the financial markets. For instance he states that the foreign banks had been conservative in their lending policies, lending only to multinational corporations and other large corporate customers. This would have meant that SMEs and many private individuals would not have benefited. He states that extending access to credit to local businesses was one of the motives for the establishment of government banks and development finance institutions. Brownbridge goes on to state that consequently local banks were able to gain a foothold in financial markets by targeting customers neglected by the established banks, such as small businesses and offering better services.

[2] See generally Rosa Maria Lastra, 'Cross-Border Bank Insolvency: Legal implications in the case of banks operating in different jurisdictions in Latin America', (2003) *Journal of International Economic Law*, 79-110; See also Eva Hupkes, 'Insolvency- why a special regime for banks?' at http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/hupkes.pdf (last accessed on 15 July 2011).

the credit industry by improving access to credit.[3] It does not concern itself with the entire scope of reforms in the Nigerian banking sector. Still, it is expected that this study will likely add support to the current reform process taking place in the Nigerian banking sector. In the following sections of this chapter, the literature concerning the major themes of this thesis is considered. The literature reviewed provides the foundation on which this thesis builds by revealing the gaps in the research already carried out and the contributions that this thesis wishes to make to the area of research under consideration.

3.1 INDIGENOUS CREDIT INSTITUTIONS

Indigenous credit institutions refer to the different arrangements by which indigenous peoples of the world have been known to mobilize credit. One commentator on indigenous credit institutions asserts that there is massive data available that demonstrates that these indigenous credit institutions are much older than even colonial currencies, and that this is contrary to earlier economic texts which either dismiss and ignore indigenous credit institutions or at best treat them as recent inventions.[4] Toyin Falola's work identifies some of these indigenous credit arrangements, in particular those existing in south-western

[3] See generally Sam N. Okagbue and Taiwo B. Aliko, 'Banking Sector Reforms in Nigeria', at http://www.imakenews.com/iln/e_article000336415.cfm?x=b11,0,w (last accessed on 15 July 2011).

[4] Toyin Falola, 'Money and Informal Credit Institutions in Colonial Western Nigeria' in Jane I. Guyer (ed.) *Money Matters: Instability, Values and Social Payments in the Modern History of West African Communities* (Portsmouth: Heinemann & London, 1995), 162-187.

Nigeria namely the *esusu*, *ajo* and *iwofa* credit institutions.[5] The *esusu* and *ajo* credit institutions were forms of rotating savings which provided its members with credit. Falola gives an apt description of the *esusu* and *ajo* in the following narrative:

> The *esusu* involved a number of people who agreed to save money for a limited time period. In some arrangements, one participant was a 'banker' for the duration of the savings. In other arrangements, participants agreed to contribute the same amount of money at the end of a week or a month. The total sum collected was given to each person in rotation. There was neither interest nor deduction of fees in *esusu*. It was a moral obligation to complete the contribution agreed upon to the *esusu*. When a contributor died his/her savings were returned to a relative.
>
> The *ajo* resembled the *esusu* in that contributors had to know one another well. The organization of *ajo* also varied. Sometimes contributors decided on the amount and the duration of savings to be collected by a chosen leader. At the end of the designated time each participant's contribution were returned. In other arrangements each member contributed what he or she could afford and could collect his/her savings at any time when money was needed. Members contributing to an *ajo* never received interest for so doing.[6]

From the aforementioned it is quite clear to see why the *esusu* and *ajo* are appropriately described as forms of rotating savings. This is because the credit supplied to members was a sum of their savings and that of the other members.

---

[5] Toyin Falola, 'My Friend the Shylock: Money-Lenders and Their Clients in South-Western Nigeria', (1993) Vol. 34, No. 3 *Journal of African History*, 403-423.
[6] *ibid* 404

In other parts of Nigeria, these rotating credit arrangements were also in existence.[7]

For larger sums of capital the indigenous people turned to pawnship. This was known to the Yoruba in south-western Nigeria as *iwofa*. The *iwofa* credit institution was a form of indigenous pawnship in which persons were held as collateral for loans. Also known as debt bondage, the person held as collateral supplied labour to the person who had given the loan and the labour went towards the payment of the interest accruing on the debt.[8] Falola does not discuss extensively on indigenous pawnship in *'My Friend the Shylock': Money-Lenders and Their Clients in South-Western Nigeria*, but does so in his other work '*Pawnship in Colonial Southwestern Nigeria*' and from there certain information is gathered about indigenous pawnship.[9] For instance, it is gathered from his work that it is not certain how old the indigenous credit institution known as pawnship is. It is thought to have begun in the early seventeenth century at the start of the trans-Atlantic slave trade and there is no question that pawnship existed before the twentieth century and certainly before colonial rule in Nigeria.[10] Reference has already been made showing that pawnship was not unique to south-western Nigeria alone; in fact it was a common method of obtaining credit in different parts of Nigeria as well as

---

[7] See generally, Paul E. Lovejoy and Toyin Falola (eds.), *Pawnship in Africa*, (Colorado: Westview Press, 1994).
[8] *ibid*
[9] See Toyin Falola, 'Pawnship in Colonial Southwestern Nigeria', in n 7 above, 245-266.
[10] See Toyin Falola and Paul E. Lovejoy, 'Pawnship in Historical Perspective', in n 7 above, 15-16.

other parts of Africa and Asia, albeit called by different terms in the different languages.[11]

Pledging is another indigenous credit institution which Edet M. Abasiekong considers in his article.[12] In his article, he focuses on a common choice of property used for pledging in Cross River State i.e. oil palm trees. According to his narrative, pledging of oil palms is as old as the society itself. In describing how a credit relationship is formed out of pledging, Abasiekong defines the terminology where the pledgor is the debtor and the pledgee is the creditor.[13] He describes the act of pledging thus:

> Pledging involves the institutional transfer of the use rights of a piece of property from one individual to another in return for a sum of money. The individual who advances the credit enjoys usage rights of the pledged property until he receives his money back.[14]

It is easy to see that pledging and pawning were not so different, in the sense that in these credit arrangements, something or someone was held as collateral by the creditor. Felix K. Ekechi makes that same correlation between pawnship and pledging in his paper titled *Pawnship in Igbo Society*.[15] He states:

---

[11] Pawnship was known as *iwọfa* in south-western Nigeria, *amuegbeomwanyiyoha* and *amuomwanyiyoha* in Edo area of Nigeria, to the Igbo of eastern Nigeria as *igba ibe*, etc. According to Toyin Falola and Paul E. Lovejoy in 'Pawnship in Historical Perspective', 16-17, 'It is worth noting that the term for pawn is similar in many languages along the West African coast: in Akan, *awowa*, in Yoruba, *iwofa*, and in Edo (kingdom of Benin), *iyoha*'.

[12] Edet M. Abasiekong, 'Pledging Oil Palms: A Case Study on Obtaining Rural Credit in Nigeria', (1981) Vol. 24, No. 1, African Studies Review, 73.

[13] The pledgor is the one who pledges his oil palm as collateral whilst the pledgee is the one who supplies the credit.

[14] n 12 above, 73.

[15] See generally Felix K. Ekechi, 'Pawnship in Igbo Society', in n 7 above, 83-104.

> For it was economic distress that often compelled individuals to pledge their farmland, economic trees such as oil palms or even valuable ornaments like beads and ivory, or guns as security for a loan. At times, as will be shown later individuals also pawned themselves. In short, pawning was an essentially economic transaction in which objects or persons were pledged or handed over to creditors as security/collateral for a debt.[16]

Although, Abasiekong does not make any pre-colonial, colonial or post-colonial distinctions, these can be inferred. For instance, there is the pledgee (i.e. the creditor) who is at one point typified thus:

> The pledgee typical of this study does not generally fit the description of a professional lender and is an artisan interested in oil palm trees for supplementary income.[17]

In addition:

> In some areas reputable money lenders are interested in oil palm trees as collateral for making loans. These moneylenders may belong to cooperatives or they may operate as individuals.

[16] *ibid* 83
[17] n 12 above, 74.

What Abasiekong succeeds in doing, albeit indirectly, is revealing some of the changes that have occurred in Nigerian credit dynamics; for instance the progression from small scale lending to professional moneylending.

In addition to identifying and describing these indigenous credit institutions as well as confirming their pre-colonial status, the literature on indigenous credit institutions also discuss what characterizes the borrowing patterns of the indigenous Nigerian people. For instance, Falola considers the 'value system underlying money and lending'.[18] He attempts to establish that the different credit institutions he studies reveal the society's values regarding money as well as their debt relations. In other words, this value system influences how people not only view money but also how they obtain credit.[19] To him myth and mystique plays a big role in how the value system governing money operates. For example, he reveals how the people's psyche is somehow attuned to viewing the 'sources' of money as something to be searched for by means that had nothing to do with hard work or even wise investment but everything to do with the 'magic of money'. Another element of the value system he writes of was the use of money in social stratification. He shows how the resulting classification of *olowo* (rich person) and *olosi* (the poor) meant that the *olosi* had to rely on the *olowo* for money by way of credit and somehow this was the natural order of things. Falola also reveals that credit is obtained by 'magic and ritual' to save one from the pain and embarrassment of poverty but is not directed towards investment or production.

---

[18] See generally, n 4 above.
[19] Falola applies the value system which he studies to the twin issues of money and credit.

Abasiekong reaches a somewhat similar conclusion as does Falola with regard to the issue of indigenous credit not being channelled towards production. Of the five purposes which he aims at in his work, 'the first is to identify the factors that lead to pledging of tree crops, particularly oil palm trees in Nigeria'.[20] The factors leading to pledging which Abasiekong identifies are comparable with Falola's value system which influences how credit is mobilized.[21] From his narrative these factors can be identified by what he terms as 'the customarily accepted reasons for borrowing' which were for funerals, marriage and protracted illnesses.[22]

In addition to these customary reasons for borrowing, Abasiekong's study also contends that there were other major reasons for obtaining credit by pledging palm trees; the most important from his study was children's education whilst the least important was agricultural development.[23] By showing other major reasons for obtaining credit, Abasiekong proposes that education is necessary to eradicate poverty whilst unwittingly pointing towards the fact that many developing economies including Nigeria still operate a subsistence economy that sustains poverty; and perhaps, demonstrates that these countries have not backed education with developmental strides in the right direction.[24] This probably explains why the farmers in the communities Abasiekong studies often borrow for marriages and funerals but less for

---

[20] n 12 above, 74.
[21] See n 5 above, 164-168.
[22] And because his work is done in the post-colonial era, he adds litigation and tax payments, which were obviously not present in the pre-colonial era to the list of reasons for borrowing.
[23] It is worth noting that his study covers a cross section of Cross River State and cannot be construed as conclusive of all of Nigeria.
[24] n 12 above, 80.

agricultural improvement. In other words, credit is channelled towards more unproductive areas rather than towards the improvement of a substantial source of livelihood. This phenomenon is well expressed by Eric L. Furness:

> finance, using the term to include money, credit, and the whole structure of financial institutions, can contribute greatly to the standard of living of society, but it does so only indirectly, by helping man to become much more productive.
>
> A subsistence economy, that is, one in which each family produces for itself most of what it needs, is doomed to comparative poverty, because poverty itself inhibits the construction and accumulation of tools and other implements by which output could be raised.
>
> A subsistence economy is therefore in a vicious circle....[25]

Akin L. Mabogunje combines these themes of 'values' and 'production' in formulating what he describes as the fundamental hypothesis of his paper titled *'The Capitalization of Money and Credit in the Development Process: The Case of Community Banking in Nigeria'*.[26] He states:

> Put simply, it is that if the value attached to money and credit in a given society is not transformed in line with the operations of the prevailing mode of production, to that extent the development process will be impaired and circumscribed.[27]

---

[25] Eric L. Furness, *Money and Credit in Developing Africa*, (London: Heinemann, 1975), 1.
[26] Akin L. Mabogunje, 'The Capitalization of Money and Credit in the Development Process: The Case of Community Banking in Nigeria' in Jane I. Guyer (ed.) *Money Matters: Instability, Values and Social Payments in the Modern History of West African Communities* (Portsmouth: Heinemann & London, 1995), 277-295.
[27] *ibid* 277

With regards to the value attached to money and credit, he describes money as a mere medium of exchange and credit as not being used for the purpose of enhancing production. In fact for Mabogunje, credit and indeed the Nigerian economy are still in a pre-capitalist state whereby the mode of production and access to the factors of production are governed by kinship relations and where in order to achieve the transformation from pre-capitalist to capitalist economy, it would be necessary to commoditize the factors of production as well as govern the access to the factors of production by means of 'the market and money nexus'.[28]

3.2 THE IMPACT OF COLONIALISM ON INDIGENOUS CREDIT INSTITUTIONS

Apart from revealing a pre-capitalist mode of production, negative values regarding money and credit, as well as instability in credit mobilization in Nigeria, the existing scholarship also reveals the impact of colonialism and colonial policies on credit mobilization in Nigeria. In other words, the issue of mobilization of credit as well as debt matters can be described as being influenced by twin evils: the enemy within and the enemy without.

For example, Mabogunje credits colonialism with attempting to transform Nigeria's pre-capitalist economy into a capitalist system where in order to attain this capitalist mode of production, the factors of production

[28] n 26 above, 280; the pre-capitalist nature of credit was evidenced by the fact that some of the indigenous credit arrangements did not charge interest.

would have to be commoditized in a similar fashion as had occurred in Britain during the eighteenth and early nineteenth century.[29] In particular, the commoditization of credit or capital was to be achieved through the introduction of a banking system. However, despite the introduction of a banking system, the indigenous credit institutions with their inherent limitations continued to operate and Mabogunje asserts that money continued to be used mainly for exchange purposes and not for the creation of credit. Mabogunje says this fact 'was not unconnected with the mode of operations of the banks'[30] which apparently 'was to provide services rather than to extend credit'.[31] According to him:

> Most of the banks played virtually no part in developing local African entrepreneurship on the grounds that the business experience and sense of responsibility of the Nigerian community at large were not of an acceptable level. [32]

Furthermore, the establishment of African banks was still not without problems. As Mabogunje states, a huge amount of liquidity still remained outside the banking sector because of community values relating to money, coupled with the fact that even though these banks operated on a capitalist mode of production, the Nigerian economy was still pre-capitalist in its orientation. He argues that the establishment and increase in the growth of community banks in the Nigerian banking sector will provide the opportunities

[29] n 26 above, 281.
[30] n 26 above, 285.
[31] n 26 above, 285.
[32] n 26 above, 285.

for the 'capitalization' and mobilization of credit which is necessary for development.

Like Mabogunje, Falola in his work *'My Friend the Shylock': Money-Lenders and Their Clients in South-Western Nigeria'*, considers the impact of colonialism on the indigenous credit institutions of south-western Nigeria. According to his narrative, colonialism in Nigeria brought the introduction of foreign credit institutions such as banks. He posits that the interaction between the pre-existing indigenous credit institutions and the newly introduced foreign credit institutions resulted in what he describes as the 'synthesis' of indigenous and alien credit systems in Nigeria. In other words, colonialism did not completely eradicate all indigenous credit institutions. Rather, what occurred was the adaptation of the old to the new in a manner which meant that in order to survive the innovations of the colonial government, the indigenous credit institutions had to be reformed. The fact that these indigenous credit institutions survived albeit in reformed status, can be correlated with what Schimdhauser describes as the 'pragmatism of British colonial policy'.[33] That is, that British colonial policy allowed certain indigenous practices to survive so long as they did not threaten the stability of British rule in the colony.[34]

Consequently, for example, Falola mentions the three major credit arrangements that arose in south-western Nigeria as a result of the impact of colonialism: the reformed *ajo* and *esusu* via the operation of the *alajo*, selling

---

[33] John R. Schimdhauser, 'Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems', (1992) Vol. 13, No. 3, *International Political Science Review*, 323 or via the internet at http://ips.sagepub.com/cgi/content/abstract/13/3/321 (last accessed 15 July 2011).
[34] *ibid*

on credit through the *osomalo* and money-lending through the *sogundogoji*.[35] Falola's focus, however, in this particular work is on money-lending through the *sogundogoji*. He examines the practice during colonialism in Nigeria, the innovations it introduced to credit arrangements and the problems that came with it. An innovation which the *sogundogoji* introduced and which was influenced by modern banking, was the documentation of credit agreements.[36] Other prominent features, or as he puts it, 'notorious features' of money lending in Colonial Nigeria, were 'high interest rates and forcible collection of debts'.[37] Falola makes comparison of how debts were recovered prior to colonial rule in Nigeria, with how the practice was conducted after colonialism. Prior to colonialism, indigenous credit arrangements had relied on trust in their operations; and although defaults received the sanction of indigenous authorities, when it came to debt recovery there was often 'room for the operation of sympathetic considerations' which even applied to the *iwofa* institution (indigenous pawning).[38] Whereas with the emergence of the *sogundogoji* during the period of colonialism, 'sympathetic considerations' no longer had any place in credit arrangements.[39] Another point of comparison he makes relates to the issue of interest charges. No interest was charged nor was fees deducted in the *esusu* and *ajo* credit arrangements, and even the *iwofa*

[35] n 5 above, 405.
[36] n 5 above, 407.
[37] n 5 above, 407.
[38] n 5 above, 408.
[39] n 5 above, 408.

which charged interest did so only in the form of labour, whereas with the emergence of the *sogundogoji*, interest was introduced.[40]

In other works, Falola considers the impact of colonialism on the indigenous credit arrangement of pawnship and establishes how the colonial government operated a policy which at sometime tolerated these indigenous credit institutions and at other times opposed them. For instance, the colonial government did not initially move to extinguish pawnship entirely. On the contrary, Falola argues that 'it provided the opportunity for pawnship to spread.'[41] According to Falola, the end of slavery had resulted in a labour shortage which pawnship filled. In some way, he makes the innocuous suggestion that the British replaced one (slavery) with the other (pawnship). This is not to imply that pawnship only continued because it was encouraged by colonialism. In fact Falola's narrative is realistic as it shows that it was also in the interest of the indigenous people for pawnship to continue as:

> most of the conditions that promoted debt bondage in the nineteenth century remained important in the colonial period.[42]

The conditions Falola speaks of include some of the customarily accepted reasons the indigenous people have always had for borrowing; for example, marriages, funerals, building, trading, festivals, etc.[43]

---

[40] n 5 above, 407.
[41] n 9 above, 246.
[42] n 9 above, 246.
[43] The introduction of colonial taxation would become another reason for borrowing and pawnship.

Falola's research on the impact of colonialism on indigenous credit institutions takes a balanced approach to the matter in that it does not attempt to idealize indigenous credit institutions whilst treating the innovations of colonial rule in indigenous credit arrangements as all blameworthy. For instance, Falola describes the intervention of the colonial state in the despicable practices of money lending through law enactment as well as the eventual abolition of pawnship.[44] He also credits the 'formal' banking system with influencing the documentation of agreements in indigenous credit arrangements. Granted, Falola reveals that the colonial policy and intervention in indigenous credit institutions was not entirely altruistic.[45] Still, he offers a fair assessment of the impact of colonialism on indigenous credit institutions.

Similarly, in his article, Chibuike Ugochukwu Uche studying the introduction of foreign banks as a new source of credit, also reveals how colonial policy impacted on credit in relation to the banking system that was introduced.[46] Utilizing information obtained from looking at these foreign banks through the lens of 'change and contingency' occurring during colonial times, he establishes that foreign banks' policies on lending to Africans were

---

[44] n 5 above, 410-415.

[45] n 5 above, 410-412; government intervention in the despicable practices arising from money-lending was precipitated by the fact that government establishments had become embroiled in the ensuing fiasco as civil servants 'were often involved in borrowing, lending or serving as sureties'. Job performance of civil servants was crucial to the success of the colonial administration and so it was in the colonial government's interest to reform money-lending to guarantee job performance.

[46] See generally, Chibuike Ugochukwu Uche, 'Foreign Banks, Africans, and credit in colonial Nigeria, c. 1890-1912', (1999) LII 4 *Economic History Review*, 669-691.

influenced not by the need to offer an alternative to indigenous credit but rather to serve the interests of the bank shareholders.[47]

Like Falola, Uche also makes some reference to the *esusu* and *ojo* (*ajo*) credit institutions describing them as rotating credit institutions used mainly for the purposes of savings rather than to raise large capital; and the *iwofa* as an indigenous method of pawnship that used labour as interest. He also considers how credit featured in the Afro-European trade before the arrival of banks on the scene. In particular, he discusses the liberal credit policies of German traders that saw credit being advanced to the Africans acting as middlemen in the ensuing Afro-European trade. He reveals that credit was not advanced to place these African middlemen on an equal footing trade-wise with the European traders, but rather credit was advanced and used as a tool for 'colonizing the middlemen and subsequently achieving trade monopoly with the hinterland'.[48]

The credit policy which the British government put into operation to counteract the German attempt to gain the upper hand in Afro-European trade was aimed at discouraging giving credit to the Africans whilst encouraging British trading interests.[49] In this regard, the German and British credit policies are similar in that they aim at protecting interests other than African interests. Uche draws the same conclusion about legislation introduced, i.e. the Recovery of Credit Proclamation of 1900. In his assessment of the matter, the protection of British trading interests was most likely the reason behind the legislation

---

[47] *ibid* 669
[48] n 46 above, 687.
[49] n 46 above, 688.

seeing that it hindered the African middlemen yet promoted the British traders.[50]

Uche further establishes that not only did colonial credit policy and legislation protect interests other than the indigenous peoples interest in obtaining credit, but also that the emergence of foreign banks in colonial Nigeria served self-interested purposes that had nothing to do with providing the indigenous people with an alternative source of credit other than indigenous forms of credit. For example, the African Banking Corporation was the first British bank to establish itself in colonial Nigeria and it served the interests of the shareholders (British merchant houses) which was 'to help preserve barter trade and their monopolistic position in the export-import trade'.[51] The Bank of British West Africa which arrived on the scene later on served the interest of the colonial government 'which favoured monetization, believing it to be a policy that would make both governance and the lives of government employees easier'.[52] These examples support Uche's attestation that the introduction of banks in colonial Nigeria did not completely succeed in providing the indigenous people with more credit than the indigenous credit institutions.

Thus, in order to answer the question as to whether the legacy of colonialism impacts on credit institutions and affects the provision or availability of credit for SMEs in Nigeria, this study combines theories of indigenous 'value system' and colonial policies. In other words a combination

[50] n 46 above, 688.
[51] n 46 above, 669.
[52] n 46, 677.

of internal or external factors will be studied in investigating this research question for as Tunde Obadina puts it:

> Focusing on imperialism has drawn attention away from internal forces that are crucial to the understanding of the African condition and which, unlike external demons, can be changed ordinary Africans.[53]

Therefore the view taken by this thesis, of a postcolonial theoretical framework, is realistic in its approach and avoids an idealistic view of indigenous credit arrangements and institutions. The end is to gain an understanding into the intricacies of credit and debt relations in Nigeria and to develop a theory of insolvency that supports development.

Beyond testing the theories of others, which attempt to account for the developmental failure of Nigeria, this research adds to the issue of law reform as a subject that requires consideration alongside the aforementioned issues and as a possible vehicle of change.

---

[53] Tunde Obadina, 'The myth of Neo-colonialism', via the internet at http://www.afbis.com/analysis/neo-colonialism.html (last accessed 15 July 2011).

3.3 LEGAL IMPERIALISM, LEGAL PLURALISM AND LAW REFORM

Colonial impact on legal systems and laws of the colonized nations can best be described as 'legal imperialism'. In his works, Schmidhauser demonstrates this fact when he focuses on the impact of colonialism on the legal systems of colonized countries and legal education.[54] He identifies legal imperialism as the concomitant of external manifestations of power such as military conquest and colonialism and establishes that legal imperialism has continued to persist in former colonies so much so that their legal cultures have remained dependent on their former colonizers albeit at varying levels. The following are a summary of the attributes and lingering effects common to legal imperialism which Schmidhauser identifies:

1. Legal imperialism is the attendant result of the external manifestations of power for instance by military conquest or colonialism.
2. The conquering nations developed legal and theoretical justifications for the replacement of indigenous law with conqueror's law and for the imposition of law. According to Schmidhauser, the reality was more often the acquisition of wealth and power.
3. Legal imperialism imposed law where civil stability and economic penetration was at issue and where the authority of the conqueror might be threatened by indigenous law.

---

[54] See n 33 above; John R. Schmidhauser, European Origins of Legal Imperialism and its Legacy in Legal Education in Former Colonial Regions (1997) Vol. 18, No. 3, *International Political Science Review*, 337-351 or via the internet at http://ips.sagepub.com/cgi/content/abstract/18/3/337 (last accessed 15 July 2011).

4. The imposition of the conqueror's law resulted in the subjugation and eventual replacement of indigenous legal and judicial elites with those of the conqueror, until an indigenous elite was trained and screened by the conqueror.
5. In the eighteenth and nineteenth centuries, legal imperialism permitted dual or plural legal systems but the indigenous legal systems were and even to date are secondary to the imposed legal system.[55]

Long after the departure of the colonial administrators from the colonies, the effects of legal imperialism are still experienced. One body of law which has perpetuated legal imperialism is the English Common Law. This law was imposed on several nations as the English expanded the British Empire. The subsequent independence of many nations from colonial England has however not resulted in the extensive rejection of the Common Law system in these countries. On the contrary English Common Law and English–style law continue to hold sway in a vast number of ex-English colonies. Take Nigeria for instance, on the attainment of independence, the sources of Nigerian Law are:

1. English law consisting of:

a) the received English law comprising[56]

   i. Common Law

   ii. the doctrines of equity

[55] *ibid*

[56] According to Schmidhauser, the designation 'received' suggests a willing acceptance of an external legal culture which history contradicts.

iii. statutes of general application in force in England on 1 January 1900

iv. statutes on specified matters

b) English law passed before independence and extending to Nigeria

2. customary law

3. local legislation

4. judicial precedents.[57]

So for instance Nigeria's Corporate Insolvency Law which is contained in Nigeria's Companies and Allied Matters Act 1990 is largely based on the English Companies Act 1948.

Brian Z. Tamanaha considers the issue of legal pluralism which Schmidhauser states is one of the effects of legal imperialism. In his article he states that:

> In many studies, the term "legal pluralism" is used to characterize the interaction between competing and conflicting official legal systems, or between an official legal system and one or more of the other normative systems. The interplay is complex and multisided. [58]

His article also considers among other things, the systems of normative ordering commonly identified and discussed in studies on legal pluralism, the

---

[57] T. O. Elias (ed.), *Law and Social Change in Nigeria*, (Lagos: The University of Lagos, 1972).

[58] See generally Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global, 41 last accessed at http://www.law.usyd.edu.au/slr/slr30_3/Tamanaha.pdf on 15 July 2011. See also (2008) 30 *Sydney Law Review* where the article appears.

clashes that occur *between* and *within* normative systems and the actors who fuel the conflict. He identifies and then goes on to describe the following normative systems:

1. Official legal systems;
2. Customary/Cultural normative systems;
3. Religious/Cultural normative systems;
4. Economic/Capitalist normative systems;
5. Functional normative systems;
6. Community/Cultural normative systems.

He goes on to posit that these conflicts are fuelled by interested parties who have a stake in the competing normative systems in order to advance their individual or collective goals.[59]

From the preceding sections of this chapter, it is clear to see that in the Nigerian context there would be conflicts between the official legal system imposed by the English colonizers and the customary normative system which involved 'social rules, and customs, as well as social institutions and mechanisms'. That is, between the foreign legal mechanisms governing insolvency and traditional indigenous mechanisms of credit. From the foregoing sections again, there is also identifiable, a conflict between an Economic/Capitalist normative system introduced by the colonizers and which 'consists of the range of norms and institutions that constitute and relate to capitalist production and market transactions within social arenas' and again a

[59] *ibid* particularly 36-41 and 42-43

Customary normative system which some have argued consist of a pre-capitalist mode of production. Very clearly, different permutations of conflicts between and within the normative systems of ordering present in Nigeria could be identified. It would also be easy to see who the stakeholders are (e.g. banks, indigenous lenders, debtors, lawyers) and how these conflicts could be fuelled for their interests and benefits.

In America, the same phenomenon regarding the impact of legal imperialism pre- and post- independence is easily identified. American scholar David Skeel makes indirect reference to legal imperialism as it impacts upon insolvency law in his work. According to him, before the American Revolution (i.e. before independence) the law of debtor and creditor was fashioned along the lines of the law in England. After independence, the 1800, 1841 and 1867 American Insolvency laws took much inspiration from English Insolvency law.[60] Nonetheless, because the law of the colonizer does not simply go away even after the experience of colonialism, this study does not propose the dismantling of the imposed legal systems which have in many instances become so influential, for to make such a proposal would be to take a rather simplistic approach. According to Dipesh Chakrabarty the European Colonizer preached an Enlightenment Humanism which has been inherited globally and has provided the underpinnings for critiquing socially unjust practices.[61] In other words, Chakrabarty argues that the very critique of colonialism itself is

[60] David Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2004), 2, 90.
[61] Dipesh Chakrabarty, *Provincializing Europe: postcolonial thought and historical difference*, (Princeton: Princeton University Press, 2000), 4.

influenced partially by the legacy of Enlightenment Europe. Hence, rather than challenging a 'heritage that is now global'[62], this study proposes to build on the research already done on legal imperialism and its concomitant legal pluralism, albeit by investigating its legacy in the development of insolvency law and what impact insolvency law reform can have on credit mobilization in Nigeria.

One might ask, why the choice of insolvency law as beneficiary of potential reform efforts? The logic is this: credit enhances production and by extension encourages economic development. Furthermore, the nature of credit that will be required to promote production is the kind that has been described as 'extensive credit'[63] which of necessity breeds debt. As necessity is the mother of invention, insolvency law is that body of law that concerns itself with the inability of persons whether individual or corporate to pay debts as and when due and certain matters that transpire thereafter. This sequence of interactions, i.e. access to credit, encountering financial distress and the response of insolvency law to debt, underscores why insolvency law has been identified by this study as being a worthwhile recipient of reform efforts.[64]

There is however, an ongoing debate over the nature and purpose of insolvency law which has witnessed scholars holding divergent views. According to John Armour, the views held on the purpose of insolvency law occur at different levels. He states:

---

[62] *ibid*

[63] Charles Warren, *Bankruptcy in U.S. History*, (Cambridge: Harvard University Press, 1935), 17.

[64] This sequence of interactions will be investigated by the research question: **What impact will insolvency law reforms have on the provision or availability of credit for SMEs in Nigeria?**

> First, there are conflicting views on the positive question of which goals or values insolvency law does reflect. Secondly, there is a normative debate over which policy goals or values insolvency law ought to target. Finally, there are prescriptive differences over questions of implementation-how the law should be structured so as to reach a given goal.[65]

One theory of the normative debate is Thomas Jackson's contractarian theory which led to his conclusion that insolvency law was nothing more than a collective approach to financial distress and its only goal was the maximization of returns to creditors.[66] Another normative theory that has been developed by law and economics scholars and has featured prominently in the insolvency debate is that the goal of insolvency law is the enhancement of efficiency. In other words, law and economics scholars argue that insolvency law exists to minimize the costs of financial distress.[67] Apart from views as to how insolvency law *should* and *does* function which show a normative vision of insolvency law, David Skeel reveals a different approach to the study of insolvency law as he looks at *how* and *why* US Bankruptcy law has its distinctive shape.[68] Skeel's approach to insolvency law study is therefore policy-oriented as opposed to a normative vision of insolvency law.

---

[65] See John Armour, The Law and Economics of Corporate Insolvency: A Review, 11 last accessed via the internet at http://www.cbr.cam.ac.uk/pdf/wp197.pdf on 15 July 2011.
[66] See generally Thomas Jackson, *The Logic and Limits of Bankruptcy Law*, (Cambridge: Harvard University Press, 1986).
[67] n 65 above, 5.
[68] n 60 above, 13; Skeel through this work shows that the same political factors that shaped the US response to financial distress in the nineteenth century continue to do so today.

Whatever views of insolvency law are held, and whether the views diverge as to how insolvency law should and does function (or as to how and why it has its particular shape), one point of convergence for these divergent views is the fact that all concede that insolvency law is a response to financial distress. Take for instance Thomas Jackson's argument that insolvency law was a response to a common pool problem which only sought to maximize the returns to creditors; the 'common pool problem' was simply as a result of a corporate debtor defaulting on its debts and thereby becoming financially distressed. What of the case of law and economics scholars who base their views on the premise that the primary goal of insolvency law is minimizing the costs of financial distress, once again we see that the operating factual condition is financial distress. Even Skeel's work on the *how* and *why* of America's distinctive nature reveals that the reform of US insolvency law was associated with financial distress; likewise the earlier works of Charles Warren and Peter Coleman.[69] In all, the fact that financial stability is imperative for the health of an economy makes financial stability a public good which requires legislation.[70] A good place to start is with insolvency law reform which targets financial distress.

---

[69] See generally n 63 above; Peter Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (Madison: State Historical Society of Wisconsin, 1974). The Panic of 1792 in the eighteenth century, the failures of the railroad industry in the nineteenth century and the Great Depression of the twentieth century are some of the instances indicative of insolvency law being a response to financial distress.

[70] See Eva Hupkes in n 2 above, 2-5.

3.4 INSTITUTIONAL REFORM

Kranton and Swamy study British institutional reform in *The Hazards of Piecemeal Reform: British Civil Courts and the Credit Market in Colonial India, Foreign Banks, Africans, and Credit in Colonial Africa, c.1890-1912.*[71] They look at how legal reforms can impact on credit by building on what economists already believe which is that an effective legal system promotes economic growth.[72] As a result they study how British institutional reforms in India (in particular the Bombay Deccan) have impacted on credit markets but have also produced adverse effects that were not intended.

According to them, prior to British rule in India, lenders in the Bombay Deccan relied on personal resources to recover loans and as a result enforcement of loans was costly and personalized and a lender's scope of operations was limited. The introduction of civil courts by the British launched reforms that enabled lenders to recover loans from farmers through means other than by private enforcement methods, and encouraged competition by opening up the credit markets to more lenders. Economists believe that competitive markets should make more capital available for investment. However, this did not prove true in the Bombay Deccan as the increase in competition in the Bombay Deccan credit markets also had a negative impact on future productivity of lenders as well as certain activities of the farmers who took

---

[71] Rachel E. Kranton and Anand V. Swamy, 'The Hazards of Piecemeal Reform: British Civil Courts and the Credit Market in Colonial India, Foreign Banks, Africans, and Credit in Colonial Africa, c.1890-1912', (1999) Vol. 58, *Journal of Development Economics*, 1-24.
[72] *ibid*

loans. In the past, lenders who had previously demonstrated sympathy for the farmers in bad times were now predisposed to enforce loan agreements in courts regardless of the effects it had on future productivity. Perhaps the ensuing sale of lands and assets could have been 'welfare-enhancing' but as it turned out farmers were losing their lands to professional moneylenders who had no desire to cultivate the lands acquired.[73]

Kranton and Swamy do not deny the positive effects that the introduction of British reforms via the operation of civil courts had on the Bombay Deccan. For one, enforcement of loan contracts was efficient and the expansion of cultivation starting in the 1840s would not have been possible had it not been for the finance from the immigrant lenders.[74] Apart from this, they also make the conjecture that 'it is likely that in the absence of the civil courts, the supply of capital would have been lower and interest rates would have been higher, perhaps slowing expansion'.[75]

According to Kranton and Swamy, the study of colonial policies can provide theoretical insights to institutional reforms.[76] Building on the arguments of Kranton and Swamy, the research question of whether insolvency law reforms will have an impact on the provision or availability of credit for SMEs in Nigeria, seeks to ascertain what impact if any insolvency law reforms will have on the Nigerian credit market. Studying colonial institutional reform that took place in the Nigerian credit market will reveal insights capable of

[73] n 71 above, 3.
[74] n 71 above, 6, 22.
[75] n 71 above, 22.
[76] n 71 above, 1.

influencing change in Nigeria's present day credit industry. Most importantly, this work will attempt to show ways in which these insights can be applied.

Acquiring theoretical insights into institutional reform in the banking sector from colonial credit laws and policies involves developing a theory of institutional change. The development of a theory of institutional change was the subject of Douglass C. North's work.[77] North seeks to achieve an understanding of how economies develop by studying how institutions and institutional change affect such development. He attempts to explain what he calls the 'divergences between societies' and 'the disparity in the performance of economies' through the process of incremental institutional change taking place in these societies.[78] To illustrate how this works, he contrasts nineteenth century American economic growth with that of developing countries. In the case of the former:

> the basic institutional framework that had evolved by the beginning of that century (the Constitution and the Northwest Ordinance, as well as norms of behavior rewarding hard work) broadly induced the development of economic and political organizations (Congress, local political bodies, family farms, merchant houses and shipping firms), whose maximizing activities resulted in increased productivity and economic growth both directly and indirectly by an induced demand for educational investment.

---

[77] See generally Douglass C. North, *Institutions, Institutional Change and Economic Performance*, (New York: Cambridge University Press, 1990).
[78] *ibid* 6

As economic organizations evolved to take advantage of these opportunities, they not only became more efficient (see Chandler, 1977), but also gradually altered the institutional framework.

The profitable opportunities were sometimes from tariff creation, the exploitation of slaves, or the formation of a trust. Sometimes indeed frequently, policies had unintended consequences. In consequence institutions were- and are- always a mixed bag of those that induce productivity increase and those that reduce productivity. Institutional change, likewise, almost always creates opportunities for both types of activity. But on balance nineteenth-century US economic history is a story of economic growth because the underlying institutional framework persistently reinforced incentives for organizations to engage in productive activity however admixed with some adverse consequences.[79]

In the case of the latter:

The opportunities for political and economic entrepreneurs are still a mixed bag but they overwhelmingly favor activities that promote redistributive rather than productive activity, that create monopolies rather than competitive conditions, and that restrict opportunities rather than expand them. They seldom induce investment in education that increases productivity. The organizations that develop in this institutional framework will become more efficient-but more efficient at making the society even more unproductive and the basic institutional structure even less conducive to productive activity. [80]

[79] n 77 above, 8-9.
[80] n 77 above, 8-9.

Kranton and Swamy recount North's theory of institutional change in their work when they study the effect of British reform via the operation of civil courts in the credit market of colonial India. They reach the same conclusion as North: because institutional reform takes place in the world of the 'second best', the result is that institutional reforms have negative and positive effects. Despite the fact that North arrives at the same conclusion as Kranton and Swamy, he nevertheless contends that negative effects accompanying institutional reform do not downplay the importance and benefit of institutional reform. He also posits that restructuring the underlying institutional framework of any society will result in increased production by that society's organizations and by extension improved economic performance.[81] Although North attempts to distinguish between his theory of institutional change and those of others he agrees that:

> whether they are theories of imperialism, dependency, or core/periphery they have in common institutional constructs that result in exploitation and/or uneven patterns of growth and income distribution. To the extent that these models convincingly relate institutions to incentives to choices to outcomes they are consistent with (his) argument....[82]

Likewise, in this research, theories of value systems, colonialism, and institutional reform will be explored to the extent that they relate to the subject matter. According to North, a study of institutions is capable of answering the

[81] n 77 above, 110.
[82] n 77 above, 134.

question as to what is responsible for poor economic performance: is it the 'institutional structure imposed from without or is it endogenously determined or is it some combination of both?'[83]

3.5 LEGAL TRANSPLANTATION AND THE RELATIONSHIP BETWEEN CULTURE AND LAW

Legal transplantation has been described as the transfer of laws and institutional structures across geopolitical or cultural borders.[84] The two opposing theories on the subject of legal transplants are the transferist theory and the culturalist theory.[85] The position of the transferists as put forward by Watson and others argues that law and society are separate and therefore law is autonomous from the society in which it operates. As a result lawmakers transplant laws into their society because they perceive the laws to be good.[86] On the other hand culturalists argue that law and culture are linked, that law is a 'culturally determined artefact' and as a result it cannot be separated from its

---

[83] n 77 above, 134.

[84] John S. Gillepsie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam*, (England: Ashgate Publishing Ltd, 2006), 3.

[85] Richard G. Small, Towards a Theory of Contextual Transplants, 1433- 1436, last accessed via the internet at http://www.law.emory.edu/fileadmin/journals/eilr/19/19.3/Small.pdf on 15 July 2011. Small's article is also available at (2005) Vol. 19 *Emory International Law* Review, 1433-1436. See also n 84 above, 13-14 where Gillepsie summarizes the various theories on legal transplants as follows. Divergence theorists argue that as legal transfers do not transmit the 'whole law', they are likely to produce divergence in legal practice. Convergence theorists on the other hand argue that with the shift towards internationalization and globalization, there is the likelihood that legal systems will begin to have uniform or similar rules. Legal evolutionists also argue that globalization 'forces' legal systems to evolve towards the most efficient solutions.

[86] See Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Georgia: The University of Georgia Press, 2ed, 1993) 22-24; Comparative Law and Legal Change, (1978) Cambridge L.J. 313.

original purpose or the circumstances over which it was first promulgated.[87] However it has been argued that culturalist theory has failed to account for instances where laws appear to have been successfully transplanted in spite of different legal cultures.[88]

Seeking to extend and complete the existing debate in a new direction, Small has attempted to construct a theory of 'contextual transplants'.[89] He argues that the nexus of the two theories (transferist and culturalist) is that it is the law itself that is transplanted but not a context or 'manners and customs'. He describes culture as referring to a society's entire background that may shape the form rules will take, whereas context refers to the circumstances that drive the development of a particular rule. In other words, culture determines the shape the rule takes but context dictates whether the rule is necessary in the first place.[90] So for instance, in applying Small's line of reasoning to the Nigerian situation, in the context of a pre-capitalist indigenous economy, insolvency law would be redundant. If however the context were to change as colonialism in Nigeria attempted to do, by transforming the pre-capitalist indigenous economy to a capitalist structure with its attendant commoditization and banking system, the new context would then make insolvency law relevant. Still as this Chapter revealed, colonialism was not entirely successful as the introduced banking system merely provided basic services rather than extending credit facilities to Nigerians and as a result the Nigerian economy

[87] See generally, Pierre Legrand, The Impossibility of 'Legal Transplants', (1997) 4 *Maastricht Journal of European and Comparative Law*, 111.
[88] n 85 above, 1436.
[89] n 85 above, 1437-1438.
[90] *ibid*

was still pre-capitalist in orientation and a huge amount of liquidity still remained outside the banking sector even with the introduction of African Banks because of community values relating to money and credit. Arguably, within the context of a more capitalist society in present day Nigeria, a more modern insolvency law becomes necessary. In other words, the current context in Nigeria is likely to dictate the necessity of a modern insolvency law. Nevertheless as Small argues, culture which he refers to as a society's entire background will determine the shape the law will take. This Chapter began an investigation into the background of Nigerian society and revealed the value system relating to money and credit in pre-colonial and colonial Nigeria. In the following Chapter, the thesis will investigate the existence of a value system relating to money and credit as well as other aspects of Nigerian society and will argue as Small does that such societal background is likely to determine the shape that insolvency law reforms in Nigeria will take.

From the foregoing, the disagreement over legal transplantation is whether legal transplants need to reflect internal social forces in order to succeed. For instance it has been argued that the reason why the wholesale adoption of western-model laws in Asian countries often fails is to some extent because it is difficult for societies which do not share the same ideological beliefs as the authors of the legal models to instantly embrace law reform.[91] The argument that societal attitudes, beliefs, values and norms should be taken

[91] See Stacey Steele, Towards a 'Modern' Corporate Bankruptcy Regime, last accessed via the internet at http://kirra.austlii.edu.au/au/journals/MULR/1999/5.html on 15 July 2011. Steele identifies differences in ideological beliefs about such issues as capitalism, corporate governance and the place of government in protecting insolvent debtors and assisting unsecured creditors.

into consideration when making and reforming laws because they play a vital role in determining the effectiveness of laws is not a new one, certainly not in the area of insolvency law in any case. For instance, Nathalie Martin examines the role of history and culture in the development of bankruptcy and insolvency systems with a view to understanding the legal implications of transplanting such systems from one cultural entity to another.[92] Her work is premised upon this sensitive question: Does culture shape law or does law shape culture? In response, the author observed that the bankruptcy and insolvency systems of most developing economies were not based on existing local cultural condition but on foreign laws with the bankruptcy laws of the US as an example of such foreign or imported laws. Therefore, she examines the challenges of transplanting US style bankruptcy law in other countries and concludes among other things that 'cultural attitudes play a tremendous role in the efficacy of bankruptcy and insolvency systems'.

A look at Japan revealed that it has borrowed much from the US and developed a complex bankruptcy system but culture hinders its use. Saving is preferred to spending and the Japanese culture encourages informal mediation and negotiation, while law is seen as a last resort where every form of mediation and negotiation has failed. Referred to as a 'culture of shame', financial failure usually results in exile or suicide. As a result personal bankruptcy in Japan is very rare not only because of the saving habit but also

[92] See generally, Nathalie Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, 28 B.C. College Int. & Comp. L. Rev. 1 (2005) 18, also available at http://law.bepress.com/expresso/eps/172(last accessed 15 July 2011). Martin's article is a comparative analysis of the bankruptcy systems of the US, Europe, Japan, China and Hong Kong.

because it is seen as a social stigma in the society. Although recent developments in the laws would suggest that the Japanese society now accepts business failure as part of life, this is far from the truth because both private and business bankruptcies are still seen as an embarrassment in Japan.

Similarly, in Hong Kong the insolvency laws are based largely on English law dating back to 1929. Corporate insolvency law has not been modernized and therefore liquidation is the only option available to corporations and although the bankruptcy law for individuals has been modernized, there are still problems with the discharge provisions. The conclusion therefore is that the law lacks local cultural elements unique to Hong Kong.

The following issues have also been identified with China. Chinese history is that of economic and social isolation. Confucianism and Chinese culture play a dominant role in the making of Chinese laws including its bankruptcy laws. Bankruptcy is seen as a generational problem, which means that the debt owed by a man could be passed on to his children and their children. In spite of the series of reorganization laws that have been enacted in China, financial failure is still seen as a loss of face. The new reorganization laws have not been able to overcome ancient cultural and societal beliefs in China and this is to the detriment of the Chinese desire to compete in a global market economy.

In a similar vein, Stacey Steele in studying bankruptcy law in Indonesia made the following observations. Bankruptcy law in Indonesia was first

enacted under the Dutch Colonial administration in 1905 but was rarely used. As a result there was a lack of legal expertise on bankruptcy. This contributed to Steele's argument that the reason why the wholesale adoption of western-model laws in Asian countries often fails is to some extent because it is difficult for societies which do not share the same ideological beliefs as the authors of the legal models to instantly embrace law reform. The law was subsequently amended in 1998 in order to modernize it and to overcome the reluctance of creditors and debtors to use it.[93] This situation is similar to the Nigerian experience where its insolvency law borrowed extensively from English legislation due to Nigeria's colonial ties with England. Nigeria equally faces the problem of a lack of legal expertise on insolvency matters as well as the reluctance of creditors and debtors to use the Bankruptcy Act 1979; problems for which this thesis proffers solutions.

From the foregoing, the conclusion that can be reached is that although bankruptcy systems have become a necessity in both developing and developed societies because of globalization, there should not be wholesale replication. The reason is that individual countries whether developed or developing have their own peculiar and differing historical, legal, political and cultural antecedents. Again, bankruptcy systems as social tools should be used in such a way that they truly reflect the particular values of a culture as anything more than this would be regarded as mere imposition. Thus the challenge before

[93] See generally, n 91 above.

every nation is to work out an enduring means of helping private individuals and corporate organizations out of financial failure.[94]

This thesis agrees with the approach that insolvency law should be enacted and developed taking into consideration societal attitudes towards debt and financial failure in order to cope with the challenges posed by the extensive availability of credit around the world. It is however different and therefore original because the thesis attempts to extend that approach by also seeking to apply insolvency law as a tool for making credit much more accessible for SMEs. The thesis argues that reforming Nigerian insolvency law giving consideration to societal attitudes, beliefs, values and norms will serve as a bridge between indigenous sources of credit and formal sources of credit in Nigeria and that the increased competition between both sectors will arguably increase access to credit thereby encouraging enterprise of SMEs.

The readily available, easily accessible credit in much of today's western world has been held to be largely responsible for and contributory to the financial meltdown and so called 'credit crunch' that is now being experienced worldwide but obviously there is a clear distinction between reckless lending and responsible lending. This thesis certainly is not advocating for reckless lending when it argues for increase in the access to credit for SMEs in Nigeria. In fact as will be discussed in the thesis, if one of the goals or the purpose of insolvency law is as a collective procedure for the recovery of debts owed to creditors, certainly what the thesis could be said to be advocating is

[94] n 92 above, 5.

that whilst credit should be more accessible to SMEs in order to encourage enterprise, financial obligations should be honoured within reason.

The thesis argues that if all creditors irrespective of whether they operate in indigenous credit markets or formal credit markets are motivated by the expectation of the return of loans made and it is a goal of insolvency law to procure the recovery of debts, then surely by ensuring that insolvency law in Nigeria is available as a tool for lenders not just in the formal credit sector but also in indigenous credit markets will bridge the gap between both sectors by providing the indigenous credit market in Nigeria with the same 'legitimacy' and 'recognition' that the formal credit sector in Nigeria has. Arguably this would increase competition in credit markets and improve access to credit for SMEs. On the other hand, with insolvency law available as a tool for debt recovery, arguably the dubious recovery methods of indigenous creditors in Nigeria will be discouraged, again putting both sectors of credit on the same level playing field with regards to debt recovery methods.

These various attempts to transplant foreign bankruptcy laws in different countries demonstrate that the attempts have not always been successful as might have been envisaged and that the unsuccessful transplants may be attributed to a failure to have regard for the prevailing societal attitudes in the countries where the transplant attempts have been made. As stated in Chapter One, one of the ways colonialism manifests itself is through law and whilst the laws and the legal traditions inherited from the English are a rich resource for Nigerian law, to continue to borrow from English law or elsewhere

without regard for prevailing realities in Nigeria will be a form of neo-colonialism which must be discouraged.

SUMMARY

Indigenous credit institutions in Nigeria were pre-colonial in nature. They existed before and are much older than colonial currencies and colonial banking systems. As this chapter demonstrated, the advent of colonialism and the attendant introduction of a foreign banking system as well as colonial policies on credit would leave a lasting impact on these indigenous credit institutions and the mobilization of credit. Although innovative features such as the documentation of credit agreements were introduced, the synthesis of indigenous and foreign credit systems resulted in various notorious features such as high interest rates and forcible debt collection. Thus, this chapter provided answers to the research question on how the legacy of colonialism impacts on credit institutions and affects the provision or availability of credit for SMEs in Nigeria. However, this chapter also identified theories of indigenous value system underlying borrowing patterns of the indigenous Nigerian people and argued that it was necessary to study the combination of indigenous value system and colonial policies in order to avoid an idealistic view of indigenous credit institutions. In the next chapter, this combination of theories of indigenous value system and colonial policies will be tested through the vehicle of a survey in order for the thesis to be realistic in its approach.

CHAPTER FOUR

UNDERSTANDING THE MORAL ECONOMY OF BORROWING IN NIGERIA

> To understand a phenomenon, it is essential first to understand the *idea* on which it is based. An idea is given form in an invention, institutional development, or just an historical event. The *form* combines with other phenomena and experiences to reshape the idea.
>
> Toyin Falola and Akanmu Adebayo[1]

In Chapter Three, apart from identifying colonial policies affecting credit mobilization in Nigeria, theories of value system characterizing the borrowing patterns of the indigenous Nigerian people were considered. To understand credit issues in Nigeria, it is necessary to understand the 'idea' on which credit is based. Thus this chapter focuses on the 'idea' on which credit in Nigeria is based by examining the nature and innate characteristics of pre-colonial indigenous credit arrangements and how those characteristics have combined with colonial elements to produce the existing beliefs, attitudes and values which are held by indigenous Nigerian people with regards to credit which impact on their access to credit. In other words, the chapter considers the interaction between different normative systems and the resulting conflict. This is what is referred to as *the moral economy of borrowing in Nigeria* and an

[1] Toyin Falola and Akanmu Adebayo, *Culture, Politics and Money Among the Yoruba* (New Brunswick: Transaction Publishers, 2000), 51.

understanding of this concept is crucial to developing a policy that is effective for Nigeria's insolvency law regime. This chapter sets forth the premise that a policy of insolvency law reform in Nigeria should take into consideration the realities on which credit is based in Nigerian society (in this case, the moral economy of borrowing) as otherwise, a failure to do so will result in laws that are irrelevant and impractical for Nigeria.

4.1 MORAL ECONOMY-DEFINITIONAL ISSUES

An important starting point is to elucidate on the use of the term 'moral economy' in this chapter. Generally, moral economy refers to the interaction between economic activities and moral and cultural beliefs.[2] According to Sayer, moral economy is the study of how economic activities of all kinds are influenced and structured by moral dispositions and norms, and how in turn those norms may be compromised, overridden or reinforced by economic pressures.[3]

Moral economy as an inquiry has been used in different ways by different authors. E. P. Thompson uses the term 'moral economy' in an inquiry into 'the idea' that influenced incidences of food riots in eighteenth century England thus utilizing the term moral economy to explain popular action.[4] For

---

[2] The term moral economy has also been used in different ramifications such as in: John P. Powelson, *The Moral Economy* (Ann Arbor: Univ. of Michigan Press, 1998) and Joseph Heath, *The Efficient Society: Why Canada is as close to utopia as it gets*, (Toronto: Penguin, 2005).

[3] Andrew Sayer, Moral Economy, at http://www.lancs.ac.uk/fass/sociology/papers/sayer-moral-economy.pdf, 2 (last accessed 15 July 2011).

[4] E. P. Thompson, Moral Economy of the English Crowd in the Eighteenth Century (1971) no. 50 Past and Present, 76-136.

him, to view the food riots of the eighteenth century as nothing more than spasmodic was to limit an investigation into how the behaviour of eighteenth century English people when faced with hunger and distress was modified by 'custom, culture and reason'. As Thompson explains:

> It is of course true that riots were triggered off by soaring prices, by malpractices among dealers, or by hunger. But these grievances operated within a popular consensus as to what were legitimate and what were illegitimate practices in marketing, milling, baking, etc. This in turn was grounded upon a consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the community, which taken together, can be said to constitute the moral economy of the poor. An outrage to these moral assumptions, quite as much as actual deprivation, was the usual occasion for direct action.[5]

In a similar vein, James C. Scott argues that certain incidences of peasant rebellion in Southeast Asia are the reactions of the peasant communities to actions they perceived as tantamount to an attack on their chances of survival.[6] Studying the reactions of peasant communities from a moral economic perspective, the premise of his work therefore is that the idea of survival is the 'moral touchstone'[7] which influences the nature of economic activities the peasants he studies engage in. For Scott, embodied in the moral economy of the peasant in Southeast Asia are 'the fears, values and habits of rice farmers in

---

[5] *ibid*

[6] James C. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia*, (New Haven: Yale University Press, 1976).

[7] Benedict R. Anderson, [Review of the book, The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia] (1977) Vol.37, No.1 *Journal of Asian Studies*, 173.

monsoon Asia'.[8] In this sense, a moral economy is something which occurs in every social group as what people fear most will cause them to value that which can keep their fears at bay and over time habits are formed to protect a certain way of life. J.P. Olivier de Sardan also uses the term moral economy in his remark on corruption in Africa.[9] Although one might question the use of the term 'moral economy' beside a seemingly immoral word as 'corruption' in the title of his article, de Sardan's work demonstrates that there are certain 'logics' that influence and justify corruption. He locates these logics in certain social norms in Africa and argues that it is these social norms that are responsible for influencing corruption.

A moral economy therefore means the 'legitimizing notion'[10], the 'moral touchstone'[11], the 'logics'[12], behind economic activities which is born out of social and cultural norms of a society. It is a combination of a society's response to economic stimulus, its solutions for economic problems which are influenced by what it fears and what it believes and values.

When the term moral economy is juxtaposed with the term market economy, the result might be to think of both terms as operating under some sort of binary opposition which manifests itself in many ways. Take for instance, credit markets: whereas the credit markets of the West are described as 'modern', those of Africa are often described as 'primitive' or worse still

---

[8] n 6 above, 2.
[9] See generally J.P. Olivier de Sardan, A Moral Economy of Corruption in Africa? (1999) Vol. 37, No. 1 *The Journal of Modern African Studies*, 25-52.
[10] n 4 above, 78.
[11] n 7 above.
[12] n 9 above, 25.

'non-existent'.[13] Rationality and logic therefore become adjectives that qualify the operation of market economies, and fall outside the purview of a moral economy. But as the foregoing has revealed rationality and a moral economy are not mutually exclusive. According to Gareth Austin, because the moral economies identified by Thompson and Scott were 'countercapitalist', it might lead many into thinking that moral economy is synonymous with 'countercapitalist'. However he disputes such idea as being conclusive as he demonstrates that although a moral economy existed in colonial Asante, it was certainly not countercapitalist.[14] In fact he goes on to argue that even Thompson himself never intended it to be envisaged that there was 'an absolute segregation between a moral and a market economy'.[15]

In fact the interesting parallels demonstrated by the following examples reveal how moral economies have existed in historical settings all over the world, from Africa to Asia and even in eighteenth century England. And so for example, in his exploration of money and informal credit institutions in colonial Western Nigeria[16], Falola describes what he terms as a 'delicate exercise in risk management'. In a society where people were ignorant of the 'sources' of money[17], currency was unstable and social stratification was determined by finding the 'source' of money, the fear of a 'rich-to-poor

---

[13] Gareth Austin and Kaoru Sugihara (eds.), *Local Suppliers of Credit in the Third World, 1750-1960* (London and Basingstoke: Macmillan, 1993), 2.
[14] Gareth Austin, 'Moneylending and Witchcraft: The Moral Economy of Accumulation in Colonial Asante', 1; paper for the Modern Economic History Seminar, LSE, 8 May 2003.
[15] *ibid* 3
[16] See Toyin Falola, 'Money and Informal Credit Institutions in Colonial Western Nigeria' in Jane I. Guyer (ed.) *Money Matters: Instability, Values and Social Payments in the Modern History of West African Communities* (Portsmouth: Heinemann & London, 1995), 162-187.
[17] *ibid* 164-165; according to Falola, there was factual basis for this ignorance which stemmed from the fact the cowry was not produced in Nigeria as neither was the colonial currency.

downward mobility' explains the value system the people he studies attached to money and wealth and the habits they formed for storing wealth, for example by converting raw cash to assets and borrowing.[18] Consider also Gareth Austin's work on indigenous credit institutions in West Africa which although not a work that expressly uses the term moral economy, has in the opinion of the present author a moral economic perspective to it. This opinion is reached at by the fact that Austin's work in trying to discuss the history and types of indigenous credit arrangements in West Africa makes reference to the rationality and efficiency of indigenous economic behaviour.[19] The fact that he discusses how 'in precolonial West Africa the variety and extent of demand for credit was conditioned by certain characteristics of the natural, technological and economic environments'[20] is evidence of a moral economic perspective whereby social and cultural norms influence economic behaviour and activities.

In a similar approach, James Scott discusses 'the fears, values and habits of rice farmers in monsoon Asia' which forms the moral economy of the peasant in Southeast Asia.[21] Thus it is the fear of food shortage and the desire to survive that makes the farmers he studies value 'anomalous technical, social, and moral arrangements' and form habits that he describes as the safety principle. And for E. P. Thompson, the actions of the English crowd of the eighteenth century were informed and motivated by the 'legitimating notion' that poor people

---

[18] n 14 above, 165.
[19] See Gareth Austin, 'Indigenous Credit Institutions in West Africa, c.1750-c.1960' in Austin and Sugihara (eds.), *Local Suppliers of Credit in the Third World, 1750-1960* (London and Basingstoke: Macmillan, 1993), 93, 95.
[20] *ibid* 100
[21] n 6 above.

were entitled to food at affordable prices. And so when the subsistence of the poor was threatened by rises in food price, in order to protect what was considered their traditional rights or entitlements, popular protests occurred. Whilst for Gareth Austin, the legitimating notion or principle was 'an ethic of accumulation...rather than an ethic limiting market forces to safeguard the survival of the poor'.[22]

Having dealt with issues of definition of a moral economy, the issue then is whether there is such a thing as a Nigerian moral economy of borrowing. However, how appropriate is it to attach a label of 'moral economy' to a nation that is being studied within a postcolonial context and furthermore how valid is it to speak of a Nigerian moral economy of borrowing given that the country itself is made up of several ethnic groupings. These matters are considered in turn.

It has been argued that there has hardly been any discourse about Africa for itself.[23] In fact 'it is now widely acknowledged that Africa as an idea, a concept, has historically served, and continues to serve, as a polemical argument for the West's desperate desire to assert its difference from the rest of the world'.[24] Here lies the dilemma of using the term 'moral economy' in relation to the country Nigeria, the fear that once again the 'Other' is compared with the West such that the former retains its 'nothingness'. Consider now some of the labelling already used in comparing Africa with the West: 'traditional' versus 'modern', 'irrational' versus 'rational', 'resistant to change'

---

[22] n 14 above, 25.
[23] Achille Mbembe, *On the Post Colony* (Berkeley: University of California Press, 2001), 3.
[24] *ibid* 2

versus 'progressive', 'myth' versus 'reason', 'pre-capitalist' or 'countercapitalist' versus 'capitalist', etc. The list is endless. Worse still is to 'problematize everything in terms of how identities are "invented", "hybrid", "fluid", and "negotiated"'.[25] To this list add, 'synthesis' and 'syncretic'.[26] According to Mbembe, even a notion such as a moral economy is called upon to explain the subaltern subject. It is doubtful that Mbembe is opposed to the term moral economy or any of the other terms he refers to because he views it as another western creation meant to represent all that is wrong with Africa, more than likely it is because he worries that like many other terms used in conjunction with Africa, the term moral economy might be used with prejudice and without regard for materiality.[27] Writing in relation to the description of African societies as 'traditional' or 'simple', Mbembe explains:

> But it must not be forgotten that, almost universally, the simplistic and narrow prejudice persists that African social formations belong to a specific category, that of simple societies or of traditional societies. That such a prejudice has been emptied of all substance by recent criticism seems to make absolutely no difference; the corpse obstinately persists in getting up again every time it is buried and, year in year out, everyday language and much ostensibly scholarly writing remain largely in thrall to this presupposition.[28]

---

[25] n 23 above, 5.
[26] Whilst Toyin Falola applies the term 'synthesis', for J. P. Olivier de Sardan it is 'syncretic'.
[27] n 23 above, 5.
[28] n 23 above.

Then the question is, when does the term 'moral economy' become a *dirty word* not to be used in conjunction with Africa or what pertains to Africa? Perhaps the answer is when a moral economy as a 'legitimizing notion', or 'logics' that are socially embedded becomes that which is compared with a 'market economy' ultimately creating what Mbembe calls a 'false dichotomy', 'a distinction allowing all that is cultural and symbolic to be put on one side, all that is economic and material to be put on the other'. In this sense a moral economy becomes what even one of its founders (Thompson) never intended it to be; 'an absolute segregation between a moral and a market economy'.[29] Let it be clear then that this work does not append the term moral economy to Nigeria with any intentions to continue to perpetuate a false dichotomy between Nigeria and the West nor to foist on Nigeria an identity that is merely a creation of the West for explaining what it does not really understand. Far from that, this work and in particular this chapter aims at knowing and understanding the dynamics of credit in Nigeria without descending into a comparison that seeks only to develop the 'self-image' of the West thus denigrating that which obtains in Nigeria or Africa. This is not to conclude that all that will be found in Nigerian dynamics of credit is perfect and without need of change or reform but the ultimate starting point for reform should be a knowledge and understanding of institutions which hitherto has been lacking in discourses on Africa. No wonder 'while we now feel we know nearly

[29] n 14 above, 3.

everything that African states, societies and economies *are not*, we still know absolutely nothing about what they actually are'.[30]

Borrowing from the intellectual tradition of writers such as Thompson and Scott, the concept of a moral economy of borrowing in Nigeria therefore refers to the social and cultural mechanisms that influence borrowing in modern Nigeria. In other words, the term is used to refer to the 'logics' embedded in social and cultural norms in Nigeria by which borrowing as an economic activity is modified. Given that Nigeria is made up of various ethnic groupings with their own peculiarities, a 'Nigerian moral economy of borrowing' is used in a similar manner as Olivier de Sardan's work which refers to a 'moral economy of corruption in Africa' by which he refers to certain social norms that for him are broadly recognizable in Africa whilst not implying an ignorance of the various national distinctions and argues that it is these social norms that are responsible for influencing corruption. Similarly, it is the broadly recognizable social norms that are identifiable that will be taken as constituting the Nigerian moral economy of borrowing. A survey was therefore launched in order to identify these broadly recognizable social norms and where better to search for these than to:

a) Consider the characteristics of indigenous credit arrangements and the effect on accessing credit in present day Nigeria; and

b) Investigate the values and attitudes of Nigerians that influence not only their choice of creditor but also how they approach credit matters.

---

[30] n 23 above, 9.

4.2 METHODOLOGY

Mbembe has argued that to study African societies 'in relation to nothing other than themselves', ultimately 'poses numerous problems of methodology and of definition'.[31] One reason he gives for this is a dearth of political science and economics literature in Africa[32] which has resulted in the constant referral to works by European authors.[33] As this research is conducted within a postcolonial theoretical framework; a study on an African society such as Nigeria cannot be conducted in relation to nothing other than itself. Surely, the experience of colonialism in Nigeria makes it somewhat difficult to accomplish that. It must be that this study on credit regulation in Nigeria must be conducted in relation to the experience of colonialism. Now the task of developing a postcolonial methodology for this study beckons. In this case the post colony is an African society namely Nigeria, and if any methodology is intended to ferret out knowledge, then surely the oral tradition of Nigeria necessitates that the methodology for this work cannot ignore that oral tradition. The method of inquiry of the survey took into consideration the oral tradition of Nigeria for collecting information with regards to the moral economy of borrowing of Nigeria. While it may be true that the tools and methods of social theories display an ignorance of non-western cultures,[34] still as Chakrabarty attests to the indispensable nature of the universal concepts put forward by the European

---

[31] n 23 above, 5.
[32] n 23 above, 5.
[33] See Dipesh Chakrabarty, *Provincializing Europe: postcolonial thought and historical difference*, (Princeton: Princeton University Press, 2000), 28.
[34] *ibid* 29

Enlightenment, perhaps the methods of social theories in spite of their 'inherent ignorance' of non-western cultures are now so universal themselves as to prove indispensable as well. And so in this chapter, the social science method of survey research was applied in data collection. The choice of the survey research method was prompted by the opportunity it would provide for the use of the 'interview' and the 'questionnaire' as tools of measurement. Some of the considerations taken into account follow. With the interview, the respondents would be able to speak at length on issues raised by the researcher. Given that African societies have rich oral traditions, it was hoped that the use of the 'interview' would open up that wealth of knowledge that can be gained from Nigeria's oral culture. The oral tradition of Africa that is evidenced by the culture and tradition of storytelling, narrative poetry and proverbs, songs, etc is comparable to the 'interview' as they both serve the same purpose; transmitting information or knowledge. Within the postcolonial theoretical context that is applied in this study, the 'interview' loses its quality as a method of western social research theories and simply becomes a tool for knowing and understanding the post colony that is Nigeria.

With regards to the use of the 'interview', it is also worth noting that its application was crucial to the survey that was conducted because it sought to excavate common perceptions and preoccupations about credit which was the purpose of the survey itself. Its primary use was as a qualitative social research method as opposed to merely producing statistics. Therefore, frequency distributions and probability tables are absent as they were not as important as

the 'reality' that was expressed through such things as beliefs, impressions, attitudes, experiences, etc.

However, given that the survey was to be conducted solely by the researcher within a relatively short time, and considering the length of time the interviews would take, the 'questionnaire' was employed with the intention of reaching a wider population. One drawback to the use of the questionnaire which was also taken into account was the fear that some of the questions might be misunderstood when read by a respondent who was either illiterate or semi-literate, or simply did not understand the question and lacked the opportunity to seek further clarification from the researcher. So whilst care was taken to avoid ambiguity in the questions, there was the occasional mishap in understanding and interpreting what the question really meant. Take for instance, when respondents were asked if the business loans they had obtained from banks had been secured or unsecured. The question was: Was it secured or unsecured? A few respondents interpreted the question as asking if the loans that they had applied for had been granted or not, when in fact the intention of the researcher was to determine if loans had been obtained by means of collateral or not. This problem was however not encountered in the interviews where the opportunity to explain further existed.

Those who had utilized indigenous credit in Nigeria were the population in this study. However, the accessible population in this study was narrowed to those who had utilized indigenous credit in Rivers State, one of 36 states in Nigeria. In order to construct a sampling frame that was representative of this

population, the researcher contacted, small and medium sized business owners, local chieftains well versed in cultural beliefs and practices concerning indigenous credit and generally residents of Rivers State. From this sampling frame, the sample was chosen. The sample was to involve an estimated sixty participants which included small and medium sized business owners, those with experience of accessing (and attempting to access) credit from indigenous credit sources and or formal credit sources (in particular banks). They were to be indigenes and residents of the city of Port Harcourt and two Ikwerre communities. Port Harcourt is the capital city of Rivers State with a metropolitan area that is home to over 2 million inhabitants. The choice of Port Harcourt as sample for this survey was due to the fact that not only is Rivers State home to various ethnic groups represented by the 23 local governments, its capital city Port Harcourt is now home to many Nigerians of other ethnic background from the various parts of Nigeria, the result of an influx that has seen many coming to Port Harcourt in search of commercial opportunities. And because of this diversity of people, Port Harcourt is now aptly described as 'no man's land' by indigenes and residents alike. Whilst this survey may not be regarded as representative of all of Nigeria by some because it could only reach a limited number of participants within the resources of the researcher having not received any large funding or assistance from any organization, the responses collated from Port Harcourt however must be treated as the nearest possible approximation of what transpires in similar commercial cities all over

Nigeria because of the peculiar nature of Port Harcourt. In this sense, the study takes upon itself a representative nature of Nigeria.

The survey took place between June and August 2007.[35] Research methods used were a combination of interviews and questionnaires. In both instances, questions were constructed in such a way that it was envisaged would elicit some details. Of the sample taken, 33 responses were received which have been summarised in the following sections of this chapter. The questions asked in the survey research were designed in order to address the research question: **What impact does the legacy of colonialism have on credit institutions and the provision or availability of credit for SMEs in Nigeria?** The survey was aimed at unravelling the relationship between colonialism (via bank lending policies) and access to credit for small and medium sized businesses. 35 questions were asked in the survey. Whilst 13 of those questions dealt with accessibility of credit and peoples' preferences for accessing credit, 12 of the questions asked dealt with enterprise and productivity, and 10 questions dealt with varied issues of financial services regulation that included amongst other things exploitation and consumer protection. The responses received are summarised in the following sections of this chapter.

[35] The estimated time frame for the survey was one month, but difficulties in receiving responses to questionnaires meant that an extra month was utilized as well.

4.3 INDIGENOUS CREDIT ARRANGEMENTS: ACCESSIBILITY, ADAPTABILITY AND EXPLOITATION EXPLORED

The approach taken by this section is not to idealize indigenous credit arrangements in any way. In fact as has already been shown by much of the literature examined previously, there are not only doubts as to whether large sums of capital could be raised through indigenous credit arrangements or whether the credit accessed was actually directed towards production, but there has also been focus on some of the ignominious characteristics of these indigenous credit arrangements.[36] On the contrary, the aim of this section is to give a balanced view that reflects 'the good, the bad and the ugly' characteristics of indigenous credit arrangements whilst at the same time incorporating the responses of respondents bearing in mind that institutional reform itself is a two edged sword that comes with negative as well as positive effects.

In pre-colonial times, credit was sourced for the most part between parties who had some manner of relationship. And so for instance loans were made between friends, relatives, ethnic groups, trade partners or associates etc; which meant that one could easily access credit from various indigenous

[36] In Chapter Three the following literature reviewed expressed doubts as to whether large sums of money could be raised from indigenous credit arrangements, see Toyin Falola, 'My Friend the Shylock: Money-Lenders and Their Clients in South-Western Nigeria', (1993) Vol. 34, No. 3 *Journal of African History*, 403-423 and Paul E. Lovejoy and Toyin Falola (eds.), *Pawnship in Africa*, (Colorado: Westview Press, 1994); on doubts as to whether credit was directed at production see Akin L. Mabogunje, 'The Capitalization of Money and Credit in the Development Process: The Case of Community Banking in Nigeria' in Jane I. Guyer (ed.) *Money Matters: Instability, Values and Social Payments in the Modern History of West African Communities* (Portsmouth: Heinemann & London, 1995), 277-295; and on some of the ignominious characteristics of indigenous credit arrangements see Toyin Falola, 'My Friend the Shylock: Money-Lenders and Their Clients in South-Western Nigeria', (1993) Vol. 34, No. 3 *Journal of African History*, 403-423.

sources. Take for instance, the different varieties of rotating savings and credit associations; contributors to such schemes often knew themselves. One of the advantages of this was that the relationship between the parties to the credit arrangement meant that would-be lenders were privy to personal information about prospective borrowers which could help reduce the risks in lending, much in the same way that present day credit referencing bureaus operate. Another advantage of there being a relationship between parties to the credit arrangement was that sometimes such loans could be interest free.[37]

Apart from indigenous sources of credit, it appears that even in pre-colonial times, there have always been other sources of credit. According to Austin, prior to colonization in Nigeria as well as other parts of Africa, because trade occurred both externally as well internally although as Austin states the majority of pre-colonial trade was largely internal, trade credit was also sourced externally as well as internally. So apart from indigenous sources of credit, European and North African sources of credit also financed pre-colonial trade as well but indigenous sources of credit were predominant.[38] Likewise during the period of colonization, indigenous sources of credit continued to exist alongside foreign sources of credit, namely British banks. During this period as in the former, indigenous credit sources continued to thrive and remained predominant as the failure of the British banks in Nigeria to offer medium and long-term credit to Nigerians was capitalised on by indigenous money lenders,

[37] Of course on the other hand, personal knowledge of the borrower could assist the lender in fixing the interest rate to manage the risks he faced, which could result in high interest rates.
[38] n 19 above, 96-100.

who were willing to accept the type of property Africans had to offer as security. According to Uche:

> In particular, it is now widely accepted, for instance that foreign banks in colonial West Africa lent much less to Africans (individually and corporately) than they did to the Europeans and that most of the credit received by Africans was obtained from non-bank sources.[39]

During the time of colonialism, it is fair to say that the foreign banks in Nigeria were mainly concerned about servicing self-interested interests ranging from foreign bank shareholders interests, British trading interests, and the colonial government's interests; practically every other interest but Nigerian interests.[40]

Whereas the experience of colonialism served to exclude Nigerians from accessing credit from the formal banking sector, the persistence and survival of indigenous sources of credit can be attributed to its accessibility which is born out of relationships of some kind. Even today, whilst a personal introduction or recommendation of a potential borrower by a friend or family member to a potential indigenous money lender is enough to set a credit arrangement in motion, one would need much more than a mere recommendation in order to access credit from the banks or other financial services institutions.[41] The same applies to modern day rotating savings and

---

[39] See Chibuike Ugochukwu Uche, 'Foreign Banks, Africans, and credit in colonial Nigeria, c. 1890-1912', (1999) LII 4 *Economic History Review*, 669.

[40] *ibid*

[41] That is not to say that present day indigenous money lenders are any better than the formal banking sector. As will soon be shown, indigenous money lenders these days have borrowed much from the formal banking sector.

credit arrangements such as the *esusu* which still involve some manner of relationship between members. For example, market women, University lecturers in Port Harcourt, to mention but a few have been known to form such credit arrangements amongst themselves; in these instances their professional relationship becomes the platform upon which their credit arrangements are formed.

The professional indigenous moneylender however is a creature of colonialism. Whilst it is true that indigenous lending existed before colonialism, the pre-colonial operations of lenders were regulated by traditional morality, indigenous authorities and sanctions. The 'opportunities and deprivations of the colonial era'[42] weakened traditional morality and sanctions and resulted in the birth of the professional indigenous moneylender. And in a colonial era where credit was hard to access from the newly introduced financial services institutions, this provided the atmosphere for the professional indigenous moneylender to thrive. Thus he capitalised on the inaccessibility of credit from the formal sector and on the breakdown of indigenous credit regulation to charge high interest rates and to exploit consumers.

To further understand the accessibility of credit from indigenous sources, the inaccessibility of credit from the present day banking institutions is explored.[43] Two questions were asked to determine how accessible credit was from banks. The first question was whether the respondent's business had been advanced credit by banks or other financial institutions. Of the responses

[42] Toyin Falola, in n 36 above, 403.
[43] Foucault applied a similar approach in his works where he discusses sanity and insanity, health and sickness in relation to each other.

received from the survey (33), whereas 13 respondents stated that their businesses had been advanced credit from the banks, 18 respondents stated that they had not obtained any credit from banks or financial institutions, one respondent stated that she was still in the process of trying to secure a business loan from the bank, and one respondent declined answer to the question. The second question respondents were asked was how easy it was for their businesses to secure credit from banks in Nigeria. Of the 13 respondents who had obtained credit from banks, most of these (10) declared that it had not been easy obtaining credit. Some respondents spoke of the 'conditions' that must be met before loans can be accessed through formal financial institutions such as banks, which said conditions make it difficult and often times impossible for many small and medium sized business persons to access loans from banks. One respondent described the process of acquiring business loans from banks as having 'some bottlenecks'. The response of another respondent in describing the difficulties in accessing loans from banks was that 'the environment here (Nigeria) is not so friendly towards the small business man'. In fact there were only two respondents out of the 13 respondents who had accessed credit from the banks for their businesses, who stated that it had been easy accessing their business loans from the banks. Whilst one stated that it was 'very easy', the other stated that it was 'relatively easy'. There was one respondent out of the 13 who declined answer to this question.

A survey conducted by Remi Adeyemo as far back as 1984 revealed data that is very much similar to the results of this present survey. According to

Adeyemo's survey, none of the respondents who were all women had secured credit from the commercial banks or the government credit corporations as they were unable to provide the collateral these institutions required. On the other hand the women in this study were able to secure credit from their trade associations, cooperatives, friends and relatives. Those who could not obtain credit from these sources borrowed from moneylenders and paid high interest.[44]

In answering the questions designed to determine the accessibility or otherwise of bank credit, one respondent also spoke at length about a government initiative called the National Poverty Eradication Programme (NAPEP) which is intended to mobilize micro-credit at the rural community level in order to encourage local entrepreneurship. The respondent stated that even this alternative formal method for obtaining micro-credit was also not easy to access and expressed concerns about the credit not reaching those for whom it was intended such as those in agricultural production.[45]

Apart from NAPEP, there have been other initiatives by the Nigerian government to assist in the mobilization of credit for investment by small and medium-sized businesses in rural or grassroots Nigeria. These included the Rural Banking Scheme set up in 1977, the People's Bank set up in 1989, and the Community Banks the first of which was commissioned in 1990.[46] In particular the Community banks were styled along the lines of indigenous

---

[44] Remi Adeyemo, Women in Rural Areas: A Case Study of Southwestern Nigeria, (1984) *Canadian Journal of African Studies*, Vol. 18 No. 3, 563-572, particularly 569.

[45] This is the opinion of this respondent and not that of the author.

[46] See Mariam Ladi Yunusa, The Community Banking System in Nigeria, at http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN004228.pdf (last accessed on 15 July 2011).

rotating savings and credit associations. At the time the survey was conducted, the author was aware of these Community banks as alternative to the standard banks for obtaining credit and so proceeded to ask questions designed to determine the accessibility of credit from these banks which were specifically designed to service small and medium sized businesses. One question asked was, 'is there a community bank in your community'. Of the 33 responses received, 14 respondents answered 'no', 17 respondents answered 'yes', one respondent answered that he did 'not know' and one respondent declined answer. The respondents were then asked, 'have you benefited from credit from a Community bank' and 'has your business benefited from credit from a Community bank'. Perhaps not surprisingly, most of the 14 respondents who had answered that there was no Community bank in their communities also answered 'no' as to whether they or their businesses had benefited from credit from a Community bank. Only one of those 14 respondents answered that he had benefited from credit from a Community bank albeit not a Community bank in his community but one at the University where he worked. Of the respondents who had answered 'yes' as to whether there was a Community bank in their community (17), 12 of those respondents had not benefited from credit from a Community bank and neither had their businesses. Four of the 17 respondents however answered 'yes' to having benefited from credit from a Community bank and 'yes' to their businesses having benefited from credit from a Community Bank as well. One respondent out of the 17 had not benefited from credit from a Community bank but his business had. In general,

these responses regarding Community banks points to the fact that alternative formal avenues for credit other than standard banks may be available but like credit from the standard banks they still appear difficult to access as not many of the respondents could claim to have accessed credit from these Community banks.

One of the respondents who stated that there was a Community bank in his community pointed out that as of present that Community bank was no longer functioning. This respondent had identified the current state of most Community banks in Nigeria which are at present not functioning due to several reasons which include incompetent management, lack of deposit insurance schemes, weak capital base, etc. The Central Bank of Nigeria (CBN) which supervises Community banks has introduced a new microfinance policy which is intended to facilitate the transformation of Community banks among others to Microfinance banks (MFBs). Community banks that fail to convert to MFBs on or before December 31, 2007 are to cease existing as Community banks. This new microfinance policy is presently being touted as the saviour that will 'enhance the provision of diversified microfinance services on a long-term, sustainable basis for the poor and low income groups'.[47] One has to wonder whether the other government initiatives for providing micro credit failed because they were not intended to be long term or sustainable. Whatever

[47] See generally Microfinance Policy, Regulatory and Supervisory Framework for Nigeria Central Bank at http://www.cenbank.org/OUT/PUBLICATIONS/GUIDELINES/DFD/2006/MICROFINANCE%20POLICY.PDF (last accessed on 15 July 2011).

the case, it is to be hoped that the present microfinance policy succeeds where others have failed.

As has already been shown the difficulty in accessing credit from banks is not a new problem. And even now, according to a report by Christianson, the foreign-owned banks still lend to a select few; governments, multinational corporations and high-income individual customers, leaving the vast majority of Africans uncatered for.[48] One therefore would have thought that the Nigerian owned banks would be more obliging in granting loans to small and medium-sized businesses, but unfortunately this does not appear to be the case.

The story is quite different when it comes to accessing credit from indigenous sources. When asked if they had utilized any indigenous credit arrangement to obtain credit, of the sample taken (33), 14 respondents answered 'yes' to having obtained credit via indigenous credit arrangements, 17 respondents replied that they had not obtained credit from indigenous credit arrangements, one respondent answered 'not yet' and one respondent declined to answer. So beneficial is indigenous credit to many rural homes that one respondent who spoke about the plight of Nigerian women in general argued that their access to credit from indigenous credit arrangements enabled many women to boost and support the family economy through enterprise. To this respondent the accessibility of credit through indigenous credit arrangements

[48] See David Christianson, 'Is a missing middle market tripping Africa's banks?' in *Business in Africa Magazine*, August 2005, 30-33.

meant that many women could be beneficiaries of credit for enterprise than might otherwise have been the case.

In relation to credit accessed from banks or other financial institutions, whereas 54 percent of the sample had not obtained credit from banks or other financial institutions, 42 percent of the sample had successfully obtained credit from indigenous sources. Most interesting is the fact that the 51 percent of the sample that had not obtained credit from indigenous sources was not as a result of their inability to access credit from indigenous sources. In fact what these respondents were put off by were the interest rates that sometimes bordered on extortionate and the debt collection methods which many believe are bothersome. As one respondent derisively put it, a creditor was probably better off owing a bank or other financial institution than the indigenous lender because with the former you were not afraid for your life whereas with the latter you most likely borrowed at the expense of your life. Unlike the West which currently encourages 'a second chance' for failed businesses, these dubious debt recovery methods suggests that those taking loans from indigenous credit arrangements only get one chance. In other words failure in business that makes it impossible to pay back loans is simply unacceptable, because by hook or crook under these indigenous credit arrangements, debts must simply be repaid. Perhaps this explains why in spite of the difficulties in accessing credit from formal institutions such as banks, many of the respondents still said they would prefer to access credit from the banks. Some said they preferred the formality of bank credit arrangements, one respondent

said he preferred the 'legalized' way for obtaining credit and described indigenous credit arrangements as having 'no rules'.

Attempts to replace these indigenous methods of borrowing with modern and formal credit arrangements by banks or other credit institutions have been unsuccessful in stamping out these indigenous credit arrangements. The persistence and survival of indigenous credit arrangements since pre-colonial times and until now has a lot to do with their availability and accessibility over modern credit arrangements. What else would explain taking loans from professional indigenous money lenders who charge high interests when compared with the alternative i.e. bank credit arrangements, if not the fact that the alternative was not easily accessible. For so many, the 'alternative' was not much of that, as after all what good is an inaccessible alternative.[49]

Indigenous credit arrangements also seem to have the ability to adapt to external phenomena and experiences. This is demonstrated for example in the manner in which these credit arrangements modified themselves during colonial times in Nigeria. This ability to adapt may have been partly responsible for their survival. One way in which indigenous credit arrangements revealed their ability to adapt to changing times, was the introduction of documentation to such arrangements which hitherto had been unwritten. The unwritten nature of indigenous credit arrangements had always been a source of many disputes between the indigenous moneylender and the debtor. Such disputes were often spurred by debates as to what the interest rate

[49] See Toyin Falola, in n 36 above, 407, where he is of a similar opinion that the inaccessibility of new alien credit institutions was responsible for indigenous money lending flourishing.

involved actually was or what was still owed by the debtor. Many times the moneylender and debtor differed over these matters.[50]

Another proof of their ability to adapt was the introduction of charging interest in cash when previously cash crops or even personal labour would have sufficed. This was of course in response to a society that had become monetized during the colonial period. Even the choice of collateral that was acceptable by indigenous money lenders is testament of their adaptability to conditions that are prevalent in rural credit markets. When respondents were asked if the business loans they had obtained from banks had been secured or unsecured, of the thirteen respondents who had obtained credit from banks, twelve of them answered that their loans had all been advanced on some security. According to one of these respondents, as far as he was concerned, his business loan had been 'secured with collateral whose value quadrupled the amount (credit) sought for'. Unlike the banks which would require property with secure titles; preferably landed property, these indigenous money lenders however are willing to accept various kinds of property as collateral, and in some cases no collateral at all.

The issues of accessibility, adaptability and exploitation that are dealt with in this section expose certain regulatory imperfections within the Nigerian credit sector as a whole. In order to promote accessibility to credit especially in the formal credit sector, ensure the efficiency and stability of Nigeria's credit markets, promote business and enterprise as well as protect consumers from

[50] See n 1 above, 165; where Falola and Adebayo describe how indigenous money lending in Nigeria was 'revolutionized by the art of writing' in the nineteenth century and how this served to reduce 'the area of dispute between the lender and the borrower'.

exploitation, proper regulation is required. In the next section, the aims and objectives of properly planned financial services regulation policy are considered as well as what financial services regulation is capable of achieving within Nigeria's credit markets.

Financial services regulation within a postcolonial context in Nigeria

Law reform has been identified by this thesis as a tool for not only integrating Nigeria's informal and formal credit sectors but also for encouraging economic development through entrepreneurial activities. This section however acknowledges the contribution financial services regulation policy can make to the law reform process which ultimately will have a wider impact on the credit sector.

According to the Central Bank of Nigeria website, financial institutions supervised by the CBN are, Deposit money banks, Discount houses, Community banks, Microfinance banks, Finance companies, Bureaux–de-change, Primary mortgage institutions, and Development finance institutions.[51] This leaves the informal credit sector which consists of mutual credit associations such as the *esusu*, Credit Unions and Cooperatives, Non Governmental Organizations (NGO) and indigenous moneylenders outside the scope of CBN regulation. The situation is quite precarious especially when one considers the fact that only 35 percent of the entire Nigerian population has

[51] http://www.cenbank.org/Supervision/framework.asp (last accessed on 15 July 2011).

access to formal financial services.[52] This means that the 65 percent who are unable to access the formal credit sector are catered to by the unregulated informal credit sector. No wonder corruption, financial abuse etc, are rampant in the informal credit sector as issues such as consumer protection are thrown out the window in this sector.

Putting the present state of indigenous credit markets in Nigeria within the context of a financial services regulation policy, much is revealed. Using the UK's Financial Services Authority (FSA) as a model upon which to determine what the proper objectives of financial services regulation are, one can say that prior to colonialism indigenous credit markets were regulated to achieve those same objectives. For instance, in indigenous credit markets trust and character witnessing served to create public awareness and to inspire confidence in indigenous credit markets and in a similar fashion traditional authorities and sanctions achieved the objectives of consumer protection and reduction of financial crime. In other words, market confidence, public awareness, consumer protection and reduction of financial crimes as proper objectives of financial services regulation were present in the regulatory measures applied in indigenous credit markets prior to colonialism. Granted indigenous credit markets might arguably have been 'small', 'fragmented', 'lacking much in way of competition', etc. but they were certainly not lacking in regulation. The experience of colonialism introduced new credit institutions, thereby creating an alternative credit market which was and still remains regulated unlike the indigenous credit markets. However as has been shown,

[52] See generally n 47 above.

the nature of colonial policy served to exclude indigenous consumers from this new credit markets. The result being that indigenous consumers were forced to remain in the indigenous credit markets which by now have been so affected and influenced by colonialism and colonial policy such that they have lost much in the way of their traditional regulation and are still relatively outside the ambit of regulation of Nigeria's present day credit regulator. To state the obvious, colonialism has been the defining factor in the credit regulation or non-existence of credit regulation in indigenous credit markets in Nigeria.

Postcolonial theory and financial services regulation policy have a lot to contribute to the present state of things. The basis for how this hypothesis is reached will be explained. Still using the objectives of the FSA as a model for financial services regulation policy, it is important to point out that those objectives serve to achieve *accessibility* to financial services markets. If consumers are confident in the stability of the market, it only means one thing; they will be more willing to access and participate in the market. Similarly, public awareness as an objective of financial services regulation can only serve to increase in the public, knowledge of the diverse instruments that are available in the credit market and of consumer rights and responsibilities, and ultimately consumers can make the informed decision to access credit markets knowing that existence of regulation would serve 'to prevent reasonable people from being made fools of'.[53] The same can be said for the consumer protection and the reduction of financial crimes objectives of financial services regulation:

[53] See Michael Blair et al, *Blackstone's Guide to Financial Services & Markets Act 2000* (London: Blackstone Press Limited, 2001), 29, where reference is made to this phrase made famous by Professor Jim Gower.

the result is the same; more consumers will willingly and readily access the credit markets.

From the foregoing, one can identify some similarity between the discourses of financial services regulation policy and postcolonial theory. Obviously this requires further explanation. Some of the discourses that postcolonial theory engages in stem from the experience of colonialism. Topical amongst these discourses is the issue of the *exclusion* of the subordinated from that which the coloniser has perceived as being solely within its purview. Therefore, postcolonial theory in the context of financial services regulation challenges the exclusion by colonial policy of indigenous people from the formal credit markets. Also relevant to postcolonial theory is the issue of *exploitation* of peoples by the colonizer. And as has been established, the exploitation of consumers in indigenous Nigerian credit markets by way of extortionate interest rates and harsh debt recovery methods stems from the era of colonialism and has continued to be perpetuated even after colonialism.

Some might be quick to point out what they consider as exploitation in pre-colonial indigenous credit arrangements in Nigeria; that is the practice of indigenous pawnship. They might argue that the use of labour as collateral for debts owed was very much akin to slavery and therefore a prime suspect for exploitation as well. However, the fact is that in the pre-colonial era, indigenous pawnship was not only an 'essentially economic transaction'[54] but also the conditions that promoted indigenous pawnship were customarily

[54] See Felix K. Ekechi, 'Pawnship in Igbo Society', in Paul E. Lovejoy and Toyin Falola (eds), *Pawnship in Africa*, (Colorado: Westview Press, 1994), 83.

accepted reasons for borrowing.[55] Whereas in the colonial era, colonial policy appeared to encourage indigenous pawnship as an alternative to slavery which at the time was on the decline, as a source of labour which was a much required necessity for the survival of the colonial government. This continued until the colonial government eventually bowed to pressure from international quarters. In other words, indigenous pawnship was a culturally accepted practice by indigenous people in pre-colonial Nigeria and was therefore not considered exploitation. Perhaps it is more appropriate to consider the use of indigenous pawnship by the colonial authorities for their benefit as exploitation.

Even the exploitation that exists in the area of debt recovery in indigenous credit arrangements is arguably also a creation of colonialism. Whilst in the pre-colonial era there was often room for sympathetic considerations when it came to default and debt recovery, sympathetic considerations went out the window during the period of colonialism and as the survey revealed particularly with regards to the professional indigenous moneylender, sympathetic considerations when it comes to debt recovery are still lacking. It is worth returning at this point to the comment of that respondent who very succinctly described a creditor as being better off owing a bank or other financial institution than the indigenous lender because with the former you were not afraid for your life whereas with the latter you most likely borrowed at the expense of your life.[56] This phenomenon which has earlier been likened to a lack of 'a second chance' where failure in business as a result

[55] See Toyin Falola, 'Pawnship in Colonial Southwestern Nigeria', in Paul E. Lovejoy and Toyin Falola (eds.), *Pawnship in Africa*, (Colorado: Westview Press, 1994), 246.
[56] See page 143 above.

of inability to repay debts is punished by restricting access to further credit for enterprise takes on an extra dimensions when studied through the lens of postcolonial theory and financial services regulation policy. Firstly let us consider the implications of 'a second chance' to postcolonial theory. A chance refers to the opportunity, possibility or likelihood of an event occurring and seizing chances when they come is what business is all about. The lack of 'a second chance' or more appropriately a lack of 'any chance at all' means that in indigenous Nigerian credit markets, indigenous peoples are denied the opportunity, the possibility and the likelihood of participating in enterprise and increasing productivity as a result of the continual perpetuation of a colonial policy that denies access to formal credit markets whilst fostering a lack of regulation in indigenous credit markets. Postcolonial theory will therefore be useful in this study in helping to construct in Nigeria's credit markets an identity that is emboldened not by colonial antecedents but by knowledge and understanding of Nigerian people and their credit philosophy.

Although it has previously been asserted that the formal credit sector in Nigeria is presently regulated as has been the case since the time of the introduction of its institutions such as banks, the sector itself still remains fraught with problems. A lack of 'any chance at all' is also mirrored in the formal banking sector where the fear of default has made banks unwilling to take the risk of lending to small and medium sized businesses. And so the

banks have collateral requirements that small and medium sized businesses are many times unable to meet.[57] According to Ibi Ajayi:

> (There is) inflexibility inherent in the banking system, loans and advances are not easily given even when the strict collateral condition is met. While banks in developed countries encourage people to take advantage of their lending facilities, our banks specialise in scaring away potential customers by requiring them to meet impossible conditions. In Nigeria, in most cases, withdrawing money or carrying out simple operations like foreign exchange transaction can take half of the day.[58]

This lack of 'a second chance' is also reflected in how Nigerian banks are quick to petition the courts for liquidation of companies which are unable to repay their debts as and when due.[59] The actions of the banks are of course encouraged by an insolvency regime in Nigeria which provides through the Nigerian Companies and Allied Matters Act 1990 (CAMA) mainly for the winding up of companies. Although there are provisions in CAMA for arrangements and compromises, in practice it is often a foregone conclusion that financially ailing companies will be liquidated. Compare this with financial services regulation policy now holding sway in the West today where

---

[57] See Stephanie Charitonenko, The Nigerian Legal and Regulatory Framework for Microfinance: Strength, Weaknesses and Recent Developments at http://www.microfinancegateway.org/gm/document-1.9.25182/25979_file_Nigeria.pdf (last accessed 18 July 2011.

[58] See Ibi Ajayi, Growth in the Banking Industry of Nigeria, an article published in Domestic and International Banking Services, (Macmillan Nigeria Publishing Limited, 1981), a compendium of papers presented at the Nigerian Institute of Bankers Annual Seminar, 1980, 184, 187-188.

[59] The researcher had the privilege of working with a law firm in Nigeria which primarily handled debt recovery matters for banks. Winding up petitions were free and flowing in respect of companies in debts to these banks. The nature of other matters conducted by this firm of course was enforcement of judgements.

individual debtors and debtor companies are giving a fighting chance to salvage their businesses from the abyss of financial liquidation, thus fostering enterprise and increasing productivity by encouraging business rescue. Take for instance the Enterprise Act 2002 which amongst other things provides for reforms in the UK's financial services regulation in order to encourage enterprise and productivity. Unfortunately the present state of things in the financial services regulation of Nigeria's formal credit sector creates a precarious situation for small and medium sized business owners amongst others.

Apart from standard banks however, there are other lending institutions and programs that have been initiated by the Nigerian government and are targeted at the section of the populace that are unable to access credit from the standard banks. Prominent amongst these are the Community banks which were referred to earlier on. Designed along the lines of indigenous credit institutions, Community banks were set up to cater for those in the rural and even the urban areas who had no access to the standard banks. Community banks were set up to promote trust, character witnessing, etc which had hitherto thrived in indigenous credit institutions prior to colonialism, whilst deemphasising rigid collateral requirements in carrying out their activities which included deposit taking, credit disbursement and trade advisory services.[60] Consider the following statement on Community banks in Nigeria:

---

[60] n 46 above, 2.

> A popular alternative in Nigeria is the community banking program, in which one's honor and standing in the community can take the place of collateral in securing a loan. The principal function of collateral is to ensure that the applicant does not renege on the commitment to repay the loan by the due date. In Nigeria, in places where strong community ties exist, a peer sanction system has been used to ensure correct behavior in credit transactions. The community's basic system of trust creates a climate in which residents can pool their money and then loan it to one another. [61]

The Community banks however seemed to deviate from their original mandate which primarily was to encourage accessibility of financial services to those in the Nigerian population whose access had been restricted, when many of these banks began to lend only for short-term investments or to restrict lending to perceived low risk customers, in a much similar fashion to the Commercial banks whose lending policies they were meant to counteract. The result once again was to continue to limit the access of a large percentage of the Nigerian population to financial services. In fact in many respects many of these Community banks began to serve as mere deposit takers. According to a report on Community banks in Nigeria:

> The original legal and supportive framework had many deficiencies, among them a lack of vision to develop the originality of community banks, inadequate institutional support, insufficient orientation towards professionalism and profitability and insufficient depth of on-site inspection. This led to the creation of mini-commercial

[61] See Akin L. Mabogunje, City and Community: Towards Environmental Sustainability: Box 6.5 Nigeria's Community Banks: A Capital Idea, at http://archive.wri.org/newsroom/wrifeatures_text.cfm?ContentID=893 (last accessed 17 July 2011).

> banks, low levels of market penetration, poor credit recovery performance, low degrees of financial intermediation and a concentration on clients without risks.[62]

In 1995 there were over 1300 Community banks in Nigeria and yet at present only 509 Community banks are recorded on the CBN website as being supervised by the CBN. This would suggest that over 500 of these Community banks have since shut their doors for failing to meet regulatory requirements. The point once again is that the themes of accessibility, exclusion and exploitation are brought to the fore and again financial services regulation policy and postcolonial theory have much to contribute to these matters.

4.4 THE RELATIONSHIP BETWEEN A MORAL ECONOMY OF BORROWING AND CORRUPTION: A CASE STUDY ON BELIEFS, ATTITUDES AND VALUES IN PORT HARCOURT

Interviews held with indigenes and residents of Port Harcourt alike have resulted in mixed messages. On the one hand there is talk of investment and business enterprise and the need to access credit and capital for such and yet on the other hand there is talk of making money through 'get rich quick' schemes.[63] In fact it is interesting that in all of the informal discussions held with informants, there was talk of accessing credit to invest in 'business'; the

---

[62] See Federal Republic of Nigeria: Assessment of Community Banks, Report No: 04/031 IC-NIR, 20 September 2004, at http://www.microfinancegateway.org/gm/document-1.9.26321/30162_file_ng_assessment_of_co.pdf , 5 (last accessed 17 July 2011).

[63] See n 1 above, 228; where Falola and Adebayo use the phrase 'making money without sweat' to describe such money making schemes.

problem however was the actual nature of the business referred to. The 'business' referred to by some of the informants was a legitimate profession or trade they were involved in. For others, it was some of these 'get rich quick schemes' that was spoken of. For example, some respondents spoke of how banks in Nigeria were providing people with the facility for accessing credit with which to invest in Nigeria's current thriving capital market. Taking advantage of the opportunity to own shares is definitely an investment that would reap many benefits for the investor in the long term and is a laudable step taken by the banks in Nigeria to get people investing. The other side of this story was expressed by one respondent who narrated how some time in the nineties a certain lady approached a bank for credit to invest in one of these 'get rich quick' schemes. The particular investment opportunity this lady was interested in was run by a Port Harcourt based company known as Umanah-Umanah which invited depositors to invest their money promising them a high interest rate of forty percent. It was not surprising when the Umanah-Umanah investment company collapsed and took with it several depositors' money. Similarly other respondents commented about credit being advanced to people who did not direct it to the business or enterprise for which it had been granted. One thing that can however be gathered from the different narratives of the respondents is the attitude or spirit of opportunism that is pervasive in the country. This phenomenon of opportunism observed is similar to that which this Yoruba proverb expresses: *Awon omoge iwoyi ko gbe Surulere mo, Olorunsogo ni won n gbe*, 'women nowadays do not live in Surulere (meaning

patience is profitable) but take up residence in Olorunsogo (meaning God has provided or God has given the opportunity).[64] No doubt the changing economic environment has a lot to do with this opportunistic attitude of Nigerians towards credit and although the term opportunism is regarded as having a pejorative quality, the attitude of opportunism which affects how the Nigerians in this survey treat credit also has a lot to do with their 'survival'. In answering many of the questions asked, many of the respondents used the word 'survival' to describe what dominated their relationship with credit. Therefore, if this opportunism is born out of the need or desire to survive, then in that sense opportunism as an attitude towards credit loses its pejorative quality and becomes something to be valued.

There is some correlation between this pervasive atmosphere of opportunism and the belief in the 'magic' of money and credit. Three questions were asked in regards to magic, money, credit and hard work. The first question was: 'do you believe there is some 'magic' surrounding money'. To which eight respondents answered 'yes', whilst 25 respondents answered 'no'. Two of those who answered 'no' said it was 'prudence' and 'proper management' and not magic that was essential to money. When asked the second question which was: do you believe the same 'magic' surrounds credit, this time nine respondents answered 'yes' whilst 24 respondents said 'no'. Interestingly when asked the third question: do you believe wealth is acquired by hard work or by 'magic' every respondent (33) answered that wealth was acquired by hard work. One conclusion that can be gathered from these responses is that there is

[64] n 1 above, 65.

a belief that money/wealth does not only come by hard work. This explains why even though all respondents were of the opinion that wealth is acquired by hard work, some still believed that there was also an element of 'magic' to it as well and that this 'magic' affected not only money but credit as well. According to one respondent, 'some people could work hard and honestly all their lives and still not accrue any wealth and yet still, others without appearing to do much could accumulate much wealth'. This same respondent spoke at length about how people (educated and uneducated alike) in the community he lived in viewed 'the source' of money and credit. In his narrative, he told of how some people had been known to take loans from certain associations and still experienced failures in their ventures because the source (the associations) from where they had obtained the loans magically redirected the would-be profits of the loans away from the debtor and back to the creditor. According to this respondent, in a bid to counteract such misfortune associated with accessing credit from an 'evil source', those accessing credit from indigenous creditors would sometimes obtain magical antidotes to protect their interests. This same respondent spoke about another factor affecting how people made money or accessed credit. This factor he said was sometimes the only 'magic' that surrounded money or credit. This he said was the phenomenon known as '*man know man*'; which in Nigeria is a colloquial expression that simply means having the right connections or knowing the right people. Writing in relation to 'making money without sweat', Falola and Adebayo explain:

> There had always been a belief that one could cut corners to make money through the use and abuse of power, corruption, war booty, or the possession of powerful charms to conjure money. At the root of counterfeiting was this belief that work, especially hard work, could be circumvented in the search for money. 'If hard work brings money,' goes a popular proverb, 'all the Hausa in Sabo would have become rich.' Sabo (or Sabongeri) is the strangers' quarters in southwestern towns and cities where the Hausa from Northern Nigeria resided. The Hausa were famed for their industriousness, energy, and perseverance. They were relied upon for all sorts of purposes, sell water in large buckets and firewood in large quantity, and work as night guards. Yet they remained poor, as evidenced by their untidy appearances in many urban centers and a lifestyle that showed little appreciation for material acquisition. [65]

Many in the West would be quick to relate this pervasive attitude of opportunism, the belief in the magic of money and the exploitative nature of indigenous credit arrangements with the corruption that is now seen as typifying many African countries. They might conclude that the so called Nigerian moral economy of borrowing is nothing more than corruption. Let us examine the relationship between the so called moral economy of borrowing and corruption. The moral economy of borrowing discussed in this chapter is made up of elements from traditional African society (mutual help and support, access to credit, character witnessing, traditional sanctions, etc.) as well as innovations from the colonial period (introduction of foreign credit institutions, etc.), described by Falola as a 'synthesis' of the old and the new. Interesting enough, de Sardan's moral economy of corruption in Africa is also an

[65] n 1 above, 228.

amalgamation of elements from traditional African culture, from the colonial era as well as the independence era. According to him 'this moral economy is post–colonial (see Mbembe, 1992) and fundamentally syncretic'.[66] In a similar vein, the broadly recognizable social norms surrounding credit that are identified in this chapter are not 'traditional' or pre-colonial cultural norms. In fact they are the result of pre-colonial social norms combining with elements from the colonial and postcolonial era. This combination of traditional or pre-colonial social norms with elements from the colonial era means that the resulting moral economy of borrowing is evidently postcolonial. One of such elements that can be said to have combined with pre-colonial norms is the issue of monetarisation or as de Sardan describes it, over-monetarisation. And so for instance, the monetarisation of Nigerian society has had an overall impact on almost everything; even social responsibilities such as weddings, funerals, etc, for which people have been known to borrow for have become so monetarised creating an atmosphere for corruption. The desire to meet social responsibilities and to 'survive' has inflamed the need to create wealth sometimes through 'get rich schemes', which in turn has affected credit and enterprise.

Perhaps another element of the colonial era which can be said to have encouraged corruption on the credit landscape of Nigeria (both in the formal and informal credit sectors) is the element of 'predatory authority'.[67] And so the indigenous moneylender who is himself in some position of power over the consumer believes it is within his right to levy some form of tribute say by way

[66] n 9 above, 26.
[67] n 9 above, 41- 42.

of extortionate interest from the borrower, the bank manager in exercise of his office withholds credit from the small business owner until the small business owner has paid his 'levy', the man in authority at the institution set up by the government to ensure access to credit for those that have been denied access by the formal credit sector, misappropriates or misdirects the funds. The exercise of predatory authority in the Nigerian credit sector is an ever real and present threat to the country's economic development.

As earlier stated, it would be simple to conclude that the 'logics' of such elements of the Nigerian moral economy such as opportunism, the magic of money and exploitation reveal nothing else but corruption. According to de Sardan, 'the legal definitions of corruption in Africa are the same as in Europe being directly derived from the European model'.[68] The difference however is that while the legal definitions of corruption in Europe correspond to the sociocultural logics in European society, the same cannot be said for Nigeria.[69] So what may legally be considered as corruption (or exploitation) in Nigeria's credit markets is encouraged by the social and cultural norms that are recognizable in Nigeria (i.e. the moral economy of borrowing in Nigeria). Therefore the laws that govern and regulate Nigeria's credit markets need to reflect the moral economy of borrowing in Nigeria if it is to effectively combat the corruption and exploitation that occurs in these markets. And in this thesis, the argument is made that Nigerian insolvency law should reflect the moral economy of borrowing in Nigeria.

---

[68] n 9 above, 47.
[69] n 9 above, 47.

SUMMARY

When faced with accessing credit whether from indigenous credit arrangements or from formal financial institutions such as banks, the attitudes and values of Nigerians towards credit can best be described as their response to existing state of things in credit markets. This response to credit is the result of a combination of pre-colonial 'traditional' norms and colonial elements and is what this chapter has termed the moral economy of borrowing. For all intents and purposes this identifiable moral economy is postcolonial as it did not exist in pre-colonial Nigeria. In fact this moral economy of borrowing only came into existence during the era of colonialism, at which point the existing pre-colonial traditional norms surrounding credit combined with elements from the colonial era and resulted in what now exists.

There is no question in the minds of the respondents that were interviewed that indigenous credit arrangements are important to the Nigerian economy as it is in other economies in Africa and Asia. However there was the general consensus among the respondents of the survey that legal and regulatory intervention is necessary not only to regularise indigenous credit arrangements to ensure among other things consumer protection but also to integrate the 'informal' indigenous credit market with the 'formal' credit market in order to produce the much needed credit that is required for the growth of businesses and which in turn contributes to economic development. There is a role for the law to play in integrating Nigeria's credit markets and the reform of law will promote the supply of credit to a large percentage of the

Nigerian populace and hopefully accord indigenous credit arrangements the 'legitimacy' it requires.

This chapter built on the issues of indigenous credit institutions and values, colonialism, legal imperialism and pluralism and the role of institutional change in economic development which were raised in Chapter Three and placed them within context in Nigeria via the use of a survey in this present chapter. In the next chapter, the focus will be on the role of a good insolvency law regime and the need to incorporate the attitudes, beliefs and values people hold regarding credit to the policy behind the regime in order for it to be effective.

CHAPTER FIVE

THE ROLE AND PURPOSE OF A GOOD INSOLVENCY LAW REGIME

In Chapter Four, it was suggested that there is a role for the law to play in integrating Nigeria's credit markets and that reforming insolvency law will promote the supply of credit to a large percentage of the Nigerian populace. In actual fact what is being suggested is that a reformed insolvency law regime can serve as a bridge for uniting the formal and informal credit sectors in Nigeria. This premise was arrived at by the simple fact that creditors in both formal and informal sectors are motivated by the same factor: the expectation that loans will be repaid. It is accepted however that some businesses (and viable ones at that) will run up debts that simply cannot be paid. What is therefore required is a means for assisting in debt recovery and that the right processes are maintained to ensure that entrepreneurship is not stifled as a result of debts. Insolvency law meets these requirements in that it is a means for debt recovery for the creditor and a means to encourage entrepreneurship for the debtor by ensuring that viable business ventures can have a fresh start. In this chapter, the role and purpose of insolvency law is considered. What would be a 'good' insolvency law regime for Nigeria and the potential contributions that reforming Nigeria's insolvency law can make towards

improving access to credit for SMEs and economic development are also considered.

On the issue of the purpose of insolvency law, there is an ongoing normative and prescriptive debate as to the goals of insolvency law. There are different views as to which goals insolvency law reflects, which goals insolvency law ought to target and differences over how insolvency law should be implemented to achieve its goals. Everyone however agrees that a 'good' insolvency law regime is a necessary element which provides a cushion for the risks involved in operating a credit economy by providing a collective and orderly process for the collection of debts. The crux of the debate therefore seems to be whether insolvency law should do just that (i.e. serve as a debt collection device only) or more. This chapter pays attention to this ongoing debate as to the proper function or functions of a 'good' insolvency system and evaluates Nigeria's insolvency law regime in light of the foregoing in order to determine what can be considered a 'good' insolvency law regime for Nigeria, and the improvements that can be made to the regime that will reap among other benefits, improved access to credit for SMEs.

In comparing between indigenous credit institutions and formal banks in Nigeria as sources of credit in the country, Chapter Four revealed some of the difficulties that SMEs face in accessing credit from both sectors. Prominent amongst these were the unwillingness of the formal banking sector to take the risk of lending to SMEs and the unwholesome practices of debt recovery undertaken by lenders in the indigenous credit sector. Therefore this chapter

considers in a comparative sense what solutions or benefits a 'good' insolvency law regime will proffer for both sectors of credit with regards to the problems of accessing credit that were highlighted in Chapter Four bearing in mind the function and purpose of insolvency law that are debated.

Finally, because economic development is the ultimate expectation, the implications that the existence or non-existence of a 'good' insolvency law regime has for economic development are also considered. And whether economic development will be best served by a 'good' insolvency law regime because insolvency law arguably provides the procedures for dealing with financial distress experienced by participants in a credit system which if not tackled can spread from local financial systems to regional and even international financial systems.

5.1 THE PURPOSE OF INSOLVENCY LAW EXPLORED

'Every man for himself and the devil take the hindmost'[1]

According to Douglas Baird:

> Imagining the world without bankruptcy law gives us an opportunity to identify precisely what it is that bankruptcy law adds to our legal regime and hence what

[1] An early 16th century proverb.

bankruptcy policy is or should be.[2]

This statement gives an indication to the fact that insolvency law is not the only creditor remedy available to creditors and that there are other remedies available to creditors in the quest to recover their debts suggesting that a starting point could be to consider other creditor remedies in order to determine what it is that sets insolvency law apart or makes insolvency law different from other creditor remedies and thereby discovering what insolvency law policy is and what it adds to our legal regime. This would throw some light on what the purpose of insolvency law is. A consideration of what remedies are available to a creditor who seeks to recover his debts outside of insolvency law is therefore necessary.

Here the term 'creditor remedies' is used in a manner as not including remedies within an insolvency law framework. It refers to that body of creditor remedies that exists under what has been referred to as a 'non-bankruptcy creditors' remedy system'.[3] According to James W. Bowers, the doctrines which describe what steps the state will take in order that private rights are given effect are known to lawyers as the law of creditors' remedies.[4] This definition refers to creditors' remedies that utilize the power of the state to recover the debts owed to creditors from their debtors. But apart from creditor remedies that utilize the power of the state, there are also other remedies that

---

[2] Douglas G. Baird, A World without Bankruptcy, (1987) Vol. 50, No.2 *Law and Contemporary Problems*, 174.
[3] James W. Bowers, Security Interests, Creditors' Priorities and Bankruptcy, (1997) *Encyclopaedia of Law and Economics*, 93.
[4] *ibid* 91

indigenous lenders have been known to utilize.

Creditor remedies which utilize state power would usually involve commencing a civil action to recover debts. This is often the judicial remedy taken by creditors to recover their debts after a demand has been made for the repayment of a loan and a reasonable period has elapsed and the debt has remained unpaid. Upon judgment the creditor would ordinarily apply for a writ of execution to attach the judgment debtor's property or by way of garnishee proceedings attach the property of the judgment debtor that is in the hands of a third party. According to the High Court of the Federal Capital Territory, Abuja (Civil Procedure Rules) applicable in Nigeria (hereinafter referred to as the Rules), a civil action to recover debts is referred to as a 'claim for a debt or liquidated demand'. In Nigeria, a liquidated demand is defined as follows: 'Wherever the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale, or other positive data it is said to be liquidated or made clear'.[5] Quite simply a liquidated demand is a debt. Generally speaking, the Rules allow for different permutations where a claim for a debt or liquidated demand is made to the court. So for instance where a creditor brings a claim for a debt or liquidated demand and the debtor does not file a defence within the time allowed, the creditor will have final judgment entered on his behalf for the amount claimed with costs.[6] Again there are exceptions to the Rule allowing for a final judgement for default of defence being entered in the plaintiff's favour where the claim for debt or liquidated demand has been made.

[5] *Odume v Nnachi* (1964) 1 All NLR 329.
[6] Order 27 Rule 2 (1), The Rules.

The exceptions are where the claim is for the recovery of the debt owed or the enforcement of any agreement or security relating to the debt owed and is brought by a moneylender or an assignee. In such instances a default judgment cannot be entered except in accordance with Order 14 rule 9 of the Rules.[7]

Another procedure for dealing with recovery of debts under the Rules is the summary judgment procedure. Although there are different summary judgment procedures provided for under the Rules, the one that relates to debt recovery is the summary judgment procedure where a suit is entered in the Undefended List under Order 23 of the Rules. Under this procedure, where a claim for the recovery of debt or a liquidated money demand is made, the plaintiff may ask the Judge to enter a summary judgment by making his application supported by an affidavit which sets forth grounds upon which the claim is made and states the belief that the defendant has no defence to the claim. Where the court is satisfied that there are grounds for believing there is no defence to the claim, the suit is heard under the undefended list on the ground that the defendant really has no defence to the claim.[8] From the foregoing it is clear that there are various remedies available to Nigerian creditors under the 'non-bankruptcy law'.

On the face of it, creditor remedies applied by indigenous creditors may not be regarded as utilizing the power of the state but are however a force to be reckoned with. However as it will be shown hereafter, in certain instances indigenous creditors have been known to utilize the assistance of the Police in

---

[7] Order 27 Rule 2 (2), The Rules.
[8] Fidelis Nwadialo, *Civil Procedure in Nigeria*, (Lagos: University of Lagos Press, 2000), 542.

debt recovery. Generally indigenous creditors in Nigeria recover debts owed to them by employing the following methods:

1. The Extended Family System/Community Action-

Under this method, the creditor mounts pressure on the debtor's family. This is because a debt owed by one is literally a debt owed by all. Not wanting to incur the shame of being classed as debtors, family members have been known to equally apply pressure on the debtor to ensure that the debtor pays the debt and where this fails attempts are made at settling the debt themselves. This is done in order to save face and avoid shame. In some instances, the debtor is made to produce an undertaking as to how much he or she can pay each month to settle the debt. The agreed amount which is payable each month is, arrived at by a calculation which includes the total sum payable plus the interest accruing. The total sum that is recoverable will therefore determine how long it will take for the indigenous creditor to recover the debt. Other times, the indigenous creditor will appeal to the youth age groups who would then act as 'bailiffs' by forcefully gaining entrance into the debtor's house and removing whatever assets they consider to be of value and which can be used in settling the debt owed to the indigenous creditor.

Yet still in other situations, a creditor can invite the attention of the Chiefs and Community Elders to arbitrate over a breach of agreement in order to recover all the money owed or to regularize payment in instalments. A recent

example of Chiefs intervening in debt recovery matters is the well-known case between Chief Clement Amadi of Elelenwo in Obio-Akpo Local Government of Rivers State and Francis Ogburu of Delta State Nigeria which is being dealt with at the Palace of Chief Ike Chinda of Elelenwo Kingdom.

2. The Nigerian Police Force-

Members of the Nigerian Police Force have been known to liaise with indigenous creditors seeking debt recovery. It is a well-known practice for Police Officers to demand as payment, a percentage of the debt to be recovered (usually 10 percent) before springing into action in assisting the indigenous creditor recover the debt. It is also a well known fact that the Nigerian Police have been known to resort to illegal arrest, detention and torture in recovering debts on behalf of indigenous creditors. Their vested interest in the debt to be recovered usually guarantees a successful result in debt recovery. The following excerpt is an interesting illustration of the Nigerian Police serving as debt recovery agents.

Excerpt from a Nigerian Newspaper- Is it lawful for police to act as debt recovery agents?[9]

A reader named Iyabo Dare wrote in to a Nigerian newspaper to ask the

[9] This newspaper article by Evans Duru who incidentally is a lawyer was accessed via the internet on the 11 of December 2009 at the http://www.nlrc.gov.ng/index.php. See also http://www.sunnewsonline.com/webpages/features/managinglawfirm/2008/sept/24/managinglaw-24-09-2008-001.htm accessed on 11 December 2009. Any grammatical errors were present in the original text and have been left unchanged to ensure authenticity. Unfortunately both links were inaccessible on 18 July 2011.

question – Is it lawful for the police to act as debt recovery agents? The text of Iyabo's question and the newspaper journalist's response are reproduced here. The text highlights the fact that the Nigerian Police frequently act as debt recovery agents and for a fee.

I have lived in Lagos for 25 years. Some 4 years ago, I relocated to Idimu Area of Lagos State, when I lost my job as a Civil Servant. This made it difficult for me to pay my rent as and when due. Now, I am owing1 year rent to my Landlord. On New Year Eve, my Landlord went to the police to incident a case of threat to life and arrears of rent. Naturally, I was detained and released on bail not without signing an undertaken to pay the arrears of rent and pack out. My question is, whether it's lawful for police to act as debt recovery agents?

Iyabo Dare-Lagos

Dear Iyabo,

It is the duty of the police among other things to preserve law and order and protect life and property of all Nigerians citizens. It is not the duty of the police to act as debt recovery agents on behalf of any complainant or an aggrieved party. However, experience has shown that people exploit circumstances such as this, in the instant case to persuade the police to do certain acts which are unlawful. This is not without some inducement. Of course, a complaint of threat to life can't be ignored by the police without proper investigation, since on the face of the allegation it borders on criminality. Therefore, since a criminal act either real or imagined is one of the primary functions of the police, any officer, can within the prevailing circumstances take advantage of such allegations to institute criminal proceedings against a party. Usually, clever complainants desperate to get rid of tenant owing arrears of rent can

lawfully report cases such as threat to life, while the real issue is that of arrears of rent. The police themselves are not ignorant of this truth but often, they unscrupulously exploit it to their own advantage. There may be deep rooted reasons that may compel a policeman to sacrifice in some cases, his integrity and self esteem. The most likely reasons, may be the fact that a policeman on duty must not only buy and provide his own stationery, but may also pay his way to the scene of crime in order to apprehend a suspect. Usually, there are no office stationery and their operational vehicles are unserviceable, talk less of having it fueled. Indeed the Nigerian policemen and women are well trained but are poorly paid, ill motivated with obsolete equipment. Therefore, in circumstances where a complainant landlord is willing to provide some of these immediate necessities that officer or constable who had already lost the consciousness of self, without much ado sacrifices his being. This is the genesis of the tragic dimension of the Police officers and men. Most times faced with the temptation of sharing the 10% from the arrears of rent where such is recovered, self preservation becomes the ultimate motive and not to protect and serve with integrity. Notwithstanding the foregoing, the Police are not empowered either by the Police Act or the Constitution Federal Republic of Nigeria (as may be amended) to act as debt recovery agents on behalf of any person whatsoever.

Simply put, your aggrieved landlord can only eject you by the due process of law.

3. Juju Shrine/Witchcraft-

Under this method, the debtor is 'sued' before the Chief Priest of a Juju Shrine. Before the Chief Priest hears the case, the indigenous creditor who is the complainant in the matter is required to pay in cash or kind whatever the Chief Priest demands. In order to fully understand how this method works, a case which transpired in Eleme Local Government Area of Rivers State in Nigeria is

described here.

Mr Osarobey of Onne, Eleme v Mr Aaron Okochi of Ogale, Eleme[10]

In May 2005, Mr Osarobey (the indigenous creditor) sued Mr Okochi (the debtor) before the Onura Shrine at Alesa, Eleme. He paid the Chief Priest 10,000 Nigerian Naira, a cock and a goat before the Chief Priest would hear the matter at the Onura Shrine. The Chief Priest's Messenger served the debtor with a 'notice of summons' and notice of the date of hearing of the case. On the date of the hearing, both parties appeared before the Chief Priest and the debtor was made to pay the 'appearance fees' which included 10,000 Nigerian Naira and a goat. On hearing the case and after 'consulting with the gods', the Chief Priest was satisfied that the debtor actually owed the complainant and decided as follows:

I. That the debt should be repaid within 2 months with 10 percent cost.

II. That the debt is paid directly to the Chief Priest at the Onura Shrine.

III. That failure to pay the debt on or before the due date would result in certain misfortunes befalling the debtor and his family (including disease and death).

Mr Okochi failed to pay the debt at the stipulated time ordered by the Chief

[10] The details of this case and others reproduced in this section were provided to me in writing by an elder of the community.

Priest. 6 months later he had an attack of small pox. All those associated with Mr Okochi believed that the Shrine visited him with the affliction and so made efforts to appease the Shrine.

This practice is very common in Ogoni land, an indigenous community in Rivers State. And in fact in most instances before the loan is advanced, the creditor will take the borrower to a Juju Priest to administer a verbal agreement. Such agreements in a Juju shrine and before a Juju priest carry a lot of weight in the psyche of many Nigerians. So strong is the influence of Juju on indigenous credit agreements that education has not been entirely successful in countering belief in it as even educated Nigerians hold strong beliefs about it.

Now, irrespective of whether a creditor remedy utilizes the power of the state or not, the issue of limited assets will still be encountered by any creditor. As Baird puts it, 'we live in a world of limited liability, (and) everyone's assets are limited'.[11] Limited assets mean that there will be limits on what creditors can recover from their debtors. So for instance, where there are several creditors and as a result several individual civil actions are brought against the same debtor, not only do the courts become clogged but also there is the issue that creditors who are quick to bring their actions will have priority over the debtor's assets leaving those down the line in terms of bringing an action with nothing left to recover from the debtor's assets. This is a prime example of 'every man for himself and the devil take the hindmost'. The same result occurs even with indigenous creditor remedies; a creditors' race to recover the limited

[11] n 2 above, 175.

assets of the debtor would result in every indigenous creditor demanding his 'pound of flesh' and even then some creditors will be left with nothing to recover. Apparently it is this resultant chaotic state of creditors trying to recover their debts at great costs to themselves and to the debtor that warrants the necessity of insolvency law. The need for insolvency law is arguably based on the notion that without a collective procedure like insolvency law in place, there would be a race by the creditors of an insolvent debtor to recover their debts and the resultant chaotic state could be further worsened by the creditors seeking satisfaction of their claims at the same time.

Early insolvency law was an institution of the Law Merchant, a body of law based primarily on Italian mercantile law and developed from established commercial customs and practices of merchants all over Europe.[12] Insolvency law which has its roots in Europe found its way into the Nigerian legal framework by virtue of the fact that the English were once colonial rulers in Nigeria. The history of insolvency law in Nigeria begins therefore with a history of English insolvency law. The gradual dependence on the Law Merchant in England resulted in the enactment in 1542 of the first English Bankruptcy Act which borrowed heavily from the Law Merchant. This early bankruptcy law established in the common law the fundamental principles on which insolvency law is based today; the principles of *pari passu* (rate and rate-like distribution) and *par est codicio omnium creditorium* (equality among creditors). Although everyone very much agrees that these are undeniably the principles defining insolvency law not everyone agrees on what the goals of

[12] Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 2002), 7.

insolvency law are.

For instance, Thomas Jackson proposes that the only goal corporate insolvency law advances is the maximization of returns to creditors in the event of financial distress of a corporation. In other words, corporate insolvency law is a collective debt collection mechanism utilized when financial distress occurs. According to Thomas Jackson, while it is now 'fashionable' to state that it is a goal of insolvency law to keep companies running or that the goals of insolvency law need to be balanced with other laws or the rights of secured creditors for instance, it would be stretching the truth to state that insolvency law exists to keep companies running.[13] He argues that while insolvency law can be used to keep companies running and while it is true that insolvency law does intersect with other laws, these are not in themselves independent goals of insolvency law. He further argues that there are two historical functions of insolvency law namely: to provide a collective debt collection forum/procedure and to give debtors the opportunity of a fresh financial start. And that these two functions of insolvency law place limitations on what else insolvency law can or should do. The device of a collective debt procedure is the solution to what Jackson refers to as a common pool problem; the idea that when a debtor is unable to pay his creditors as and when due, that there would be a 'race' by the creditors to recover their debts from the debtor's assets. Apparently this is one instance where 'the race *would be* to the swiftest'. The creditor who was first in line would be first to recover his debts from the debtor's assets. This could be

[13] Thomas H. Jackson, *The Logics and Limits of Bankruptcy Law*, (Cambridge Mass.: Harvard University Press, 1986), 2-3.

the creditor who was first in time to bring an action in court in order to have the debtor's assets seized and liquidated, or the creditor who was preferred by the debtor could be pushed to the first in line, or the creditor with a security interest.[14] In other words there are several means for getting to be first in line.

This so called common pool problem as among creditors which resulted in a race to the courthouse or in a priority system where the first in line got the debtor's assets could be further compounded with the use of security devices where a creditor held the debtor's property as collateral and as such could be said to have contracted with his debtor to have first lien on the property in question where the debtor was unable to repay his debts. This system of obtaining individual remedies by seizing and liquidating the debtor's assets which is done with or without the aid of an agent of the state has been referred to as the non-bankruptcy system of remedies. The non-bankruptcy system for dealing with debt in Nigeria also includes secured lending through the use of devices such as mortgages and charges and in the case of unsecured debt as has already been mentioned, the creditor can bring a civil action, the judgment upon which the debtor's assets could be seized and attached. So, whilst on the one hand there is a system for obtaining individual creditor remedies, there is also a collective procedural system for obtaining creditor remedies. If the system of individual creditor remedies with its system of ordering creates perverse incentives as amongst creditors and a collective system is to be preferred as being able to deal with the common pool problem, the issue as

[14] *ibid* 9 where Jackson outlines examples of how a creditor could get into first position for having his debts settled.

outlined by Jackson may very well be one of efficiency.

Jackson's view that bankruptcy law is concerned with reducing the costs of converting ownership of the assets of the debtor to its creditors should be contrasted with the argument that a non-bankruptcy system which is a system of individual creditor remedies is 'presumably based on the avoidance of unnecessary costs'.[15] So which system is actually efficient?

According to Armour, US and English insolvency laws provide some support for the argument that the goal or purpose of corporate insolvency law is to ensure the maximization of creditors' returns and he cites the following examples: directors' duties in the twilight period before formal insolvency proceedings commence which shift to give consideration to the position of creditors'; the fact that the decision whether or not to enter into formal insolvency procedures is one which must be made bearing in mind the interests of creditors; insolvency practitioners owe duties to creditors when appointed. However he acknowledges that both US and English insolvency laws contain provisions that clearly do not serve the purpose of maximization of returns to creditors. Again he cites the examples of: the willingness of the law to alter the priority ranking of creditors' claims inter se such as employees ranking ahead of unsecured creditors for certain wages, holiday pay and employers' pension contributions; the fact that reorganization procedures can legitimate outcomes which do not necessarily maximize returns to creditors such as Chapter 11 resulting in old shareholders receiving claims in the reorganized firm even though insolvency would suggest that their claims had been extinguished or the

[15] n 3 above, 95.

English Administration procedure which has as one of its purposes the survival of the company as a going concern.[16]

While other scholars agree with Jackson that insolvency law exists to solve what Jackson refers to as a common pool problem, there are those that argue that the ever changing nature of the commercial environment means that insolvency law must target other goals other than the two historical functions Jackson emphasises. In other words, those who raise the issue of other goals which insolvency law should target do not disagree with Jackson per se but point towards these other goals which should not be ignored. Some scholars argue that when financial distress occurs, corporate insolvency law reflects other goals such as 'the recognition of the interests of groups in society apart from the debtor and its creditors', 'the preservation of viable commercial enterprises', etc.

Again it is also clear to see the logic behind the argument that one goal of insolvency law should be to protect other interests in society apart from debtors and creditors. In the current recession which is being experienced in the UK, the failure of many businesses has seen a rise in unemployment. Statistics show that unemployment is higher than it has been in the last thirteen years.[17] Clearly the failure of a business has consequences not only for the debtor or the creditor but also for others in society such as employees. Again, although some may disagree that it is a goal of insolvency law to preserve ailing businesses,

---

[16] John Armour, The Law and Economics of Corporate Insolvency: A Review, 9-10, last accessed on 18 July 2011 at http://www.cbr.cam.ac.uk/pdf/wp197.pdf.

[17] See http://www.statistics.gov.uk/pdfdir/lmsbrief0809.pdf last accessed on 18 July 2011. According to the National Office of Statistics, unemployment is up by 7.8% in the three months to June 2009 with 2.43 million unemployed persons.

the predominant current view of governments all over the world is that rehabilitating ailing businesses is a prerequisite for sustaining economic development. This is evident in the fact that many insolvency law regimes in the world provide for restructuring and rehabilitation of businesses.[18]

Another goal of insolvency law is proposed by law and economics scholars who operate on the premise that insolvency law exists to minimize the costs of financial distress. In other words, they argue that the goal of insolvency law is economic efficiency. When a company begins to experience severe difficulties in honouring its debts to its creditors, such a company can be said to be in financial distress. This may or may not lead to insolvency. The attendant costs which a company or an individual in financial distress might encounter are the so called costs of financial distress. Examples of the costs of financial distress include loss of assets recovered by creditors or liquidated by the court, lawyers' fees, auditors' fees, restrictions on future borrowing, reduction in basic living requirements, garnishment of wages, untold harassment, etc. Presumably, this would suggest that there would be fewer costs of financial distress under an insolvency law regime as opposed to a 'non-bankruptcy' system. Arguably this could also be taken to mean that there should also be fewer costs of financial distress under a 'good' and effective insolvency system as opposed to an ineffective insolvency system as we gathered from the

[18] See n 16 above, 10. According to Armour, although Thomas Jackson would prefer to regard provisions in insolvency laws which do not support the goal of maximization of returns to creditors as aberrations, he refers to Elizabeth Warren and others who have pointed out that Jackson's conclusion cannot be reached on the basis of a purely positive analysis of the law given that other goals are reflected in these laws and that those who had prepared these laws had intended that they be there.

previous chapter, that Nigeria's insolvency law regime is outdated, ineffective and or inoperative. Under a 'non-bankruptcy system', when a debtor is unable to pay his debts, his creditor would have recourse to individual creditor remedies in order to recover the debt. Where the debtor has several creditors, there presumably would be a 'race' to recover their debts from the debtor's assets presuming the debtor has sufficient assets to satisfy all his creditors. In the event that the debtor has insufficient assets to satisfy all his creditors, some creditors will lose out in the race to recover the debts owed to them. And because it is more than likely that a debtor would have several creditors, security devices were introduced into lending which in turn created an order of priority to contend with the situation where the debtor does not have enough to go round his creditors. Insolvency law in dealing with the collective debt collection process would arguably minimize the conversion costs involved in transferring the debtor's assets to all his creditors.

According to Armour, although there are 'difficulties with the claim that economic efficiency should be the only, or even the most important, goal for law reform', he posits that these difficulties notwithstanding, economic efficiency 'can make several claims to primacy in the context of corporate insolvency law'. He argues that proposals based on economic efficiency suffer less from indeterminacy and internal coherence than those based on the other normative positions and that it is possible to 'close off' arguments from other normative positions in the context of corporate insolvency law. And if that were not enough, he argues that the law and economics literature is highly

relevant to policy makers.[19]

In the preceding paragraphs the issue of limited assets and the limitations it would put on debt recovery was raised. This issue of limited assets also affects the application of insolvency law as well. According to Baird, 'one of the central tasks facing any law reformer is to articulate the limits on the rights of creditors to reach assets'.[20] When one considers the fact that there are limitations on what debts creditors can recover from their debtors under insolvency law, one must ask the question: why then is insolvency law to be preferred above other debt collection devices? Or precisely how does insolvency law improve the likelihood of creditors recovering their debts? For instance, the element of discharge in insolvency law also places a limitation on what debts creditors can recover from their debtors. Limitations such as this and others can arguably hinder access to credit markets because the knowledge that some debts might be unrecoverable might cause creditors to be unwilling to lend in certain instances and to certain persons (whether natural or legal persons). Still limitations such as discharge are not without purpose. Discharge for example, will give the honest but unlucky debtor an opportunity to make a fresh start and places upon creditors the duty to act responsibly in advancing credit. One can therefore argue that rather than hinder access to credit, some of these limitations which come with insolvency law make for better credit markets. In other words, while there might be limits on debt collection through insolvency law, such limits may not hinder access to credit markets but rather

[19] n 16 above 14-15.
[20] n 2 above, 179.

act as a deterrent to irresponsible and predatory lending.

It has been established that insolvency law is only one of several debt collection mechanisms and that it raises the question as to why insolvency law should be preferred over other debt collection mechanisms that already exist in Nigeria. However it also raises another question: how will reforming Nigeria's insolvency law regime improve access to credit for SMEs (and even foster healthy debt collection in the indigenous credit sector)? Put in another way, the matter is simply one of efficiency; are the rules of insolvency law really more efficient than those outside of insolvency law? It is easy to state that a market economy where credit operates necessitates the requirement of an insolvency law regime to contend with instances of inability to pay debt. Or that, there is a common pool problem which exists in a world where one debtor has several creditors and as a result a collective bargaining process as amongst debtors is required and provided through the medium of insolvency law.[21] But what is to say that the rules that operate outside of insolvency law are incapable of dealing with instances of inability to pay debts or offering a collective procedure for creditors in recovering debts? Again, the matter is quite simply one of efficiency and costs. One could therefore argue that perhaps it might be preferable to reform the existing indigenous creditor remedies applied in debt collection as well as the creditor remedies that exist outside of insolvency law. The answer is simple: this thesis does not argue that one should be preferred over the other. In fact there is nothing to suggest that creditor remedies whether under insolvency regime or elsewhere cannot and should not exist side by side.

[21] See Thomas Jackson on the issue of collective bargaining in n 13 above.

As Thomas Jackson stated 'bankruptcy law is an ancillary, parallel system of debt collection law'.[22] The issue is whether the present state of Nigeria's insolvency law regime is conducive for achieving the goals of this thesis. Reforming other creditor remedies that exist in Nigeria whilst a worthwhile task, is simply not within the remit of this thesis.

5.2 INSOLVENCY LAW IN NIGERIA

The following statutes govern insolvency in Nigeria:

The Companies and Allied Matters Act 1990

Companies (Winding Up) Rules 2001

Bankruptcy Act 1979

Bankruptcy Rules 1990

Other statutes that contain provisions pertaining to insolvency but generally dealing with other matters as well include:

Banks and other Financial Institutions Act 1991

Nigerian Deposit Insurance Corporation Act 1990

Investments and Securities Act 1999

Securities and Exchange Commission Guidelines on Mergers, Acquisitions and Combinations

The Companies and Allied Matters Act 1990 (CAMA) and the Companies

[22] n 13 above, 4.

Winding Up Rules 2001 deal with corporate insolvency in Nigeria. Although CAMA deals with general corporate matters in Nigeria it contains provisions dealing with corporate insolvency in Nigeria. The following are procedures which may be taken under CAMA:

1. Winding Up of Companies[23]
2. Arrangements and Compromise[24]
3. Merger and Takeovers of Companies[25]
4. Power of the Corporate Affairs Commission to strike off a defunct company[26]
5. Receiverships[27]

Under the Act one of the circumstances under which the court may wind up a company is where a company is unable to pay its debts.[28] According to the Act a company is unable to pay its debts in the following instances if:

a. a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding N2000 then due has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

[23] Companies and Allied Matters Act 1990, Part XV.
[24] Companies and Allied Matters Act 1990, Part XVI.
[25] Companies and Allied Matters Act 1990, Chapter 4.
[26] Companies and Allied Matters Act 1990, s 525.
[27] Companies and Allied Matters Act 1990, Part XIV, s 208.
[28] Companies and Allied Matters Act 1990, s 408.

b. execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

c. the court, after taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debts.[29]

Apart from the procedure for winding up by the court, a company can also be voluntarily wound up. Circumstances under which a company can go through voluntary winding up are:

a. when the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs on occurrence of which the articles provided that the company is to be dissolved and the company in general meeting has passes a resolution requiring the company to be wound up voluntarily;

b. if the company resolves by special resolution that the company be wound up voluntarily.[30]

From the foregoing it is clear that the decision to proceed with a voluntary winding up is not an indication of insolvency on the part of the company. In fact in a voluntary winding up of a company, the solvency or otherwise of the company only becomes crucial in determining whether the voluntary winding up will be classed as a members' voluntary winding up or a creditors' voluntary winding up. The Act requires the directors of the company to make a declaration of solvency which shows that after making full enquiry into the affairs of the company, the directors believe the company to be able to pay its

[29] Companies and Allied Matters Act 1990, s 409.
[30] Companies and Allied Matters Act 1990, s 457.

debts in full and 12 months from the time that winding up commences.[31] If directors make a declaration of solvency without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period specified, they are guilty of an offence and liable on conviction to a fine of N1500 or 3 months imprisonment.[32] Where a declaration of solvency is made, the winding up process is classed as a members' voluntary winding up but where a declaration of solvency is not made, the winding up is a creditors' voluntary winding up. This suggests that the solvency or insolvency of a company is not the crucial factor in determining the nature of a voluntary winding up. What matters is whether or not a declaration of solvency has been made.

Also under CAMA are provisions for 'arrangements and compromise'. The Act defines an arrangement as:

> any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company other than a change effected under any other provision of this Act or by unanimous agreement of all parties affected thereby.[33]

CAMA itself does not define a compromise but according to the court in *Yinka Folawiyo and Sons Ltd. v T.A Hammond Projects Ltd*[34], an agreement which enables the majority of the creditors to accept less than is due to them may be a compromise on the part of the creditors as a whole, but where the shareholders

[31] Companies and Allied Matters Act 1990, s 462.
[32] Companies and Allied Matters Act 1990, s 462 (3).
[33] Companies and Allied Matters Act 1990, s 537.
[34] (1977) FRCR 143.

do not give up anything it is not a compromise but an arrangement.

The procedure is as follows;

1. Once the scheme of arrangement or compromise is prepared by either the company, its members, creditors or where the company is being wound up, by the liquidator, a summary application is made to the court by such a person or group of persons praying for an order to convene a meeting of the creditors and/or shareholders with whom a compromise is being sought or with whom it is sought to enter into a scheme of arrangement.

2. If the order is granted, then a meeting is called accordingly. The scheme must be approved by at least ¾ (three quarters) in value of the shares of members or class of members or of the interest of creditors or class of creditors, as the case may be, present and voting either in person or by proxy.

3. The compromise or scheme of arrangement may thereafter be referred by the court to the Securities and Exchange Commission to investigate the fairness of the compromise or scheme and make a written report to the court.

4. If the court is satisfied as to the fairness of the compromise or scheme it shall sanction the same and it shall be binding on all the creditors, or class of creditors or members or class of members as the case may be. However such order will be ineffectual until a certified true copy of the order has been filed and registered at the Corporate Affairs Commission (Companies Registry).[35]

In actual fact, an arrangement or a compromise is not a formal rescue procedure and whether or not they can actually be termed as insolvency procedures is also arguable. The fact is that according to Section 538, in order to effect an

[35] See Akinwunmi and Busari Legal Practitioners, Insolvency Practice in Africa- The Nigerian Experience, 14, last accessed via the internet on 18 July 2011 at http://www.akinwunmibusari.com/images/documents/Insolvency%20Practice%20in%20Africa%20-%20The%20Nigerian%20Experience.pdf.

arrangement, the company would have first resolved by special resolution that the company be put into members' voluntary winding up. As discussed earlier, for a company to be put into a members' voluntary winding up, a declaration of solvency would have been made by its directors. Again the aim of an arrangement or a compromise is not to rescue the business as a going concern; it is merely to obtain the best deal there is for the creditors and shareholders and as was held in *Yinka Folawiyo and Sons Ltd. v T.A Hammond Projects Ltd*, this simply means a majority of creditors accepting less than is due to them or shareholders not giving up anything.

Also under CAMA are provisions relating to mergers and takeovers. It defines both merger and takeover as follows:

> merger means any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate;
>
> take over means the acquisition of by one company of sufficient shares in another company to give the acquiring company control over that other company.[36]

One important remedy available to debenture holders is the power to appoint a receiver and or manager over the property charged and CAMA contains provisions relating to Receivers and Managers.[37] A receiver has the

[36] Companies and Allied Matters Act 1990, Ss 590-613 relate to mergers and takeovers. Also see J Olakunle Orojo, *Company Law and Practice in Nigeria* (Lagos: Mbeyi & Associates, 1991), Chapter 24, for an overview of mergers and takeovers in Nigeria.
[37] Companies and Allied Matters Act 1990, Part XIV.

power to take possession of the assets that were subject to a mortgage, charge or security, receive rents and profits and discharge all outgoings and realise the security for the benefit of those who appointed him.[38]

The Bankruptcy Act 1979 and the Bankruptcy Rules 1990 govern personal insolvency in Nigeria. Under the Act there are two types of bankruptcy proceeding, a creditor proceeding or a debtor proceeding. For a creditor proceeding to be initiated by presentation of a petition, the following conditions must be satisfied:

1. The petition must be based on any of the four acts of bankruptcy. That is:
    a. Obtain final judgment or order against the debtor;
    b. Levy execution of final judgment or order against the debtor;
    c. Declaration by the debtor of inability to pay debt;
    d. Presentation by the debtor of bankruptcy proceedings against self.
2. The act of bankruptcy must have occurred 3 months preceding the presentation of the petition.
3. The debt must be:
    a. Due and payable either immediately or at a certain future date;
    b. A specific and liquidated sum; and
    c. Not less than N2000.
4. The debtor must have, within a year prior to the presentation of the petition:
    a. Been ordinarily resident in Nigeria; or
    b. Owned a dwelling house or place of business in Nigeria; or
    c. Conducted business in Nigeria either personally or through an agent or manager; or

[38] Companies and Allied Matters Act 1990, s 393.

d. Been a member of a firm or partnership having business in Nigeria through a partner, agent or manager.

5. The petition must be presented at the Federal High Court which has exclusive jurisdiction over bankruptcy proceedings and must be instituted in the division of the court where the debtor has within the preceding six months carried on business.

The creditor proceeding can only be used to enforce payments of debts but not to establish a debt. The indebtedness of a debtor must first be established in a separate judicial proceeding before the creditor proceeding is commenced. Again a creditor would need to fulfil the conditions as laid down in the Bankruptcy Act before such a creditor would be permitted to present a petition for bankruptcy.

5.3 WHAT'S WRONG WITH NIGERIA'S INSOLVENCY LAW ANYWAY?

The following are some of the problems with Nigeria's insolvency law regime. They are summarised below.

A major problem with Nigeria's corporate insolvency law and bankruptcy law is the fact that it is dated and not in touch with current developments in the area of insolvency law. As a result its philosophical foundation or guiding policy is equally dated or borrowed from English law which itself has since been reformed. Nigeria's Bankruptcy Act 1979 is based on the English Bankruptcy Act 1914 with slight modifications and as earlier

stated, Nigeria's corporate insolvency law which is contained in Nigeria's Companies and Allied Matters Act 1990 is largely based on the English Companies Act 1948.[39] In other words, both the Nigerian Bankruptcy Act and CAMA therefore have the same philosophical foundation or policy as English law of that time. However since then English personal and corporate insolvency law and even its company law have been reformed. This is why much of Chapter Four argued that Nigeria's insolvency law regime should be reformed to reflect a philosophical foundation or policy that is Nigerian in identity and in view of current developments all over the world. According to Inam Wilson, a Legal Practitioner in Nigeria:

> The philosophical foundation of English Bankruptcy Law is slightly different from that of Nigeria to the extent that it serves a number of beneficial purposes that are not available under Nigerian law. English Law provides procedures aimed at relieving the debtor from the cumulative burden of debts which he has no realistic prospect of repaying and hence offer him hope for the future in the form of a fresh start consequent upon his rehabilitation.[40]

However, this thesis has sought to demonstrate that the assertion that English bankruptcy law and Nigerian bankruptcy law have different philosophical foundation is not entirely correct. In fact as earlier stated the philosophical foundation of both personal and corporate insolvency law in Nigeria was

---

[39] See Philip R. Wood, *Principles of International Insolvency* (London: Sweet & Maxwell, 2007) where the author refers to the fact that Nigeria's Bankruptcy Act 1979 is based on the English Bankruptcy Act 1914 whereas CAMA is based on the British Companies Act 1948 with modifications.

[40] Inam Wilson, *Bankruptcy Proceedings as a Tool for Debt Recovery* (Lagos: Olisa Agbakoba & Associates, [200-?], 15.

actually borrowed from English law; the problem with the philosophical foundation of Nigerian insolvency law is simply that it is dated. In fact if Nigeria borrowed from English insolvency law today then the various 'beneficial purposes available under English Law', which Wilson agrees, are lacking in Nigeria's insolvency law regime would become available.

Arguably it is this lack of a modern philosophical foundation that has led to Nigeria's corporate insolvency law being regarded and utilized as a mere tool for debt recovery. CAMA lacks a 'rescue culture' which is present in most modern commercial insolvency laws. This is evident in the fact that the law does not in actual fact make provisions for formal rescue schemes. Take for instance the administration procedure available in the UK, its primary aim towards a business in distress is to rescue the business as a going concern, failing that to sell the business off with the intention of getting a better deal for creditors than would have been obtained during liquidation. Similarly the goal of Chapter 11 reorganization is that a company is not liquidated at the earliest indication of financial distress but rather continues to trade for a period of time with the intention that the company will either be able to pay its creditors from future profits or be sold as a going concern and the proceeds used in paying off debts.

However, the same cannot be said to apply to an arrangement or a compromise under CAMA. In fact it is fair to say that in Nigeria insolvency law is used primarily as a tool for debt recovery. Going by the approach taken by legal practitioners in Nigeria, it appears as though insolvency law is

synonymous with 'winding up' of corporate organizations to recover debts. Arguably, this approach is a valid one given that it is supported by Jackson who argues that the historical function of insolvency law is to serve as a collective debt recovery mechanism. However the problem with the current approach taken by legal practitioners in Nigeria is that there is a difference between 'unable to pay' and 'unwilling to pay' and often times this distinction is not made when utilizing the winding up process in debt recovery.[41] CAMA itself describes the use of the winding up petition in the instance of inability to pay debts. The use of the winding up process as a 'threat tool' to facilitate debt recovery is not why the process was created and unfortunately will create instances of abuse of court process. In his book, Inam Wilson also appears to suggest that even Nigeria's bankruptcy law should be cast in the same mold; that is, as a tool for debt recovery. He argues that new tools are needed to

[41] See Access Bank v AP Plc, Suit No FHC/L/CS/644/09 where a winding up petition filed by Access Bank was dismissed because the Court found that AP Plc is solvent and that the petitioner had concealed facts from the court. Those facts included that AP Plc had N1.55 billion in its accounts with Access Bank and that Access Bank owed an underwriting commitment of N4.8 billion to AP Plc. In other words, there was a dispute as to the debt and this should have prevented the petitioner from making the petition, the debtor was not insolvent and that the petitioner was likewise indebted to the debtor. The spate at which winding up petitions are presented even when there are apparent disputes in relation to the debt seems to give an indication that the intention may be to embarrass the debtor with the publication of the winding up petition and to force the debtor to settle. It is cases like these that seem to suggest that the winding up petition is being used in a manner that wasn't intended. Again cases like this are expected to be on the increase due to the recent regulatory action taken by the Central Bank of Nigeria on certain banks in Nigeria. See This Day Newspaper of Wednesday 19 August 2009, Vol.14, No. 5232, where the newspaper published a Central Bank of Nigeria (CBN) advertorial giving the names of debtors (mostly shareholders and directors) who had secured loans totalling N747 billion from five Nigerian banks whose executives had been removed from office by the CBN. According to the CBN 'following the recent regulatory action of the Central Bank of Nigeria on the five (5) banks, it has become necessary to use this medium to request the (following) defaulting customers of the affected banks to pay without further delay their indebtedness, failing which the banks will take all appropriate legal actions to ensure repayment'. As the pressure mounts for banks to recover debts, the fall out of this move by CBN is the expected increase in the use of winding up petitions as a tool for debt recovery.

manage bad debts and that bankruptcy law would be effective in doing that. According to him 'its effectiveness is not in the judicial process but in the social consequences of being adjudged bankrupt'. This is all well and good but concerns must be raised about the methods of debt recoveries.[42]

Schemes for arrangements and compromises have come under sharp criticism because the procedures are considered complex, there is the apparent lack of a moratorium when utilizing these schemes as well as the length of time it takes for such schemes to be completed. Whereas there are provisions relating to a moratorium on actions and proceedings during winding up, the same does not apply during schemes for arrangement or compromise. And since in theory these schemes can be entered into before a company has been placed into liquidation or after the company has gone into liquidation, such schemes are 'seldom used prior to liquidation because the process could be undermined at any stage by the filing of a petition by an aggrieved or unsatisfied creditor'.[43]

Furthermore although CAMA allows for the stay of proceedings when a winding up petition has been presented and only allows the commencement of proceedings after leave of court has been sought once a winding up order has

---

[42] See Olisa Agbakoba and Tunde Fagbohunlu in Bankruptcy and Winding Up Proceedings: Potential Mechanisms for Speedier Debt Recoveries last accessed via the internet at http://www.agbakoba-associates.com/admin/uploads/pubs/BANKRUPTCY%20AND%20WINDING%20UP.pdf on 18 July 2011, where they refer to a mandate of a Committee of Distressed Banks set up by the Central Bank of Nigeria. The said mandate involves exploring 'aggressive methods for debt recoveries'. One fears that if care is not taken formal methods of recovery may soon begin to resemble certain indigenous methods in disrepute.

[43] The relevant sections for moratorium in a winding up are Companies and Allied Matters Act 1990 Ss 412, 417, 534, 535. See also Akinwunmi and Busari, Insolvency Practice in Africa-The Nigerian Experience, 16, in n 35 above.

been made in order to protect the assets of the company from reckless dissipation, the rights of secured creditors to their collateral are not protected. In other words although secured creditors in Nigeria have absolute priority to their collateral outside of bankruptcy procedures, they do not have absolute priority to their collateral inside of bankruptcy procedures.[44] The absolute priority rule stipulates that creditors with higher ranked securities should have their claims satisfied in full before any creditors with lower ranked securities or no securities at all.[45] One can say that the absolute priority rule seeks to protect property rights which creditors have freely negotiated with debtors. However, it has now become clear that the rigorous enforcement of the rights of secured creditors would impact upon corporate reorganization and as a result countries such as the US and the UK have sought to balance the rights of secured creditors as negotiated with their debtors and the power of the courts to alter those rights for the purpose of reorganization.[46] So for example, in the US whilst the absolute priority rule is a fundamental principle of Chapter 11

---

[44] According to Companies and Allied Matters Act 1990, s 418, an order for winding up a company shall operate in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory. Therefore all creditors and contributories share in the surplus assets of the company. And whereas secured creditors would have absolute priority to their collateral outside of bankruptcy procedures, this absolute priority to their security is lost inside of bankruptcy procedures. According to the Companies (Winding Up) Rules 2001, s 127, the Liquidator may require a secured creditor to give up his security for the benefit of creditors generally. See also the summary of the *Doing Business 2011* data for Nigeria at http://www.doingbusiness.org/data/exploreeconomies/nigeria?topic=getting-credit which was last accessed on 18 July 2011.

[45] Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*, (Oxford: Oxford University Press, 1998), 167.

[46] *ibid* 164-165, 167 According to Carruthers and Halliday, 'however fair the standard of absolute priority, it put a powerful brake on the scope of bargaining over reorganizations, for the rule sharply constricted room for movement by stronger creditors to trade some of the assets they had secured for concessions and flexible adjustments by weaker creditors, debtors, and stock-holders'.

reorganization (and secured creditors in the US have absolute priority to their collateral outside and inside of bankruptcy procedures), the absolute priority of secured creditors to their collateral inside of bankruptcy is tempered by the concept of 'adequate protection'. Adequate protection protects the value of the creditor's interest in the property being used by the debtor in possession and the debtor in possession may be required to make periodic cash payments, or provide new or additional security.[47] This is therefore the approach taken in the US to create a balance between the rights of secured creditors to their collateral and the need to encourage successful reorganizations.

In a similar vein, in seeking to reform Nigeria's insolvency law to imbibe a rescue culture in line with most modern insolvency laws, creating such a balance between the absolute priority of secured creditors to their collateral and achieving successful reorganizations becomes an issue for reform given the assertion above that the rigorous enforcement of the rights of secured creditors would impact on corporate reorganization. However as earlier stated secured creditors in Nigeria do not have absolute priority to their collateral in insolvency procedures in Nigeria even though obtaining security has been described as one of the most basic and reliable ways for lenders to reduce their financial risk and thus protect their financial position.[48] Arguably, what makes this a potential issue for the reform of insolvency law in Nigeria is the fact that

[47] See 11 United States Code s 361. See also 11 United States Code s 363; under Chapter 11 a debtor in possession may not use cash collateral without the consent of the secured creditor or the court, which must first examine whether the interest of the secured creditor is adequately protected. Where cash collateral is used, secured creditors are entitled to receive additional protection.

[48] n 45 above, 159.

this thesis argues that the ability of lenders to recover their loans when made is a major motivation for their making loans in the first place and that insolvency law provides them with a vehicle for debt recovery. In other words, insolvency law serves as a means to minimize the financial risks of creditors. Therefore in reforming Nigeria's insolvency law, upholding the absolute priority of secured creditors to their collateral whilst at the same time ensuring that successful reorganizations are not hindered should be a priority if lenders are to be motivated to lend.[49]

In the US and the UK, financial institutions such as banks and other secured lenders have been involved and instrumental in statutory reforms of insolvency law especially those reforms that sought to balance the rights of secured creditors as negotiated with their debtors and the power of the courts to alter those rights for the purpose of reorganization. Their willingness to engage in the issues of statutory reform of insolvency law was more than likely due to the fact that, 'collateralization is central to the ways banks manage credit, and so any legal change which threatens to attenuate, restrict or otherwise modify security interests has the potential to undercut the profitability of banks and other secured lenders'.[50] In other words, financial institutions such as banks and other secured lenders have an interest in insolvency law reform and as a result ensured that their interests were represented.[51] Unfortunately, in the case of Nigeria, this research was unable to unearth any evidence of involvement of

---

[49] n 45 above, 159.
[50] n 45 above, 204.
[51] For a discussion on the role of secured lenders in the insolvency reform process in the US and the UK, see Chapter 4 in n 45 above.

secured lenders in the insolvency reform process. This should not be viewed as an indication of the absence of interest groups in Nigeria. On the contrary, organized interest groups such as the Nigerian Bar Association (NBA) and the Nigerian Labour Congress (NLC) have played an important role in Nigerian politics. The Nigerian Law Reform Commission has however realized that when it comes to law reform in Nigeria, there is the need for wide public participation in the law reform process.[52] What is therefore required is a process of encouraging wider participation and representation in insolvency law reform by relevant stakeholders and interest groups.

Although CAMA provides a list of persons that are disqualified from acting as receivers or managers, the present law does not however prescribe what qualifications an insolvency law practitioner is in actual fact required to possess. This is bound to create a lack of confidence in the competence of insolvency law practitioners in Nigeria.[53] In stark contrast, recognised professional bodies authorise and regulate insolvency practitioners in the UK and subject to other sections of the Insolvency Act 1986, a person who acts as an insolvency practitioner for an insolvent company or individual when he is not qualified to do so may be liable to imprisonment or a fine or both.[54] Some of the criteria used for authorising insolvency practitioners in the UK include education, practical experience and training. The right to perform insolvency work is a jurisdictional right, and law commonly defines how to acquire such

[52] See the Nigerian Law Reform Commission website at http://www.nlrc.gov.ng (this link was last accessed on 4 February 2011 but was inaccessible on 18 July 2011).
[53] Companies and Allied Matters Act 1990, s 387(1).
[54] Insolvency Act 1986, s 389 and s 389A.

right. As Chapter One revealed, Insolvency Practitioners played an important role in bankruptcy reforms in the United States as they 'frequently sought to protect or expand the occupational monopolies they enjoyed over the more rewarding aspects of bankruptcy work'.[55] With regards to insolvency law reform in the UK, whilst there are differences between the English approach and the US approach to insolvency law reform; there are also similarities such as the role of insolvency practitioners (e.g. lawyers and accountants) which also pervaded all stages of the reforms that led to the Insolvency Act 1986. According to Carruthers and Halliday, in such reform processes these professions may act under various guise such as mobilizing on their own behalf for wider jurisdictions of work, higher status and monetary rewards; or they may act collectively or individually as agents of their clients; or they may act mixing their own interest and those of their clients with civic consciousness and the idea of fulfilling some public good.[56] Whatever the guise in which professionals such as lawyers may act in insolvency reform processes, 'bankruptcy legislation has several of the attributes most conducive to expert influence' and by ensuring that criteria such as the appropriate education, practical experience and training are utilized in authorising Nigerian Insolvency Practitioners then surely their expert influence cannot be excluded from insolvency reforms in Nigeria.[57]

The offences dealing with fraudulent and delinquent directors are

---

[55] Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*, (Oxford: Oxford University Press, 1998), 42-43.
[56] *ibid* 148-149
[57] *ibid* 148

inadequate and demonstrate a failure in protecting and safeguarding the interests of the public.[58] The fines for fraudulent and delinquent directors are so insignificant that they are not likely to serve as a deterrent to directors against fraudulent or delinquent acts.

Even though the Bankruptcy Act has been in existence in Nigeria since 1979, the first creditor bankruptcy proceeding was only initiated in 1992 and even that was unsuccessful as a result of a failure to fulfil the required conditions before presenting a bankruptcy petition in a creditor proceeding.[59] With regards to debtor bankruptcy proceeding, it has even been suggested that it is very unlikely for a debtor in Nigeria to initiate one. The general consensus seems to be that it is the stigma associated with bankruptcy that has led to the avoidance of bankruptcy proceedings by debtors. Inam Wilson, the Nigerian Legal Practitioner referred to earlier on put forward a case for the use of bankruptcy law as a tool for debt recovery which one can only think must have been addressed at creditors when he argued that 'its effectiveness is not in the judicial process but in the social consequences of being adjudged bankrupt'. In other words, the fear of the stigma of bankruptcy would cause debtors or perhaps their families to pay their debts rather than face bankruptcy court proceedings. Whilst one can see the logic in his arguments and the benefits as well, concerns about abuse of process must be thoroughly considered. However, fears that reforming Nigeria's Bankruptcy Act in order to encourage its use especially by entrepreneurs of SMEs will lead to a decline of morals and

[58] Companies and Allied Matters Act 1990, Ss 502- 508.
[59] See Omananyi v Majekodunmi Suit No FHC/L/BK/1/92.

of bankruptcy stigma, and yet still an increase in bankruptcy filings, the type of which is being experienced in the West, are probably unfounded. The existence of a bankruptcy stigma as hindering entrepreneurs of SMEs from petitioning for bankruptcy when faced with financial difficulty in no way, shape or form suggests that Nigerians hold higher or superior morals than their counterparts all over the world. On the contrary, as the preceding chapter revealed, there is already a decline of morals in Nigeria as is also universally experienced and evident. One thing appears certain for now; an increase in bankruptcy filings in other parts of the world cannot be conclusively linked with the decline of bankruptcy stigma. On the one hand there are studies that suggest that a decrease in the level of bankruptcy stigma is linked to an increase in bankruptcy filings, whereas on the other hand there are also studies that equally exclude bankruptcy stigma from having any influence on the increase in bankruptcy filings.[60] As there will always be a shift in public attitudes and perceptions regarding credit, debt and the stigma of debt, insolvency law reform can bridge the gap between what is and what ought to be. That is after all the normative role of law.

Although the general consensus appears to be that it is the stigma associated with bankruptcy that has led to the avoidance of bankruptcy proceedings by debtors, nevertheless one of the main problems with Nigeria's Bankruptcy Act is the fact that the bankruptcy proceedings contained in the Act are not 'first charge proceedings' or primary actions. According to Inam Wilson:

---

[60] Rafael Efrat, The Evolution of Bankruptcy Stigma, (2006) Vol. 7 *Theoretical Inquiries in Law*, 393.

> Bankruptcy proceeding is only available to enforce the obligations of a debtor after such obligations would have been established in a separate judicial proceeding. This is process is cumbersome and makes bankruptcy no more significant than the conventional modes of enforcing judgments, like garnishee and fife. [61]

In other words, a potential user of the Bankruptcy Act would have first gone through a prior court proceeding to establish a debt before then commencing the bankruptcy proceeding to enforce the debt. After all the time spent, the expenses incurred and all of the rigours in general that are involved in one court proceeding, one can hardly see what appeal bankruptcy proceedings would hold. This situation must be contrasted with what obtains in England where a bankruptcy petition can be presented without a debt having been first established in as separate judicial proceeding.

The earlier discussion on the debate about the goals of insolvency law revealed the following: even though the ever changing nature of the commercial environment means that insolvency law must target goals other than the two historical functions Jackson emphasises, everyone appears to agree that as a minimum insolvency law should accomplish its two historical functions which are to provide a collective debt collection forum/procedure and to give debtors the opportunity of a fresh financial start. Whilst insolvency practice in Nigeria can be said to have considerable experience in debt recovery cases through the application of winding up procedures, unfortunately debtors

[61] n 40 above, 14.

are still not accessing the opportunity of a fresh financial start. According to INSOL, providing a fresh start to a debtor who cannot reasonably repay all of his pre-existing debts is the recognition by society that over indebtedness is, in many cases, excusable and a key element of any consumer debtor insolvency law or rehabilitation procedure.[62] No doubt the Nigerian Bankruptcy Act 1979 contains provision for a debtor to apply to court for an order of discharge at any time after being adjudged bankrupt as well as provision for an automatic discharge after five years from the date a receiving order was made against the debtor.[63] However much work needs to be done to Nigeria's insolvency law regime to reduce not only the stigma of bankruptcy but also to promote fresh starts and hence entrepreneurial activity.

Nigerian approach to international insolvency

Although this thesis is primarily concerned with SMEs, the inter-connectivity of commerce all over the world necessitates that we consider albeit briefly the area of international insolvencies. This is because as SMEs grow, they might become multinationals. The difficulties of regulating multinationals within a political system of independent nation states are further worsened by the problems created by the insolvency of such multinationals (i.e. international insolvencies). International insolvencies have serious legal implications for the insolvency framework of the different nation states involved and raise serious

[62] See http://www.insol.org/pdf/consdebt.pdf last accessed on 18 July 2011.
[63] Bankruptcy Act 1979, Ss 28, 31.

conflict of laws issues. In Chapter One we saw that the approach of the US to international insolvencies was that it applied the doctrine of territoriality to foreign judgments and universalism to its domestic judgments. In Nigeria, apart from the fact that foreign judgments or orders of foreign countries may be recognised and enforced in Nigeria in cases where those countries have a reciprocal treaty, there is no law in Nigeria which deals particularly with the recognition and enforcement of cross-border insolvencies.[64] Nigeria has also not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

5.4 SOME FEATURES OF A 'GOOD' INSOLVENCY LAW

Putting the debate of what the goals of insolvency law are to one side, significant work has gone into the development of key objectives and core features that are expected to be found in what can best be described as a 'good' insolvency law. For instance deciding what these key objectives and core features should be was the task that the United Nations Commission on International Trade Law (UNCITRAL) set for itself. As a result the Legislative Guide on Insolvency Law 2004 (The Guide) was given birth to. The UNCITRAL Legislative Guide on Insolvency is intended for nations to utilize as a reference point for the creation of an efficient and effective legal framework to address the difficulties of debtors. The Guide contains recommendations and is not intended to be enacted as a national law but provides legislators with core issues to consider. As a result it does not provide

[64] See the Foreign Judgments (Reciprocal Enforcement) Act Cap F35 LFN 2004.

for a single set of solutions but provides for different approaches to be considered. The Guide identifies eight key objectives that should be considered in an efficient and effective insolvency law and these are: provide certainty in the market to promote economic stability and growth; maximize value of assets; strike a balance between liquidation and reorganization; ensure equitable treatment of similarly situated creditors; provide for timely, efficient and impartial resolution of insolvency; preserve the insolvency estate to allow the equitable distribution to creditors; ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and recognize existing creditors rights and establish clear rules for ranking of priority claims.[65]

Similarly, the European Commission Best Project on Restructuring, Bankruptcy and a Fresh Start 2003 (The Best Project) is another attempt at benchmarking insolvency norms. In the case of The Best Project four keys areas were considered namely: early warning, legal system, fresh start, social attitudes. The Best Project identifies early warning mechanisms as being key to early recognition of distress and prevention of failure. It recommends that legal systems should provide for restructuring as an option and should not be a deterrent to a fresh start. The Best Project also recognized that insolvency law can influence society's views about failure and stigmatization and considered

[65] UNCITRAL (2004), *UNCITRAL Legislative Guide on Insolvency Law* accessed via the internet at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf last accessed 18 July 2011. Apart from the key objectives that The Guide requires legislators to consider, it also provides for common features that should be considered and core provisions of an efficient and effective insolvency law.

ways of changing negative social attitudes.[66]

In order to reduce the stigma of bankruptcy and to ensure that insolvency systems in Europe promote a fresh start for debtors, The Best Project recommended that insolvency systems should distinguish between fraudulent and non-fraudulent debtors by drawing a distinction between the measures applicable to fraudulent bankruptcies and measures applicable to non-fraudulent bankruptcies so that the attitude of third parties to the debtor could be improved and non-fraudulent debtors would not be stigmatised by association with fraudulent ones.[67] Furthermore, The Best Project recommended that legislators should not stigmatise non-fraudulent debtors through the imposition of inadequate measures and legislation such as unnecessary restrictions, disqualifications and prohibitions. Again the goal should be to protect the honest but unlucky entrepreneur who failed through no fault of his own as opposed to harming his image. The Best Project went on to make recommendation that whilst tougher and more restrictive legislation should be applied to fraudulent debtors, it was important to provide for early discharge for non-fraudulent debtors in order to promote fresh start and entrepreneurial activity.[68] Early discharge of non-fraudulent debtors is an issue that insolvency legislation in Nigeria needs to consider, given that the current automatic discharge period is Nigeria is put at 5 years, a fact that is likely to discourage entrepreneurial activity. The approach of the Best Project to

---

[66] European Commission (2003), *Best Project on Restructuring, Bankruptcy and a Fresh Start* at http://ec.europa.eu/enterprise/policies/sme/files/sme2chance/doc/failure_final_en.pdf last accessed 18 July 2011.
[67] *ibid* 7-8
[68] *ibid*

implementing the aforementioned recommendations, which focused on reducing stigma and promoting fresh starts, was the introduction of a campaign. As a result 'key actions' are already being taken all over Europe to implement these recommendations through such means as country-specific entrepreneurship campaigns and education, nationally-adapted information packs, etc.[69]

In a similar vein to The Best Project which recognizes that insolvency law can influence society's views about failure and stigmatization and change negative social attitudes, Chapter Four explored this same notion as it investigated the moral economy of Nigeria that influences societal views in Nigeria and negative social attitudes. Chapter Four concluded, as does The Best Project, that law can play a role in influencing societal views and changing negative social attitudes; take for example, the intervention of the colonial state in Nigeria in the despicable practices of money lending through law enactment as well as the eventual abolition of pawnship. According to The Best Project, Bankruptcy is not only a legal and financial badge but also a social badge, yet unfortunately general consumers lack information about what bankruptcy actually means. The Best Project concludes that the most effective way in eradicating negative social attitudes starts by education. Therefore, in Chapter Six, the role of intermediaries in Nigeria in educating, informing and effecting

[69] See Commission of the European Communities, *Action Plan: The European agenda for Entrepreneurship*, 9 accessed via the internet at http://ierc.bia-bg.com/Conf2009/DATA/KK7001EN.PDF on 18 July 2011. See also Horst Reichenbach, Sonia H. Rada, European Commission, *Entrepreneurship, Business Failure and Starting Afresh: The Work of the European Commission*, accessed via the internet at http://www.europeanrestructuring.com/05intro/022_025.htm on 18 July 2011.

change is discussed. Reforming insolvency law in Nigeria will not be complete until this aspect of fresh financial starts is dealt with and perhaps a nation-specific campaign utilizing intermediaries as will be discussed in the following chapter could be a useful vehicle in Nigeria for campaigning for the reduction in bankruptcy stigma as well as for promoting a fresh start.

In another attempt at benchmarking, the European Bank for Reconstruction and Development (EBRD) developed 10 core principles for a modern insolvency law regime which presumably would make for a good insolvency law.[70] For example some of the principles recommended by the EBRD are that an insolvency law regime should promote speedy resolution of insolvency processes; provide clear tests for the initiation of an insolvency proceeding; permit both bankruptcy and restructuring; provide interim conservatory and protective measures to ensure that the assets of the debtor is safeguarded during the insolvency proceeding; ensure that like parties are treated in an equal manner.

These attempts at benchmarking provide a valuable source for Nigeria's insolvency law reform process however this thesis is also not averse to seeking insolvency law standards from English Law. As Chapter One indicated, the contribution of English law to the development of law in former colonies such as Nigeria cannot be downplayed or ignored. Reference can be made to it as has been done in the past in order to gain insights bearing in mind the peculiar nature of Nigerian realities. For example Seyi Akinwunmi of the Nigerian firm

[70] See http://www.ebrd.com/downloads/legal/insolvency/principle.pdf last accessed 18 July 2011.

Akinwunmi and Busari states that the present Nigerian Insolvency Law should be weighed against the standards identified and specified by the Sir Kenneth Cork Committee on the Review of Insolvency Law and Practice in the UK and where it falls short it should be revised along those lines provided it is accepted that the standards specified by the Kenneth Cork Committee are a fair description of the principles on which a modern insolvency law should be based.[71]

An analysis of these various attempts at benchmarking insolvency norms reveals keys to resolving the issues facing Nigeria's insolvency law that are identified in this thesis. For example, The Guide recommends among other things that a modern insolvency law regime should provide for liquidation and reorganization, the same with the EBRD which recommends that a modern insolvency law should permit both bankruptcy and reorganization. These recommendations provide an answer for what is a major problem with Nigeria's insolvency legislation CAMA, that is, the fact that it lacks a rescue culture and does not make provisions for formal rescue schemes such as the administration procedure available in the UK or the US Chapter 11 reorganization procedure. In order to modernize, CAMA therefore needs to strike a balance between liquidation and reorganization.

Again, the various attempts at benchmarking insolvency law identify a good insolvency law as one that can influence society's views about failure and

[71] See Seyi Akinwunmi, Corporate Insolvency Law in Nigeria-The Need for Reform last accessed via the internet at http://www.akinwunmibusari.com/images/documents/Coporate%20Insolvency%20Practice.pdf on 18 July 2011.

stigmatization and considers ways of changing negative social attitudes. As earlier stated there is a general consensus in Nigeria that suggests that it is the stigma associated with bankruptcy that has led to the avoidance of bankruptcy proceedings by debtors in Nigeria. These benchmarking sources are therefore an important consideration in Nigeria's insolvency law reform process because they provide different approaches for influencing and changing negative social attitudes thereby fulfilling the normative role of law which is to bridge the gap between what is and what ought to be.

There is also the problem of costs and inefficiency associated with bankruptcy proceedings under the Nigerian Bankruptcy Act 1978 as a result of the bankruptcy proceedings not being what Inam Wilson describes as 'first charge' proceedings.[72] The Guide recommends that a good insolvency law should provide for the efficient resolution of insolvency that minimizes costs; similarly the EBRD recommends the speedy resolution of insolvency proceedings. No doubt the process of reforming bankruptcy proceedings under Nigeria's Bankruptcy Act 1978 will benefit from the various approaches recommended by these sources. Ultimately, the various attempts at benchmarking insolvency norms should no doubt provide Nigeria's insolvency law reform process with a valuable source of key objectives and core features necessary to modernize its insolvency law regime.

[72] n 40 above, 14.

SUMMARY

This chapter offered answers to the question as to what impact insolvency law reforms would have on the provision or availability of credit for SMEs in Nigeria. It argued that all creditors, irrespective of whether they operated in the formal or informal credit sectors, were motivated by the expectation that loans made would be repaid. However, it accepted that not all loans made would be repaid due to various reasons. The chapter therefore argued that because insolvency law provided a collective and orderly process for the collection of debts, it was an incentive that should encourage creditors to advance credit and as a result promote entrepreneurship.

The chapter went on to compare an insolvency law system with a system of individual creditor remedies or a 'non-bankruptcy' system of remedies and argued that efficiency would be an important incentive for creditors in deciding which system to prefer. It demonstrated by engaging in a normative and prescriptive debate as to the goals of insolvency law that, an insolvency law system was amongst other things, an efficient collective debt recovery mechanism which recognized and protected the interests of groups in society apart from debtors and creditors, preserved viable commercial enterprises and gave debtors the opportunity of a fresh financial start. The chapter then argued that if Nigeria was to gain from the various beneficial purposes available under an insolvency law system, it would need to have a 'good' insolvency law system as opposed to one which was dated and inefficient. It suggested that the minimum characteristics of a good insolvency

law system are that it should serve as a collective debt recovery tool and afford debtors the opportunity of a fresh start.

Some benchmarking sources of insolvency norms were also identified and analysed to see what key objectives and core features are considered necessary to modernize an insolvency law regime, in this case Nigeria's insolvency law regime. It was also shown how seeking resolution to the problems Nigeria's insolvency law regime identified in this thesis can benefit from the recommendations offered by these sources.

In the following chapter, different institutional frameworks for insolvency systems as well as different insolvency law models are considered. In particular, the insolvency law regimes of the US and England are studied with the expectation that insights can be gained which would be useful in the reform agenda intended for Nigeria's insolvency law. The literature on legal transplants of insolvency law is also considered in order to highlight likely challenges that a law reformer would face in transplanting a foreign insolvency law model. The point to be made is that this thesis is not opposed to borrowing a leaf from the insolvency law regimes of other countries such as the US, or England or any other jurisdiction for that matter. In fact, the foregoing and the following chapters should provide policy and law makers with guidance for reviewing and reforming Nigeria's insolvency law. However, it is argued that caution must be applied in doing so as the literature of legal transplants points to the fact that there are challenges faced in transplanting foreign laws. So for instance, Chapter 11 of the US Bankruptcy Code is often touted as the model

for corporate reorganization and many countries have therefore attempted to recreate Chapter 11 within their insolvency law regimes. The problem with doing that is that US bankruptcy law is a product of a history, culture and politics unique to the country itself. This would explain why attempts to transplant US style bankruptcy law in Japan 'have failed to overcome strong cultural attitudes against bankruptcy'.[73]

[73] Nathalie Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, (2005) 28 B.C. College Int. & Comp. L. Rev. 18, also available at http://law.bepress.com/expresso/eps/172 (last accessed 18 July 2011).

CHAPTER SIX

A STUDY OF SOME MAJOR INSOLVENCY LAW MODELS

In this chapter, some areas of the insolvency law regimes of the US and England are studied with the expectation that insights can be gained from studying these models which would in turn be useful in any proposed reform agenda intended for Nigeria's insolvency law. However, following from previous chapters, it is argued that the prevailing realities in the US and England place different demands on the insolvency law regimes of these countries and as such whilst useful insights are to be gained from studying their insolvency law models, care must be taken so as not to borrow from these models without regard for the prevailing Nigerian situation. So for instance, whilst it is true that insolvency law reform aims at changing attitudes to risk taking, insolvency law reform must also be tailored to meet the demands of the prevailing realities of the society in which the reform is undertaken.[1] This is essential if insights from foreign insolvency law models are to be effectively 'transplanted' in Nigeria. The evidence of previous legal transplantation in Nigeria's colonial era bears witness to this argument in the area of insolvency law. Therefore, in order to establish the need for effective transplants, the impact of legal transplantation of US style bankruptcy law in certain jurisdictions is also considered.

[1] For example, the US Glass-Steagal Act of 1933 and the Financial Services Modernization Act of 1999 in the US were enacted in reaction to new realities and challenges.

This chapter also looks at intermediaries and the role they can play in bridging formal and informal understandings of credit, bridging informal arrangements and formal insolvency procedures, etc.

6.1 AN OVERVIEW OF US INSOLVENCY LAW

Chapter 11 of the US Bankruptcy Code is often touted as worthy of emulation by other countries for the innovation it introduced in business reorganization. Chapter 11 can be used to reorganize a business and this includes corporations, partnerships and sole proprietorships. The goal of Chapter 11 reorganization is that a company is not liquidated at the earliest indication of financial distress but rather continues to trade for a period of time with the intention that the company will either be able to pay its creditors from future profits or be sold as a going concern and the proceeds used in paying off debts. A Chapter 11 bankruptcy case starts in two ways; by voluntary petition which is filed by the debtor or by involuntary petition which is filed by creditors. When a voluntary petition is filed, the debtor becomes 'a debtor in possession' and retains possession and control of the assets whilst undergoing reorganization. The same applies where an involuntary petition has been made and an order for relief has been entered. One unique feature of US Chapter 11 is the fact that the debtor in possession has the power to continue the operation of the business and to perform the functions that a trustee would be appointed to execute under

other chapters of the US Bankruptcy Code.[2] This is a different approach from other insolvency law regimes where an administrator is appointed to oversee the management of the business. Although a debtor in possession has many of the powers and performs many of the duties of a trustee, the US trustee would still have the responsibility to monitor and supervise the Chapter 11 case and ensure that the debtor in possession complies with reporting requirements.

Creditors' committees are another feature of Chapter 11. Creditors' committees are appointed by the US trustee[3] and consist of unsecured creditors holding the seven largest unsecured claims against the debtor. The creditors' committee acts as a check to ensure the proper management of the business by the debtor in possession. It is able to achieve this by investigating the debtor's conduct and operation of the business as well as participating in the formulation of a business plan.

Again another important feature of Chapter 11 is the automatic stay which allows for the suspension of all judgments, collection activities, foreclosures and repossessions of property once a bankruptcy petition has been filed.[4] Even secured creditors are prevented from collecting their debts. Although the automatic stay can be applied by the court under other chapters of the US Bankruptcy Code, the difference however is that creditors under Chapter 11 may be able to obtain an order granting relief from the automatic

---

[2] 11 United States Code Ss 1106, 1107; US Federal Rules of Bankruptcy Procedures s 2015(a). A debtor in possession may also seek the court's approval to obtain further loans secured by the company's assets. Such loans are known as debtor in possession loans.

[3] 11 United States Code s 1102. In the case of North Carolina and Alabama, creditors' committees are appointed by bankruptcy administrators.

[4] 11 United States Code s 362(a).

stay which creditors under other chapters of the Code would be unable to obtain. For example, a secured creditor may be able to successfully apply for the lifting of the stay where the debtor no longer has equity in the property upon which the debt was secured and the property is not essential to the proposed plans for reorganization. Although the automatic stay is able to prevent creditors, whether secured or unsecured, from bringing actions after petition for bankruptcy has been filed under Chapter 11, the rights of secured creditors to their collateral are protected. A secured creditor may seek the court's order for the payment of interest on its collateral, to request further collateral, or even demand the return of its collateral.[5]

Chapter 11 also provides for cases involving small businesses. The US Bankruptcy Code defines a small business case as one involving a 'a small business debtor' and a small business debtor is defined in the Code as one who is engaged in commercial or business activities and has debts both secured and unsecured amounting to $2,190,000 or less and the US trustee has not appointed a creditors' committee or the court determines that a creditors' committee is unable to provide the requisite oversight. As a result of an inability to find creditors willing to serve as creditors' committee or as a result of insufficient activity on the part of a creditors' committee where there is one, the small business case under Chapter 11 is subject to additional scrutiny or supervision by the US trustee especially in terms of filings than other Chapter 11 cases. Such strict filing times and extension limits which were introduced by the 2005 US Bankruptcy Code Amendments are arguably intended to make

[5] See 11 United States Code Ss 361, 363, 364.

small business cases proceed much quicker. So for instance the small business debtor may file a reorganization plan within the first 180 days of the case and that time may only be extended up to 300 days where the Court is satisfied that this should be allowed.[6]

Again the debtor (unless a small business debtor) has the exclusive right to file a reorganization plan within 120 days and this period of exclusivity may be extended up to 18 months or reduced. A creditor is also able to file a competing plan once the period of exclusivity has expired. This serves to discourage excessive delay in the bankruptcy case. When a plan is confirmed, it discharges a debtor from any debt that arose before the confirmation date. Another feature of Chapter 11 is that in the event of an emergency affecting the debtor's reorganization plans a bankruptcy judge is available to hear the debtor.

In spite of the fact that reorganization is esteemed as a worthy goal, critics claimed that the Chapter 11 system was fraught with inefficiency, in particular high failure rates and excessive delays. The result of such criticisms of Chapter 11 not only resulted in congressional amendment in the US in the way of the 2005 US Bankruptcy Reform but also other countries which had emulated Chapter 11 followed suit and inserted features in their new systems to deal with the perceived problems critics raised with Chapter 11, that is the high failure rates and long delays.[7] However utilizing data from two large studies of

---

[6] For the definition of a small business case and small business debtor, see 11 United States Code Ss 101(51C), 101(51D). See also 11 United States Code, s 1121(e) regarding strict time limits for small business cases. See also http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html#business last accessed on 18 July 2011. The strict time limits for filing a plan of reorganization were added as part of the 2005 Amendments to the Bankruptcy Code.

[7] Elizabeth Warren and Jay Lawrence Westbrook, The Success of Chapter 11: A Challenge to

business bankruptcies first filed in 1994 and 2002, two commentators reach a different conclusion than that suggested by the critics of Chapter 11; they conclude that Chapter 11 has been far more successful than supposed. [8]

Warren and Westbrook argue that confirmation of the reorganization plan is the central measure of success in Chapter 11. Prior to the 2005 US Bankruptcy Amendments, the primary complaint about Chapter 11 had been that very few cases ever manage to confirm a plan of reorganization.[9] Their empirical study which is the 'first fully reported, multidistrict data on the percentage of Chapter 11 cases that result in confirmed plans' however shows a much higher success rate than that suggested by conventional wisdom.[10] Again in response to the perception that the Chapter 11 system creates excessive delays, Warren and Westbrook present data that showed that a 'substantial number of cases are moved out far more quickly' than was thought.[11] They conclude that 'a system that was willing to pay some price to see to it that businesses have a meaningful opportunity to survive, moving one-third of the

---

the Critics, (2009) *Michigan Law Review*, 604, 605, 625-626. For example the new German structure was based on Chapter 11 but with modifications added to deal with the perceived problem of delay that Chapter 11 had been criticized for. Warren and Westbrook refer to the following articles as an indication of some of the criticisms that have arisen with regards to Chapter 11: Barry E. Adler, Bankruptcy and Risk Allocation, (1992) 77 Cornell L. Rev. 439, 463-464; Douglas G. Baird and Robert K. Rasmussen, The End of Bankruptcy, (2002) 55 Stan. L. Rev. 751, 752. See also Lynn M. LoPucki, The Trouble With Chapter 11, (1993) Wis. L. Rev. 729.

[8] *ibid* 605

[9] n 7 above, 612. This was largely based on a 1980s report estimating a seventeen percent confirmation rate for all Chapter 11 filings which helped to perpetuate the 'conventional wisdom' that the post 1978 Bankruptcy Code's Chapter 11 was beset by high failure rate.

[10] n 7 above, 615. Their 1994 sample reveals a 30.3% confirmation rate whereas their 2002 sample revealed a 33.4% confirmation rate; all much higher than the 17% confirmation rate estimated by conventional wisdom.

[11] n 7 above, 626. According to their data, the median time spent in Chapter 11 was eleven months, a third of all cases were ejected within six months and about half were gone by the nine-month mark.

cases through the system in less than six months and two-thirds in less than a year seems quite efficient'.[12]

Warren and Westbrook also present data on the impact of Chapter 11 on small business cases and the effect that the 2005 US Bankruptcy Code Amendments were likely to have on future small business cases. For example, in relation to small business cases, the 2005 Bankruptcy Amendments impose strict time limits for confirming a plan of reorganization and this time can only be extended upon justification of the likely success of the case. Warren and Westbrook show however that prior to the 2005 Bankruptcy amendments, eighty-two percent of successful small business cases under Chapter 11 took longer than the six month time limit. They conclude that 'On that basis, most of these otherwise successful businesses might have faced a serious risk of failing under the new provisions'.[13]

The data presented by Warren and Westbrook however confirm the hypothesis that the costs of Chapter 11 (such as the cost of hiring professionals to negotiate a successful plan of reorganization) are sufficiently high that small businesses were forced out of the bankruptcy system entirely or into the Chapter 7 system.[14]

As has been indicated above there are other chapters of the US Bankruptcy Code which deal with other insolvency mechanisms. So for instance Chapter 7 of the US Bankruptcy Code provides for liquidation and relief under this Chapter is available for individuals, partnerships, corporate

[12] n 7 above, 628.
[13] n 7 above, 606.
[14] n 7 above, 636.

organizations or other business entities. Under Chapter 7, the trustee will sell the non-exempt assets of the debtor and distribute the proceeds amongst the creditors. The goal therefore is to liquidate the debtor's assets in a way that maximizes return to the debtor's unsecured creditors. However only individuals can be discharged from their liabilities under Chapter 7, partnerships and corporations are not discharged under the chapter and the individual debtor is discharged from *most* of his debts as certain liabilities cannot be discharged.[15]

It has been stated that the Chapter 7 procedure offers two important protections for small business owners.[16] That is, firstly that upon the owners of the failed businesses filing for bankruptcy and having most of their debts discharged, their future earnings becomes exempt from the obligation to repay the pre-bankruptcy debts. This is known as the 'fresh start'. Secondly, business owners must only surrender current assets above an exemption level set by the State in which they live. These bankruptcy exemptions which vary across the US States mean that the debtor is able to keep certain assets. The most important of these exemptions is the exemption for equity in an owner-occupied home, also known as the homestead exemption. It has been hypothesized that the effect of these variations in bankruptcy exemptions on small businesses is that individuals would be more likely to own their own businesses in States with high level exemptions. Three researchers tested this

[15] 11 United States Code s 523(a). For example, the liabilities that cannot be discharged under Chapter 7 include debts for tax or custom duty, alimony and child support, debts for willful and malicious injury by the debtor to another entity or to the property of another entity, debts for death or personal injury caused by the debtor's operation of a motor vehicle while the debtor was intoxicated from alcohol or other substances, etc.

[16] Michelle J. White, Bankruptcy and Small Business- Lessons from the US and Recent Reforms, 22, last accessed via the internet at http://weber.ucsd.edu/~miwhite/dice-white-final.pdf on 18 July 2011.

hypothesis by examining entrepreneurship patterns in US States with different exemption levels and found that the predicted probability of owning a business was thirty five percent higher for homeowners in States with unlimited homestead exemptions when compared to States with low exemptions.[17]

For individuals including individuals in business, an alternative to liquidation under Chapter 7 is Chapter 13 which provides a means for individual debtors to retain their assets whilst agreeing with their creditors to a debt repayment plan over a period of three to five years. Chapter 13 only applies to individuals and not to partnerships or corporations. One of its main advantages is that by filing under this Chapter, the individual can stop foreclosure proceedings thereby saving his home. Once the repayment plan has been filed and confirmed and all the payments have been completed under the plan, the debtor is discharged from his debts (again with exceptions).[18]

It has been argued however that the 2005 US Bankruptcy reform has significantly reduced the level of protection offered to small businesses under the bankruptcy 'insurance policy'.[19] There is no longer an automatic right to file under Chapter 7; rather debtors must undergo a means test. It is also now more difficult to shelter financial assets using the 'homestead exemption'. Also whereas prior to the 2005 US Bankruptcy Reform, debtors filing under Chapter

---

[17] *ibid* 23

[18] The discharge under Chapter 13 is broader than that which exists under Chapter 7 as the Chapter 13 discharge allows for the individual to be released from certain debts such as debts arising under divorce settlements and debts resulting from wilful and malicious injury to property, which under Chapter 7 would not be dischargeable. Again under Chapter 13 there is a type of discharge known as a hardship discharge which is granted under certain circumstances and after meeting the requirements set by the law. It would however not discharge a debtor from any debts that are not dischargeable under Chapter 7.

[19] n 16 above, 25.

13 could propose how much they could repay, they must now use part of their post-bankruptcy earnings to repay their debts for the next five years. Even though it appears that the 2005 US Bankruptcy Reforms have significantly reduced the so called bankruptcy 'insurance policy', it is believed that lenders will now be more willing to extend business loans to small business owners as a result of the reduction in the insurance that US bankruptcy now offers.[20]

One notable feature of the US Bankruptcy Code is the requirement that no individual is allowed to be a debtor under Chapter 11 as well as other chapters unless such an individual has received within180 days before the bankruptcy case begins, credit counselling from an approved credit counselling agency whether in an individual or group briefing. They must also complete a debtor education course in order to have their debts discharged. The US Trustee Program approves organizations which provide the compulsory credit counselling and debtor education and only course providers that appear on the US Trustee Program list can advertise their services as being approved by the US Trustee Program. Whereas credit counselling takes place before filing for bankruptcy, debtor education takes place after filing for bankruptcy but before debts are discharged. So important is this requirement that, certificates are issued by the course providers and numbered through a central automated system in order to prevent fraud. And in order to evidence that a credit counselling or debtor-education course has been undertaken these certificates must be filed at the time of filing for bankruptcy or before the discharge of debts. At a credit counselling session, not only are a person's financial situation

[20] n 16 above, 25.

explored and a personal budget drawn up, but alternatives to bankruptcy are also discussed and considered. On the other hand, a debtor education course involves developing a budget, managing money, using credit wisely, etc.[21]

This concept of receiving credit counselling or debt education as it is referred to in the US will be considered in-depth within the context of what applies in England.

6.2 AN OVERVIEW OF ENGLISH INSOLVENCY LAW

Formal insolvency procedures in England are liquidation, voluntary arrangements, administration and administrative receivership.[22]

Under English insolvency law, there are two modes of liquidation. Liquidation could either be a compulsory liquidation or a voluntary liquidation. Proceedings for a compulsory liquidation starts when a petition is presented by the company or the directors or by any creditor, or any contributory.[23] Where the court is satisfied that the circumstances in which a company may be compulsory liquidated are satisfied, it will make a winding up order. The circumstances include that the company is unable to pay its debts.[24] A company is unable to pay its debts if it fails either of the cash flow or the balance sheet

[21] http://www.usdoj.gov/ust/eo/bapcpa/ccde/docs/FTC_Consumer_AlertCC.pdf (last accessed 18 July 2011).

[22] See Insolvency Act 1986, Enterprise Act 2002; See also texts such as Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 2002) for a discussion of these procedures.

[23] Insolvency Act 1986, s 124; a petition to court may also be made by a liquidator or temporary administrator.

[24] Insolvency Act 1986, s 122; other circumstances include that the company has resolved by special resolution that the company be wound up or that the court believes it is just and equitable that the company be wound up.

tests[25] and a creditor who is owed over £750 has served the company with a written demand for payment and the company has for three weeks not paid the sum, nor secured the sum, nor compounded the sum to the reasonable satisfaction of the creditor. A company is also deemed unable to pay its debt if an order of the court requiring the company to pay a certain sum to a creditor has not been satisfied.

The other mode of winding up which is the voluntary winding up has two types namely members' winding up and a creditors' winding up. A company can be voluntarily wound up in certain circumstances which include where the company has decided that the business should be wound up or on the other hand the company has decided that it cannot by reason of its liabilities continue its business.[26] Both types of voluntary winding up are commenced by the passing of a resolution by the company and the resolution would indicate whether it is in fact one or the other.[27] The difference between a members' voluntary winding up and a creditors' voluntary winding up is the statutory declaration of solvency which is made in a members' voluntary winding up but not in the case of a creditors' voluntary winding up. A statutory declaration of solvency made by the directors of the company indicates that they have made a full inquiry into the affairs of the company and have formed the opinion that

[25] Cash flow insolvency is a case where the firm is unable to pay its debts as required whereas balance sheet insolvency signifies that the book value of a firm's assets are less than those of its liabilities.

[26] Insolvency Act 1986, s 84 includes another circumstance where a company may be voluntarily wound up and that is 'when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring it to be wound up voluntarily'.

[27] Insolvency Act 1986 s 86; a voluntary winding up commences on the date that the resolution for winding up is passed.

the company will be able to pay its debts in full together with interest within a period not exceeding 12 months.[28] Where however in the course of a members' voluntary winding up, the liquidator is of the opinion that the company will be unable to pay its debts as was declared in the statutory declaration, the members' voluntary winding up is converted into a creditors' voluntary winding up.[29]

Unlike liquidation where the goal is to sell the company's assets or the business in order to maximize returns for creditors, voluntary arrangements (including schemes of arrangement) and administration are formal procedures that are geared towards reorganization or rescheduling of debts. It is not surprising therefore that the company does not have to be unable to pay its debts before resort could be had to a voluntary arrangement or scheme of arrangement. The procedure for a Company Voluntary Arrangement is initiated when the directors (or the administrator or liquidator if the company is in administration or liquidation) propose to the shareholders and unsecured creditors of the company a composition in satisfaction of the company's debts or a scheme of arrangement of its affairs. Such a proposal would provide for a nominee to either act as a trustee or supervise the voluntary arrangement.[30] The nominee submits a report to the court within 28 days or longer if the court allows as to whether, in his opinion, the proposed voluntary arrangement has a reasonable prospect of being implemented and whether the proposal for a

[28] Insolvency Act 1986, s 89, s 90.
[29] Insolvency Act 1986, s 95, s 96.
[30] A person authorized to act as a 'nominee' is someone who is licensed as an insolvency practitioner.

voluntary arrangement should be put to shareholders and creditors at meetings. Where meetings are summoned, those meetings will hold for the shareholders and creditors to decide whether to approve the proposed voluntary arrangement.[31]

A feature that is available in voluntary arrangements in England but unavailable under the formal arrangement procedure in Nigerian insolvency law is the moratorium. As already stated in Chapter Five, whereas CAMA provides for a moratorium on actions and proceedings during winding up, it makes no provision for a moratorium during schemes for arrangement or compromise. As a result these schemes are rarely used prior to liquidation to avoid situations where the process could be undermined by action taken by any creditor. In England however, since 1 January 2003, there has been a provision for a moratorium on legal processes for companies proposing a voluntary arrangement. Interestingly, this moratorium is known as the small company voluntary arrangement moratorium, eligibility for which is determined with reference to the definition of a small company under the Companies Act 2006.[32]

Unlike liquidation, the purpose of Administration is namely: to rescue the business as a going concern; or sell it as quickly as possible obtaining the best possible returns for the creditors; or to realise property in order to make a distribution to one or more secured or preferential creditors.[33] In other words, it is only if it is not possible to rescue the business as a going concern, that the

[31] That is, either scheme of arrangement or individual voluntary arrangements.
[32] Companies Act 2006, s 382, s 465.
[33] Insolvency Act 1986, Schedule B1, para 3.

administrator would seek to realise the company's property and obtain a better result for the benefit of the creditors as a whole than would have been obtainable if the company had been first put into liquidation. Again, it is if this second goal is not realisable, that the administrator would seek to realise property for the benefit of one or more secured or preferential creditor.

The appointment of an administrator can be made either in or out of court. An application to court to appoint an administrator may be made by the company, its directors or one or more creditors of the company. The court may make an administration order only if it is satisfied that the company is or is likely to become unable to pay its debts and the administration order is reasonably likely to achieve the purpose of administration.[34] On the other hand, an appointment out of court can be made by the holder of a qualifying floating charge, the company or its directors. A qualifying floating charge is a floating charge over the whole or substantially the whole of the company's property.[35] The holder of such a charge is able to make an appointment of an administrator at any time when an event has occurred which would allow him to enforce his charge and this would likely be a default under a loan agreement. The holder of a qualifying floating charge is also able to appoint an administrator in court. In such a situation, the court may make an administration order whether or not the company is actually insolvent or likely to become insolvent.[36] From the foregoing, the appointment of an administrator can occur when a company is

[34] Insolvency Act 1986, Schedule B1, para 10-13.
[35] Insolvency Act 1986, Schedule B1, para 14, 22.
[36] However this is only possible if the holder of the qualifying floating charge could have appointed an administrator under paragraph 14 of Schedule B1 of the Insolvency Act 1986.

insolvent or likely to become insolvent but even when a company is not actually insolvent (i.e. unable to pay its debts).

Since the introduction of administration, a practice known as pre-packaging administration has evolved. Pre-packaged administration or Pre-packs as they are popularly known is the process whereby the sale of all or part of a company's business or assets is arranged before the appointment of an administrator.[37] The business or assets are sold soon after the appointment of the administrator. In other words it is a type of pre-emptive action by which the owners of a struggling but arguably viable business negotiate with a prospective buyer in order for the company to be sold ahead of formal insolvency. Unfortunately when this happens, many creditors have their debts written off. In addition, administrators cannot access additional funding to bail out the businesses. According to one commentator, 'groups representing creditors say the increased use of pre-packs can make it too easy for owners to walk away from their debts and then retake control of the company and resurrect it, phoenix-like'.[38] This has led to criticisms that whilst pre-pack administration has been known to rescue jobs, it quite often results in lower overall returns for unsecured creditors. For example when a company known as USC went into administration, it sold 43 of its 58 business outlets through a

[37] See Statement of Insolvency Practice 16 (E&W), Pre-packaged sales in administrations, 2, last accessed at http://tmp.co.uk/_media/docs/SIP_16.pdf on 18 July 2011. Although Pre-packs are not specifically provided for by English insolvency legislation, the Statement of Insolvency Practice 16 contains guidance on best practice for administrators involved in pre-packs. Further guidance for administrators involved in pre-packs can also be found in the revised Insolvency Code of Ethics issued in January 2009. In the US, pre-packaged sales are actually provided by the US Bankruptcy Code.

[38] See Kate Kelland and Tome Freke, For Some Britain's Insolvency Laws Add to Pain, last accessed via the internet on http://www.reuters.com/article/idUSL372925020090212 on 18 July 2011.

pre-pack to a new company set up by the previous owners of USC. Of the 1427 jobs that the business had created, the pre-pack saved 1127 of those jobs. It is facts like these that are proffered in countering the fact that a lot of debts owed to creditors are written off. Whatever the arguments for or against pre-packs, the fact is that there are strict guidelines for effecting this procedure and they are carried out by licensed insolvency practitioners.

An administrative receiver is a receiver or manager of the whole or substantially the whole of a company's property who is appointed by the holder of a qualifying floating charge. From 15 September 2003, the Enterprise Act 2002 introduced a prohibition on the appointment of an administrative receiver.[39] From that date, a holder of a qualifying floating charge in respect of the company's property may not appoint an administrative receiver of the company apart from a few exceptions namely capital market arrangements, public-private partnership projects and utilities projects.[40]

The Enterprise Act 2002 was introduced in order to encourage entrepreneurship. The main features which the Act introduced to the English insolvency law regime include:

1. A new style and streamlined administration procedure to facilitate the rescue of businesses in a cost efficient manner.
2. Restriction on the ability to appoint an administrative receiver to holders of pre- existing floating charge securities.

[39] A floating charge entered into before 15 September 2003 is not subject to the prohibition.
[40] Insolvency Act 1986, s 72A, s 72B, s 72C, s 72D, Schedule 2A.

3. Introduction of an earlier discharge from bankruptcy; the period of automatic discharge from bankruptcy has been reduced to a maximum of twelve months.
4. Introduction of Bankruptcy Restriction Orders & Undertakings to protect the public from culpable bankrupts.
5. Amendments to the Individual Voluntary Arrangements regime to include amongst other things fast track voluntary arrangements.
6. Introduction of Income Payment Arrangements as an alternative to Income Payments Orders and like the latter are designed to facilitate bankrupts in making affordable contribution towards their debts.

Another important feature of the English insolvency law regime is the requirement that insolvency practitioners are qualified to act in that capacity. In relation to companies, this means any person acting as a liquidator, administrator, administrative receiver, or as nominee or supervisor of a company voluntary arrangement.[41] And in relation to an individual it means any person acting as trustee in bankruptcy, interim receiver of property or permanent or interim trustee in the sequestration of estate, trustee under a deed of arrangement in Scotland, or as nominee or supervisor of an individual voluntary arrangement.[42] Similarly, an insolvency practitioner in relation to an insolvent partnership is any person acting as liquidator, provisional liquidator or administrator, trustee, or nominee or supervisor under a proposed voluntary

[41] Insolvency Act 1986, s 388(1).
[42] Insolvency Act 1986, s 388(2).

arrangement.[43] Recognised professional bodies authorise and regulate insolvency practitioners in the UK and subject to other sections of the Insolvency Act 1986, a person who acts as an insolvency practitioner for an insolvent company or individual when he is not qualified to do so may be liable to imprisonment or a fine or both.[44] Some of the criteria used for authorising insolvency practitioners include education, practical experience and training.

Although credit counselling is not a requirement of the law in England as it is in the US, there are however several organizations that offer credit counselling services. One of such organizations is the Citizens Advice Bureau. In relation to debt enquiries, apart from giving clients information and advice and signposting towards the formal insolvency procedures, the Citizens Advice Bureau can negotiate informal arrangements between clients and their creditors. Arguably, the services rendered by credit counselling organizations should be considered as part of England's insolvency law regime as they act as a bridge between informal arrangements and formal insolvency procedures.

The Role of Intermediaries between Formal and Informal Understandings of Credit: A Case Study on the Citizens Advice Service

In Nigeria, there is a huge gap between the formal and informal credit sectors as well as between formal and informal understanding of credit, etc. Arguably this gap can be bridged by intermediaries that already exist in the communities

[43] Insolvency Act 1986, s 388(2A).
[44] Insolvency Act 1986, s 389, s 389A.

as well as new intermediaries that can be created.

The community based focus and nature of African societies creates several avenues for intermediaries to become useful and effective. In Chapter Three it was revealed that historically and even presently, births, deaths, marriages and even debt matters are still handled as community affairs in Nigeria. Given the communal nature of Nigerian society and its communal approach to dealing with most issues including debt, arguably such communal orderings can be utilized in a similar fashion as the Citizens Advice Service in the UK.

On the other hand there is an argument for the establishment of various credit referencing bureaus to provide reliable information that can assist creditors in making decisions regarding lending to SMEs that perhaps have had no prior dealings or relationship with the formal banking sector. Again, information gathering within Nigerian communities can prove to be effective. In Chapter Four, it was shown how the choice of the 'interview' as a tool of measurement within the context of a survey research method was influenced by the fact that Nigerian society as with other African societies has rich oral traditions of storytelling, narrative poetry and proverbs, songs, etc. The opportunities exist for the information gathering and dissemination ability of Nigerian communities to serve as a powerful tool in the creation of credit referencing agencies.

In the UK, the Citizens Advice Service is a powerful institution not only for educating and informing but also for effecting change. Since 1939 Citizens

Advice Bureaux (CABx) have been providing free, independent and impartial information and advice in communities all over the UK. In fact CABx advisers can give advice in over 40 different languages and CAB information and advice available on the internet are available in English, Welsh, Bengali, Chinese, Gujarati Punjabi and Urdu. The Citizens Advice Service is so successful in that it has been reported that 95 percent of the UK public have heard of the service and this would explain why the bureaux are able to help with 5.5 million problems a year. Debt enquiries account for a large number of cases seen by bureaux and so CABx deal with one million new debt issues each year making CABx the largest providers of free, independent money advice in the UK. An interesting feature of CABx is that the national organization (Citizens Advice) and the various bureaux in 3200 locations are registered charities. Trained volunteers make up the majority of the workforce of the Citizens Advice Service and their work in monetary terms would be worth around £86 million a year. Apart from providing free information and advice, the service is able to influence local and national policy by campaigning for improvement in policy and services using evidence obtained from the numerous cases seen on a daily basis.

The number one enquiry at CABx is debt and the role of the CAB when dealing with the numerous debt cases it encounters can be summed up as: educative, informative, mediating, negotiating, intermediary, enabling. A client whose case is dealt with by a CAB Debt Adviser (or Money Adviser as they are referred to these days) would go through a process that would include among

other things: a full exploration of the client's situation, preparation of a budget sheet, prioritisation of debts, maximising income, exploration of various strategies for debt resolution, creation of a Financial Statement, etc. According to the Debt Advice Handbook:

> Debt advice is a series of tools and professional strategies that can be used to counter the problems so far described. Debt advice provides help to clients by:
>
> enabling them to maximise their income;
>
> explaining the implications of the non-payment of each of their debts and on this basis deciding which are priorities;
>
> assisting them to plan their budgets;
>
> helping them to choose a strategy (usually to reduce or stop payments) that will minimise the effects of their debt on their financial, social or medical well being by giving them impartial, independent and confidential advice which enables them to make an informed choice about the options available to them;
>
> preserving their home, fuel supplies and liberty,
>
> assisting by advice or representation with the implementation of whatever strategy is chosen.[45]

One strategy that could be employed for resolving a client's debt situation involves negotiating with creditors and reaching informal agreements. However this is not always the appropriate option for every client and trained

[45] See The Debt Advice Handbook 8th Edition (UK: Child Poverty Action Group, 2008), xiv, xv; when an adviser is dealing with a client involved with a small business, the stages of debt advice highlighted above will be slightly modified. So for instance, the financial statement drawn up for the client will include the income and outgoings of the business and not the individual. See the debt advice overview diagram in the appendix.

debt advisers are only too aware of this fact. It is crucial in the debt advice process that advice given to clients is amongst other things appropriate for the client's particular situation. The advice given must also be in the best interests of the client and any strategy employed must be realistic and viable. Whatever a client's situation, all options are fully explored and the necessary information provided allowing clients to make an informed responsible decision as to how to deal with their debts. In effect although the adviser gives guidance, it is the client who makes informed decisions about what strategies they wish to employ in the resolution of their debt situation.

From the foregoing, it is clear that the work carried out by CABx feeds into the insolvency law regime in England because advisers at CABx may signpost clients towards formal insolvency mechanisms that may be appropriate and relevant to their particular case. Arguably most of the clients seen at CABx may already have a general awareness of different insolvency law mechanisms (Individual Voluntary Arrangements, Bankruptcy, etc) perhaps as a result of the various infomercials advertising organizations that can give assistance with these procedures. So for instance, it is not unusual for a client with multiple debts to enquire about bankruptcy or an Individual Voluntary Arrangement as a possible solution to their debt problem. It points to the fact that there is an awareness of some if not all of the insolvency mechanisms provided for by law, albeit a lack of knowledge as to the intricacies involved in their application. Specialist debt advisers in CABx are able to provide information about the various insolvency mechanisms that are

available for dealing with debt and are therefore able to guide clients. However debt advisers are usually not insolvency practitioners and therefore are aware of their limitations. A specialist debt adviser therefore knows when the services of an insolvency practitioner are required and will inform the client if this is the case. The point being made is that CABx act as a bridge between informal arrangements with creditors and more formal insolvency arrangements or as a type of intermediary between debtors and the formal insolvency law system. For instance from 6 April 2009, a new formal insolvency procedure is to be added to the already existing formal insolvency procedures available in England. Known as the Debt Relief Order, it is aimed at persons for whom bankruptcy would be too expensive. Although the debt relief order will be administered by the Official Receiver through the Insolvency Service, applications for a debt relief order must be made through an 'approved intermediary' designated by a competent authority. Citizens Advice is one of such competent authorities and Specialist Debt Advisers within the organization who meet certain criteria will be able to act as approved intermediaries. Again the terms competent authority and approved intermediary buttress the argument that the Citizens Advice Service and arguably other Money Advice Services like it act as a bridge between informal arrangements and formal insolvency procedures and therefore may be considered to be a feature of the insolvency regime in England.

The United Kingdom is currently experiencing a recession, as is the case in other parts of the world. This current recession is apparently worse than

the recessions of previous times. With high rates of business insolvency, unemployment, redundancy, even businesses of SMEs are badly affected.[46] Access to credit in the recession has been somewhat restricted and this is understandable given that it was the reckless and irresponsible lending culture that has led to the so called 'credit crunch'. For many SMEs the loss of credit has caused their businesses to struggle and in some cases go through insolvency procedures. CABx have therefore seen a rise in the number of debt enquiries seen.[47] One of the initiatives recently introduced by the government for dealing with the credit constraints which SMEs are facing is the Enterprise Finance Guarantee Scheme which seeks to enable SMEs obtain finance for their businesses. CABx are able to provide such information as well as other information and advice that would be useful to entrepreneurs struggling with debt.

Perhaps another noteworthy role that community intermediaries can perform in Nigeria could be to engage in a national campaign to reduce the stigma of bankruptcy and to encourage fresh financial start and entrepreneurial activity. Such a significant undertaking would clearly require the involvement of the Nigerian Government but as Chapter Four demonstrated, the Nigerian Government has never been shy of embarking on initiatives aimed at encouraging entrepreneurship. And in a similar vein to the approach taken by the European Commission with its Best Project Campaign on a Fresh Start, the

[46] See http://www.fsb.org.uk/default.aspx?id=1&loc=pressroom last accessed on 18 July 2011. According to the Federation of Small Businesses, there are now 4.8 million small businesses in the UK and the impact of the recession on these businesses has been tremendous.

[47] All too frequently, enquiries are intertwined. A client with an employment enquiry will have a debt enquiry; a client with a housing enquiry will have a debt enquiry, etc. The list goes on.

use of community intermediaries would ensure that such national campaign and education could be tailored to be local-specific and adapted to the various Nigerian communities.

From the foregoing, it is apparent that 'intermediaries' are able to play a significant role in the insolvency law regime of a country.

6.3 MORE THAN INSOLVENCY LAW – A CASE STUDY ON OTHER FACTORS AFFECTING ACCESS TO CREDIT AND ENTREPRENEURSHIP OF SMEs

There are several regulatory and institutional constraints that affect access to credit and entrepreneurship for SMEs in Nigeria and reforming Nigeria's insolvency law regime is only one step in the right direction. Arguably, it would take more than reforming Nigeria's insolvency law regime to improve access to credit for SMEs and in so doing encourage enterprise among SMEs as there are other factors that affect how SMEs do business in Nigeria. On a quest to obtain credit from banks, SMEs in Nigeria would have numerous hurdles to cross. For instance, SMEs would have to be registered by the Corporate Affairs Commission (CAC) either as a company or enterprise which Nigerian banks are more predisposed to dealing with when it comes to offering loans than individuals. Then there is the Lands Registry and Governor's Office in the various States in Nigeria responsible for registering lands and obtaining approval and for verifying land titles and perfecting security; prerequisites for

using land as security for obtaining loans. These are only a few of the hurdles that SMEs would have to cross before obtaining credit from banks in Nigeria. One would not be out of order to think that perhaps it would be equally appropriate to seek to reform the processes for incorporating SMEs as well as to reform insolvency law in order for SMEs to access credit from the formal credit sector. According to World Bank report on Doing Business in Nigeria 2008:

> High costs of doing business push many entrepreneurs into the informal sector—a serious problem in Nigeria. In 2002/03 the share of output generated by the shadow economy accounted for 59 percent of Nigeria's GDP, compared with 16 percent in China, 26 percent in India, and 29 percent in South Africa. Informality hurts both governments and entrepreneurs. The state treasury forgoes taxes, and informal businesses find it hard to obtain credit, use courts, or access other public services. As a result informal companies tend to be smaller and less productive that their formal counterparts.[48]

Whilst company registration will enable businesses get into the formal sector, and there are already efforts and reform taking place to ensure that it is easier and affordable for entrepreneurs to register their businesses as companies, there is no reason why this should prevent work on reforming insolvency law. Accessing credit and doing business in Nigeria will benefit from the reform of the processes for incorporation of companies as well as the reform of insolvency law. Clearly what is required is a holistic approach in order to

[48] See Doing Business in Nigeria 2008, 3 last accessed on 18 July 2011 at http://www.doingbusiness.org/Documents/Subnational/DB08_Subnational_Report_Nigeria.pdf

using land as security for obtaining loans. These are only a few of the hurdles that SMEs would have to cross before obtaining credit from banks in Nigeria. One would not be out of order to think that perhaps it would be equally appropriate to seek to reform the processes for incorporating SMEs as well as to reform insolvency law in order for SMEs to access credit from the formal credit sector. According to World Bank report on Doing Business in Nigeria 2008:

> High costs of doing business push many entrepreneurs into the informal sector—a serious problem in Nigeria. In 2002/03 the share of output generated by the shadow economy accounted for 59 percent of Nigeria's GDP, compared with 16 percent in China, 26 percent in India, and 29 percent in South Africa. Informality hurts both governments and entrepreneurs. The state treasury forgoes taxes, and informal businesses find it hard to obtain credit, use courts, or access other public services. As a result informal companies tend to be smaller and less productive that their formal counterparts.[48]

Whilst company registration will enable businesses get into the formal sector, and there are already efforts and reform taking place to ensure that it is easier and affordable for entrepreneurs to register their businesses as companies, there is no reason why this should prevent work on reforming insolvency law. Accessing credit and doing business in Nigeria will benefit from the reform of the processes for incorporation of companies as well as the reform of insolvency law. Clearly what is required is a holistic approach in order to

[48] See Doing Business in Nigeria 2008, 3 last accessed on 18 July 2011 at http://www.doingbusiness.org/Documents/Subnational/DB08_Subnational_Report_Nigeria.pdf

promote access to credit and financial services in general and this underscores the various studies and reports that have already been commissioned on the issue.[49]

The World Bank has done considerable work in this area of promoting access to credit for SMEs and its wealth of resources will no doubt be useful to

[49] For instance in South Africa, although the innovative use of technology has been identified as a tool for promoting access to credit and financial services for low income consumers and SMEs in particular, the need for the entire framework for financial services to be overhauled is not ignored. One report states that the increased use of electronic mechanisms in banking operations and credit scoring systems have among other things helped to lower loan processing and operating costs and consequently improve access to credit and financial services. 'These efforts have allowed banks to profitably provide high frequency, low-volume services. Services are increasingly delivered through new channels, including kiosks, lottery outlets, and post offices. As a result, access to loans, savings, and other much-needed financial services is increasing for low-income customers and small and medium-size enterprises—including in rural and remote areas'. However the same report states that 'without a supportive overall enabling environment, access will not broaden. This overall enabling environment concerns the legal and regulatory framework for financial services, the information infrastructure (including credit bureaus, even for micro-lenders), the general contract enforcement, the regulation of the telecommunications industry, and the electronic security framework (to assure confidence in the take up of new technologies). See generally South Africa: Technology and Access to Financial Services, particularly 4-5 last accessed via the internet at http://siteresources.worldbank.org/DEC/Resources/41114_South_Africa_Access_to_Finance.pdf on 18 July 2011.

Similarly, the approach taken by the International Finance Corporation (IFC), a member of the World Bank Group appears to suggest the importance of a holistic approach to reform in the financial services sector. The IFC is driven by the idea that effective competition between firms of whatever size is what is crucial to promoting economic development. As a result this objective guides the various strategies it applies in improving access to credit for SMEs. In other words, if credit to SMEs can be improved, then SMEs stand a better chance of competing effectively with large businesses to encourage economic development of nations. Although it identifies collateral requirements and credit ratings as key elements of the financial infrastructure required to improve access to credit for SMEs, it also believes in wider reforms. According to the IFC:

The larger framework includes broad interventions to strengthen and improve the business environment as well as enhancements to the financial system that expand access to credit. We have programs to improve business skills, enhance access to markets, and encourage competitiveness. We pursue these programs at a wholesale level, working with intermediaries that can provide information, training, and services to the broad business sector. This approach enables us to achieve a broader reach and increase the efficiency of our engagements. Where needed, however, IFC can also provide more targeted assistance to specific, strategic sectors, so we can learn what works before launching a larger effort. See generally the IFC brochure on SMEs titled Creating Opportunities for Small Businesses, 2, last accessed via the internet at http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/ifcandsmes_brochure2007/$FILE/IFCandSMEs_Brochure2007.pdf on 18 July 2011.

See also Oliver Hart, Different Approaches to Bankruptcy, 1-2, last accessed on 18 July 2011 at http://www.bankofengland.co.uk/publications/events/conf0209/hart.pdf. Hart acknowledges that bankruptcy reform should not be seen in isolation and should be considered along with legal and other reforms as well as changes in international financial systems.

any reform agenda set for Nigeria. Its 'Doing Business' annual reports examines regulations that enhance or constrain business activity. Although it does not study every area of business, it is however a wealth of information and therefore a useful tool as it measures 10 stages of business life namely: starting a business, dealing with construction permits, employing workers, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business. Clearly this indicates that the World Bank takes a holistic view to institutional and regulatory frameworks that affect businesses.

With regards to the issue of how businesses get credit, the Doing Business annual reports apply two sets of indicators to assess how well credit markets in economies are functioning. These two indicators are: credit registries/information and the legal rights of borrowers and lenders.[50] Among other things, its Credit Information Index measures the extent to which credit information systems facilitate lending, the ease of access to information and the quality of information, etc. On the other hand, its Legal Rights Index measures the degree to which collateral and bankruptcy laws protect the rights of borrowers and lenders.[51] The use of the Legal Rights Index by the World Bank

---

[50] Doing Business 2010 Nigeria, last accessed via the internet at http://www.doingbusiness.org/reports/subnational-reports/~/media/FPDKM/Doing%20Business/Documents/Profiles/CountryOLD/DB10/NGA.pdf on 18 July 2011.

[51] *ibid* 24 where the World Bank outlines the methodology it applies as follows:

> Credit information: three indicators are constructed:
> - depth of credit information index, which measures the extent to which the rules of a credit information system facilitate lending based on the scope of information distributed, the ease of access to information and the quality of information
> - public registry coverage, which reports the number of individuals and firms covered

in its research and in particular the way it measures the extent to which bankruptcy laws protect the rights of borrowers and lenders clearly lends support to the argument of this present thesis that such laws have a bearing on how businesses access credit.

Its most recent statistics suggest that in terms of its Legal Rights Index, Nigeria has over the past three years consistently scored eight (8) in a scale of zero to ten (0-10) and in terms of its Creditor Information Index however, Nigeria has over the past three years scored zero (0) in a scale of zero to six (0-6). Whereas a high score on the Legal Rights Index indicates that the laws of a particular economy are better designed to expand access to credit, a high score on the Credit Information Index indicates that more credit information is

---

by a public credit registry as a percentage of the adult population

- private bureau coverage, which reports the number of individuals and firms, covered by a private credit bureau as a percentage of the adult population

Legal Rights: the strength of legal rights index measures the degree to which collateral and bankruptcy laws protect the rights of borrowers and lenders. Ten points are analyzed:

- Can a business use movable assets as collateral while keeping possession of the assets, and can any financial institution accept such assets as collateral?
- Does the law allow a business to grant a non -possessory security right in a single category of revolving movable assets, without requiring a specific description of the secured assets?
- Does the law allow a business to grant a non possessory security right in substantially all of its assets, without requiring a specific description of the secured assets?
- Can a security right extend to future or after -acquired assets and extend automatically to the products, proceeds or replacements of the original assets?
- Is general description of debts and obligations permitted in collateral agreements and in registration documents, so that all types of obligations and debts can be secured by stating a maximum rather than a specific amount between the parties?
- Is a collateral registry in operation that is unified geographically and by asset type as well as being indexed by the name of the grantor of a security right?
- Are secured creditors paid first when a debtor defaults outside an insolvency procedure or when a business is liquidated?
- Are secured creditors subject to an automatic stay or moratorium on enforcement procedures when a debtor enters a court-supervised reorganization procedure?
- Are parties allowed to agree in a collateral agreement that the lender may enforce its security right out of court?

available from a public registry or private bureau in the particular economy to which the score relates. A score of zero for Nigeria on the Credit Information Index speaks volumes and does not need much explaining. But does a high score of eight for Nigeria on the Legal Rights Index actually mean that for instance Nigeria's insolvency laws are better designed to expand access to credit and therefore require no reform? One very interesting factor about the World Bank 'Doing Business' indicators is, that in constructing these indicators, it assumes that entrepreneurs are knowledgeable about the regulations that are in place and will use them. Ensuring that entrepreneurs in Nigeria are knowledgeable about regulations and therefore willing to use them is the task at hand and perhaps intermediaries can play a role in this area in the case of Nigeria as has been earlier identified in this thesis.

Again, another commentator in particular has studied 'a triangle of forces' that affects the activity of SMEs namely limited liability, shareholder guarantees, and bankruptcy. David Hahn considers the interplay amongst these forces and develops a framework by which these forces can work in harmony for the benefit of SMEs and entrepreneurship in general. He refers to his outcome as the velvet bankruptcy.[52] It is worth considering the velvet bankruptcy in order to see what insights can be gained for reforming insolvency law in Nigeria.

According to David Hahn three doctrines work in tandem to determine whether or not a corporate creditor (that is a lender) will be repaid when owed. In other words, 'the fulfilment or frustration of a creditor's right to payment' is

[52] See generally David Hahn, Velvet Bankruptcy, (2006) 7 *Theoretical Enquiries in Law*.

contingent on this 'triangle of forces'. These are the doctrines of limited liability of the corporate shareholders (by which he clearly means the corporate shareholder of an SME), the personal guarantee of a shareholder to a corporate lender (by which he clearly means also a shareholder of an SME), and the bankruptcy laws of any given legal regime. Put in the context of SMEs in Nigeria, it would be a worthwhile exercise to consider if indeed these doctrines influence the propensity to increase credit for and encourage enterprise of SMEs.

The principle of limited liability builds upon the principle of corporate personality. In other words because the company is separate from its owners/shareholders, the debts incurred by the company in the way of business and the debts of the shareholders incurred in their own respect are also separate. Hahn argues therefore that limited liability encourages entrepreneurship because as he puts it, it 'shifts the downside risks of business failures to more efficient risk bearers, the creditors'.[53] By so doing, more entrepreneurs (and as the focus of his article is on SMEs, it is safe to suppose that SMEs are included in this catch-all word) will venture into more business opportunities not being overly fearful of failure. Hahn also likens the limited liability principle to the bankruptcy discharge. As he puts it, 'to the extent that one is readily available with no painful side effects, the need for the other, within the business context is pretty much obviated'. Again putting this in context with the Nigerian situation, Chapter Five demonstrated amongst other things the fact that the personal insolvency law in Nigeria i.e. the Bankruptcy Act, is literally non-

[53] *ibid* 527

functional so the option of a bankruptcy discharge whilst available through statute is albeit unused. If indeed the limited liability principle and the bankruptcy discharge have a relationship of proxy or surrogacy as Hahn suggests, then it follows that shareholders of SMEs who fail to take the opportunity of the bankruptcy discharge when faced with financial difficulties would supposedly have had the opportunity of limited liability. Therefore if the bankruptcy discharge is not in use in Nigeria (for whatever reasons), shareholders of SMEs (i.e. entrepreneurs) could to some extent protect themselves and their entrepreneurial abilities by shielding themselves with limited liability. The problem with this is that in order to take advantage of limited liability which not only encourages entrepreneurship but also increases the likelihood of SMEs accessing credit from banks, SMEs would need to be incorporated. Herein is the difficulty for many SMEs in Nigeria in that they are unincorporated and so can neither benefit from limited liability nor are very likely to get a loan from a bank for business as Nigerian banks have shown a preference for offering loans to incorporated businesses.

The reason being that as many SMEs in Nigeria have a few employees working in their operations and a large section of SMEs operating in Nigeria are unincorporated as they could hardly afford to incur the expenses and rigours of incorporation, this fact of non-incorporation would therefore exclude these SMEs from coming under the provisions of the CAMA. This therefore does not paint a very good picture for credit institutions in the formal sector as they would obviously expect to have recourse to the law i.e. insolvency law or some

other debt recovery law in recovering unpaid loans. If the law cannot offer the protections required, presumably this would reduce the amount of loans or credit that these institutions would be willing to offer, hence making credit inaccessible. In other words, the formal credit sector in Nigeria might be more willing to extend credit to SMEs if the law would afford the credit institutions in this sector some guarantee that when debts remain unpaid there is the assurance that some debts can be recovered through the law. This situation with unincorporated SMEs might be resolved by the use of the Nigerian Bankruptcy Act.

Hahn is quick to point out that his article analyzes the interplay between limited liability, discharge in bankruptcy and personal liability of entrepreneurs in SMEs. In other words, the legal protection of a sole proprietorship is outside the scope of his article.[54]

The assumption that SMEs will incorporate to avail themselves of the legal protection from liability i.e. limited liability, is not an unworthy one. In fact one would have thought that if a lack of incorporation was hindering SMEs from accessing credit from the formal banking sector, then an obvious solution would be to incorporate and access the much needed credit. But the solution is not as simple as stated as the costs of incorporating businesses in Nigeria are a factor to contend with.[55] Still, the fact that liability protection of unincorporated SMEs are beyond the scope of Hahn's article is not enough reason not to give consideration to the proposal he puts forward, that is the *velvet bankruptcy*. One

---

[54] *ibid*

[55] The costs of doing business are now reckoned to be significantly lower so that incorporating businesses in Nigeria should not be as expensive as it might have been in the past.

must remember that the umbrella term SME is a term for which there are several definitions using mainly the criteria of number of employees, size of capital investment, turnover, and total assets. Incorporation is not necessarily a factor in determining whether a business is an SME or not so Hahn's proposals are still worth considering. However Hahn is right in his assertion that any enterprise which wishes to enjoy the protection of limited liability must of necessity incorporate. In Nigeria for instance where the criteria of number of employees and total assets are used for defining SMEs and not the factor of incorporation *per se*, banks will still require SMEs to be incorporated if the banks are to do business with them. According to the Small and Medium Industries Equity Investment Scheme (SMIEIS), an SME is an enterprise that has a maximum asset base of N200 Million excluding land and working capital and with a number of staff employed which is not less than 10 and not more than 300 (a definition which disqualifies many businesses in the informal sector and even many in the formal sector).[56] The SMIEIS is a voluntary initiative of the Nigerian Bankers' Committee which requires all banks in Nigeria to set aside 10 percent of their profit before tax for equity investment in SMEs. To qualify for an investment under the scheme, the SME must amongst other things be incorporated as a limited liability company with the CAC.

In further exploring this triangle of factors or doctrines that affect SME activity, Hahn contends that because limited liability shifts the risks of business failures to the creditors, entrepreneurs might engage in risky ventures that in

[56] My father operates a relatively successful business which is incorporated but does not meet the criteria of assets or total number of employees to be considered an SME for the purposes of the SMIEIS but if it is not a small or medium sized business then what is it?

hindsight they ought not to have. This hazard therefore prompts the creditors, i.e. the risk bearers, to shield themselves by taking up personal guarantees from entrepreneurs who require credit. By so doing, the limited liability shield is lifted selectively in favour of the SME's main creditor. From the creditors' point of view, the excessive use of personal guarantees therefore serves to counteract the hazard of entrepreneurs' excessive and inefficient risk-taking. The rationale for this state of things is not necessarily to enhance the collection rights of the SME's main creditor although it does just that as it allows the main creditor to collect its debt without having to share *pro rata* with other creditors. Hahn himself concedes that enhancing collection rights is one possible reason for the excessive use of the guarantee by the lending banks. Hahn argues convincingly that if limited liability was insufficient such that it prompted creditors such as banks to contract out of it by requiring personal guarantees from SMEs, it would have since been done away with. On the contrary the law still recognizes and upholds the value of the principle of limited liability. Hahn himself finds the rationale for the excessive use of guarantees by banks in the idea that the 'bank's demand of a personal guarantee from an SME's entrepreneur serves as a bonding device that combats the perils of excessive risk-taking at the corporate level'.[57] In other words, the personal guarantee obtained by the bank shifts the risk of insolvency occasioned by the hazard of limited liability i.e. excessive risk taking, from the bank as the lender to the entrepreneur. For Hahn, this is the normative role of the entrepreneur's guarantee. He also states that another reason for the excessive use of personal

[57] n 52 above, 532.

guarantees by banks in lending to SMEs can be explained by the twin factor of many SMEs being first time borrowers and having business ideas which value it is difficult to assess. This lack of adequate information (information asymmetry) therefore precipitates the need for the personal guarantee as without it many lenders would refuse credit to SMEs anyway. In a country like Nigeria where there is a lack of credit bureaus or credit referencing agencies, until a relationship is established by the bank and the SME as a result of constant dealings, the information asymmetry looms large for banks. In fact, Nigeria's first licensed credit bureau was only granted a final operating licence in May 2009. Known as XDS Credit Bureau Limited, it was first incorporated in May 2005 and having satisfied the conditions for the grant of a credit bureau license under the Central Bank of Nigeria Act of 2007 has now been licensed.[58] One suspects that until reliable information can be built up about potential borrowers, personal guarantees will continue to be extracted from SMEs. Ultimately, by creating a risk aversion amongst entrepreneurs, the excessive use of the personal guarantee stifles entrepreneurship the very thing that limited liability intended to encourage.[59]

---

[58] Credit Reference Company is another credit bureau which was set up in June of 2007 as the initiative of nine Nigerian banks in partnership with a well known global provider of credit information namely United Bank of Africa Plc (UBA), First Bank of Nigeria Plc, IBTC Chartered Bank Plc, Guaranty Trust Bank Plc, Diamond Bank Plc, Intercontinental Bank Plc, Standard Chartered Bank, First City Monument Bank (FCMB), Access Bank Plc in partnership with Dun and Bradstreet. In the past banks relied on the Credit Registry Management System (CRMS) operated by the Central Bank of Nigeria and one limitation that has been identified in the system is the fact that the system only holds 35000 records in its database and these contained only negative data on consumers. The system has been described as incomplete as best practice requires that credit registry systems should hold both positive and negative data on consumers.

[59] The excessive use of personal guarantees in the formal credit sector can be compared with the excessive requirements of collateral in the indigenous credit sector. Even in recent times, there are still instances where women (including wives) and children have been used as

The third strand in Hahn's triangle of forces affecting SMEs is the discharge in bankruptcy. The discharge in bankruptcy was apparently intended for those who fail financially as a result of unfortunate events as opposed to failing as a result of fraud.[60] Where personal guarantees are being used excessively, the bankruptcy discharge can ameliorate the effects of such a situation (e.g. underinvestment) by encouraging the entrepreneur to invest, confident in the knowledge that should he fail, a second chance would still be available. Hahn argues convincingly that the bankruptcy discharge has the potential to combat the inefficiencies of excessive guarantees, and not only from the entrepreneurs' point of view but also from the banks' point of view. He contends that because bankruptcy proceedings have the benefit of hindsight, judges can therefore differentiate between the entrepreneur who has taken excessive risks leading to financial ruin and the entrepreneur who has simply failed because of genuine economic reasons.[61] An explanation of what the result of the introduction of the bankruptcy discharge to this triangle of forces is follows here.

For the banks, the knowledge that whilst the personal guarantee requested by banks would still protect the banks' interest in loans made to entrepreneurs who have taken excessive risks that that have resulted in the

---

collateral. Other forms of collateral include land and other highly valued properties such as houses and vehicles. In Eleme Kingdom in Rivers State, there is the case of Ngoejor in Onne Community in Eleme whose parents used her as collateral in borrowing money from Chief Osarowate. Chief Osarowate is the Chief Priest of the famous Ejile Shrine in Eleme. As they were unable to pay back the money they borrowed, Ngoejor automatically became one of the wives of Chief Osarowate. Another example is that of Chief Timothy of Rumuola in Rivers State, a well-known indigenous creditor. All over his estates are parked vehicles that were used as collateral for loans.

[60] n 52 above, 540.

[61] n 52 above, 541.

failure of the business in question, it would be unreliable in safeguarding the banks' interest in loans made to an entrepreneur who fails for genuine economic reasons. This new state of things would prompt the banks at the lending stage to gather firm-specific or borrower-specific information about the SME and the business idea in general. Gathering information about SMEs at the initial lending stage which hitherto might have been considered very costly cannot therefore be considered as costly as the inefficiencies of the excessive use of guarantees. In Hahn's words:

> The availability of personal bankruptcy should balance the costs and inefficiencies of entrepreneurs' personal guarantees. But that would occur under an optimal bankruptcy regime. The following...will show why contemporary personal bankruptcy law is suboptimal and how this adversely affects the delicate balance between entrepreneurs' personal guarantees and the discharge in bankruptcy.[62]

Two shortcomings are identified as being responsible for the suboptimal nature of personal bankruptcy law in many countries, namely the length of bankruptcy cases and the stigma associated with bankruptcy. For instance, in Nigeria the stigma associated with bankruptcy means that personal bankruptcy proceedings are neither optimal nor even suboptimal but rather non-existent or fictional. Nigeria is not alone, in that the bankruptcy stigma exists all over the world; in Europe and even in the US. The bankruptcy stigma has however not stopped personal bankruptcy law from being utilized in these parts of the world. The

[62] n 52 above, 542.

statement that 'the law is influenced by social thoughts and perceptions insomuch that social thoughts are influenced by the law'[63] lends credence to a central argument of this present thesis which is that while it is true that insolvency law reforms are proposed for bringing about change in attitudes to risk-taking, law itself survives and thrives by being aware of the changes that already exist in the society's attitudes, beliefs and values. In other words, while the law influences changes in societal attitudes, it also reflects existing societal attitudes.[64] Law on the one hand and attitudes, beliefs and values on the other hand need not be on opposite sides of a divide.

Hahn's proposal of the Velvet Bankruptcy works in the following way: when a corporate insolvency case begins, the court will issue an automatic stay which would serve to prevent the lender from collecting its claim from the corporate debtor. Where a personal guarantee was given, the lender would turn its attention to the guarantor and seek to collect from the guarantor. According to the Velvet Bankruptcy procedure, where the guarantor believes that the demand by the lender would render the guarantor insolvent, such guarantor would be entitled to file a motion with the court adjudicating the corporate insolvency case asking the court to 'subject the lender's collection actions on the guarantee to the court's jurisdiction'. Upon consideration of the entrepreneur-guarantor's motion, the court will issue an order as requested provided that it is satisfied that the collection of the guarantee would indeed

---

[63] n 52 above, 545.

[64] See Rafael Efrat, The Evolution of Bankruptcy Stigma, (2006) Vol. 7 *Theoretical Inquiries in Law* 386, where he states 'while messages embedded in newspaper articles influence public opinion, these messages also reflect existing public opinion.'

render the guarantor insolvent. As a result of the 'consolidation' of the lender's claim, when it comes to distribution, the court will therefore determine what part of the lender's claim is payable by the corporate debtor and what part is payable by the guarantor.

> The corporate part would reflect the *pro rata* distribution to all unsecured creditors. The guarantor's part would reflect a discounted percent of the remainder of the claim. This discount would effectively constitute a discharge of the guarantee liability. Thereafter the court's order would bar the lender from pursuing private collection from the guarantor in the future for the remaining unsatisfied part of the original claim. Effectively, the guarantor would be discharged from the lender's claim, but without ever having to officially declare personal bankruptcy. [65]

Hahn expects that under the Velvet Bankruptcy procedure, the length of time will also be shortened.

From the foregoing it has been established that there are several factors that affect the activities of SMEs and their access to credit. Examining Hahn's Velvet Bankruptcy Procedure was simply a means to explore some of these factors; incorporation and limited liability, information symmetry or asymmetry, the demand for personal guarantees and bankruptcy discharge. These are by no means all the factors affecting the activities of SMEs or their access to credit and entrepreneurship in general. The focus of this thesis and the scope remains the reform of insolvency law but the foregoing is merely an indication that this thesis is not unaware of the breadth of institutional reforms

[65] n 52 above, 547.

that would be required in the Nigerian financial system not only for the system to operate and succeed as a whole but also for access to credit for SMEs to be improved.

6.4 WHAT'S THE TROUBLE WITH LEGAL TRANSPLANTATION?

Watson describes legal transplants 'as the moving of a rule or a system of law from one country to another, or from one people to another'.[66] According to Valderrama, legal scholars have suggested that legal transplantation takes place due to authority; prestige and imposition; chance and necessity; expected efficacy of the law; and incentives from countries and third parties.[67] Legal transplantation has also been explained from the point of economic efficiency. According to Mattei, anything that makes the legal system work better by lowering transactions costs is efficient.[68] Mattei also posits that the framing of legal rules may be explained as the outcome of a competitive process. He argues that as every legal system produces different legal doctrines or techniques for the solution of a problem, then perhaps a process of competition between these legal doctrines may determine the survival of the most efficient one.[69]

---

[66] Alan Watson, *Legal Transplants* (Edinburgh Scottish Academic Press Ltd, 1974), 21 referenced in Irma Valderrama, Legal Transplants and Comparative Law at http://redalyc.uaemex.mx/redalyc/pdf/824/82400207.pdf (last accessed on 19 July 2011).
[67] See Irma Valderrama, Legal Transplants and Comparative Law, 264-266 in n 64 above.
[68] See Ugo Mattei, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics, at http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=ugo_mattei (last accessed on 19 July 2011). Mattei also posits that a process of competition may determine the survival of the most efficient legal doctrine.
[69] *ibid* 4

On the particular issue of insolvency law transplants, Nathalie Martin argues that insolvency systems are a reflection of the legal, historical, political, and cultural context of the countries that have developed them. This is demonstrated in the discussion on the development of bankruptcy law in the US as seen in Chapter One of this thesis. As a result Martin argues that even countries with a common legal tradition such as the United States, England, Canada and Australia will still display marked differences in how they approach insolvency.[70] The key issue as Martin suggests therefore is that legal transplants when made, should be *developed* by countries adopting them to reflect their own legal, historical, political and cultural context as opposed to the countries from whence they have been transplanted. It therefore follows that to transplant laws without due regard to national and cultural differences might be considered as a disregard of these differences bordering on neo-colonialism.

Consider for instance, Japan's transplantation of US style bankruptcy law which has been regarded by one commentator as a failure.[71] The lack of success has been attributed to the failure of the Japanese bankruptcy law to take into consideration cultural attitudes that are against bankruptcy. As credit has become more accessible to businesses and individuals, the changes in Japanese bankruptcy and insolvency laws were made to contend with the increase in borrowing by promoting business rehabilitation and making bankruptcy more accessible. Unfortunately according to this commentator, the Japanese are not

---

[70] Nathalie Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, (2005) 28 B.C. College Int. & Comp. L. Rev., 4; also available at http://law.bepress.com/expresso/eps/172 (last accessed 15 July 2011).
[71] *ibid* 18

making use of the new developments in the insolvency and bankruptcy laws because of cultural reasons. Japan has a deep-rooted culture of honour and shame. In Japan where the 'group' takes precedent over the 'individual' not unlike Nigeria, because the failure of a business is seen as the personal failure of the individuals who operate the business and not a failure of the business itself, such individuals are sadly laden with the burden of having caused their families and communities shame. The result is often suicide by debtors and isolation from families. Japan's Civil Rehabilitation Act introduced to the country's insolvency law regime the US-style of reorganization which leaves the debtor to run the business (the debtor in possession concept). In practice however, the concept has not been fully embraced.

Arguably legal transplantation is not without merits or benefits and in fact this thesis does not argue against transplanting insolvency law or any law for that matter. According to Ross Cranston, 'in many cases copying foreign models is unavoidable because of pressure of time, the lack of expertise and the demands of outside interests for immediate action'.[72] In fact a Justice Minister of Turkey was once quoted as saying:

> We are badly in want of a good scientific Code. Why waste our time trying to produce something new when quite good Codes are to be found ready made? Moreover, what is the use of a Code without good commentaries to guide the application of it? Are we in a position to write such commentaries on a new Code? We dispose neither of the

[72] Ross Cranston, A Theory for International Commercial Law? at http://www.juridicas.unam.mx/sisjur/mercant/pdf/8-434s.pdf, 18 (last accessed on 18 July 2011).

> necessary time nor of the necessary precedents in practice. The only thing to do is to take a good ready-made Code to which good commentaries exist, and to translate them wholesale.[73]

The 'pressure of time, the lack of expertise and the demands of outside interests for immediate action' must however be balanced against the need for laws that work well. Irrespective of what causes legal transplantation to take place, how well it works becomes a question of efficiency. The crux of the matter therefore is how to achieve successful transplants if and when foreign insolvency laws are transplanted.

SUMMARY

Thus far specific features of both US and English insolvency legislation have been discussed and in the process some similarities and differences have been highlighted. For instance, debt education and credit counselling are notable features of US bankruptcy law and in the UK credit counselling services such as the Citizens Advice Bureaux are able to signpost to and provide information on formal insolvency procedures. Unfortunately the emphasis in places like Europe and North America has been on credit counselling and financial literacy education for those who have resorted to bankruptcy; in other words the education comes after the crisis as opposed to coming before a crisis situation

[73] See the quotation attributed to Mahmout Es'ad Bey in William Twining, Lecture IV: Generalizing about Law: The Case of Legal Transplants, 33, at http://www.ucl.ac.uk/laws/jurisprudence/docs/others/twi_til_4.pdf (last accessed on 18 July 2011).

when it is likely to be more effective. It has therefore been argued that such education should be made available especially in high-risk credit sectors and more importantly before credit extension.[74]

In Nigeria, the opportunities exist for community intermediaries to gather and disseminate information within Nigerian communities and this can serve as a powerful tool not only in the creation of credit referencing agencies but also in the promotion of credit counselling and financial literacy programmes, thereby assisting in making Nigerians more knowledgeable about insolvency procedures that are available to them.

With regards to the philosophical underpinnings of US and English insolvency legislation, there are also similarities and differences. For instance, US bankruptcy legislation has a predominant 'fresh start tradition' which one commentator has described as a century-old fresh start policy.[75] On the other hand this same commentator has described how Commonwealth Jurisdictions such as England have a 'qualified fresh start policy' citing the manner in which the once powerful bankruptcy stigma has been substantially diluted albeit not

---

[74] See Jean Braucher, Theories of Overindebtedness: Interaction of Structure and Culture, (2006) 7 Theoretical Inq. L., 345

[75] See Jacob Ziegel, Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies, (2006) 7 Theoretical Inq. L. Ziegel gives a historical overview of the fresh start rule in US insolvency legislation and provides readers with what can be described as a timeline of the fresh start policy. He shows that the fresh start rule featured early in insolvency legislation of some colonial American States before 1789, was a recurring question in the bankruptcy debates of the nineteenth century, was accepted in the period following the Great Depression, 'received official imprimatur at the highest judicial level in the US Supreme Court's judgment in *Local Loan Co v. Hunt*, and therefore would have been seen as an intrinsic part of American values and not to be tampered with lightly', and continued to be positively accepted in the post World War II period. Ziegel argues that 'a century's familiarity with the fresh start principle has led many US scholars to endorse its virtues'. He refers to Niemi-Kiesilainen and states that 'the object of the Anglo-Saxon fresh start philosophy is to relieve the consumer of the burden of accumulated debts at the earliest possible opportunity and to restore the consumer as an active participant in the marketplace'.

along the line of the US fresh start policy.[76] However, Ziegel argues that the ideological gap between US and English bankruptcy philosophy has narrowed perceptibly due to the introduction of the Bankruptcy Abuse Prevention and Consumer Protection Act 2005. US consumer bankruptcy philosophy is now much closer in concept to the qualified fresh start policy and means test model of other common law jurisdictions, even if the same cannot be said for its execution and detail.[77]

It is common knowledge that when it comes to legal transplantation in Nigeria, Nigeria has a tendency to borrow from the UK due to its colonial history and links with it. However as this Chapter reveals there are other valuable sources for reforming Nigeria's insolvency law such as the US Bankruptcy Code. The US Bankruptcy Code contains many interesting features that may be of benefit to the reform process in Nigeria. For instance the exemptions offered by US bankruptcy law to small business owners, in particular the homestead exemption strongly increases their decision to be self-employed. In a country like Nigeria, where banks require collateral from small business owners (which many a times may also be the home of the small business owner), such a homestead exemption which prevents the forced sale of a home to meet the demands of creditors may be an appealing feature in Nigeria's insolvency law. Then of course there is also the 100 percent exemption of future earnings which provides small business owners with a fresh start under Chapter 7 of the US Bankruptcy Code. Again another feature

[76] *ibid* 302
[77] *ibid*

of US Bankruptcy law which may be appealing to small business owners in Nigeria where it applicable is that one of the main advantages of filing under Chapter 13 is that the individual can stop foreclosure proceedings thereby saving his home. However, it is notable that the significant changes of the 2005 US Bankruptcy Reforms have reduced the bankruptcy 'insurance policy' and is now likely to encourage lenders to extend more business loans.

CHAPTER SEVEN

CONCLUSIONS AND RECOMMENDATIONS

The issue of access to credit which this thesis engaged with is a topical one that has already been studied from different perspectives. The existing scholarship includes approaches to the subject matter that have focused on access to credit as an issue pertaining to financial inclusion and as relating to the wider subject of social inclusion.[1] There does also exist literature on the causes of financial exclusion as well as literature that studies and compares models of formal and informal lenders and the competition between formal and informal lenders.[2] On an even wider scale is the existing scholarship that focuses on the regulatory and institutional constraints affecting not only access to credit but in general access to financial services; in other words, a holistic approach to reforms necessary to broaden access to credit and financial services generally.[3] This thesis did not ignore the already existing scholarship on the

---

[1] See for instance G. Panigyrakis, P. Theodoridis, C. Veloutsou, All Customers are not Treated Equally: Financial Exclusion in Isolated Greek Islands, (2002) Vol. 7 No. 1 *Journal of Financial Services Marketing*, 54-66.

[2] On the issue of the causes of financial exclusion, see for instance, Elaine Kempson, Claire Whyley, *Kept Out or Opted Out? Understanding and Combating Financial Exclusion*, last accessed on 18 July 2011 at http://www.pfrc.bris.ac.uk/Reports/Kept_out_opted_out.pdf ; Kenneth Amaeshi et al in, Financial Exclusion and Strategic and Strategic Corporate Responsibility: A Missing Link in Sustainable Finance Discourse?, last accessed on 18 July at http://www.nottingham.ac.uk/nubs/ICCSR/research.php?action=single&id=30 , 5. On the issue of models of formal and informal lenders, see for instance, Xavier Gine, Access to Capital in Rural Thailand: An Estimated Model of Formal vs. Informal Credit, 2-3, last accessed at http://siteresources.worldbank.org/DEC/Resources/Access_to_Capital_in_Rural_Thailand_WP.pdf on 18 July 2011.

[3] For instance, the International Finance Corporation (IFC), a member of the World Bank

issue of broadening access to credit as well as financial services; it however built on it and focused on the role of insolvency law in contributing to that process whilst at the same time studying this within a postcolonial context.

Whereas other studies on the impact of western financial and legal mechanisms on Africa have focused on such issues as third world debt of which the legacy of colonialism is also identified as a contributory factor, this thesis focused its attention on studying the relationship between colonialism and an indigenous value system, and the impact of this relationship on access to credit for SMEs and on the postcolonial regulation of insolvency in Nigeria. The relationship between an indigenous value system and insolvency law is a relatively unexplored area of study and makes an original contribution to scholarship that not only increases the literature on postcolonial theory but also the legal scholarship on insolvency law. The original contribution to scholarship asserted by this thesis and the process taken to achieve this are summarized below.

Group takes a holistic approach to reform in the financial services sector. Although it identifies collateral requirements and credit ratings as key elements of the financial infrastructure required to improve access to credit for SMEs, it also believes in wider reforms which includes broad interventions to strengthen and improve the business environment as well as enhancements to the financial system that expand access to credit. See generally the IFC brochure on SMEs titled Creating Opportunities for Small Businesses, 2, last accessed on 18 July 2011 at http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/ifcandsmes_brochure2007/$FILE/IFCandSMEs_Brochure2007.pdf . See also Oliver Hart, Different Approaches to Bankruptcy, 1-2, last accessed on 18 July 2011 at http://www.bankofengland.co.uk/publications/events/conf0209/hart.pdf where Hart acknowledges that bankruptcy reform should not be seen in isolation and should be considered along with legal and other reforms as well as changes in international financial systems.

CONCLUSIONS

The aim of this thesis as set out in the introductory chapter was to proffer answers to the research questions namely:

1. What impact does the legacy of colonialism have on credit institutions and the provision or availability of credit for SMEs in Nigeria?
2. What impact will insolvency law reforms have on the provision or availability of credit for SMEs in Nigeria?

In order to achieve the aim set, the thesis undertook the following process within the framework of postcolonial theory.

The thesis took a retrospective view of Nigeria's pre-colonial indigenous credit institutions and capital formation from Esusu, Ajo, Iwofa, pledges, etc and on the impact of colonialism on these indigenous credit institutions. The study showed that colonialism attempted to transform the pre-capitalist indigenous economy into a capitalist structure with its attendant commoditization and banking system. However it revealed that the banking system merely provided basic services, rather than extending credit facilities, especially to Nigerians and as a result the Nigerian economy was still pre-capitalist in orientation. It was further revealed that a huge amount of liquidity still remained outside the banking sector even with the introduction of African Banks because of community values relating to money and credit.

In the course of its co-existence with the colonial banking system, certain innovations were introduced to make the operation of the indigenous credit institutions more relevant to the need of a capitalist oriented economy.

Such innovations include the introduction of documentation of credit agreements, introduction of high interest rates, forcible collections of debts, citing the instance of the Sogundogoji.

The thesis also revealed that another feature of the colonial structure that impacted on the pre-existing indigenous credit system was the English legal system, leading to a situation where the legal culture of Nigeria remained dependent on that of the colonialist. This amounts for the pre-eminence of sources of Nigerian laws emanating from the received English law, English law passed before 1960 and extending to Nigeria, the statutes of general application etc.

Commenting on legal transplantation and the relationship between culture and law, the research used the United States of America as an example of legal transplants of insolvency/bankruptcy law. After reviewing US bankruptcy law and describing it as the most forgiving in the world, it also reviewed the insolvency law of other countries like Japan and China where US style bankruptcy law had been transplanted and concluded that the operation of these legal transplants had been limited due to the influence of culture in these countries. It opined that insolvency law should be enacted and developed taking into consideration societal attitudes towards debt and financial failure so as to cope with the challenges posed by the extensive availability of credit around the world. The study concluded the review by asserting that Nigeria's insolvency law should be reformed so as to give consideration to societal attitudes, beliefs, value and norms and in order to serve as a bridge between

indigenous and formal sources of credit. This it reiterated will increase access to credit thereby encouraging enterprise of SMEs.

The thesis also discussed a moral economy which it defined as the study of how economic activities of all kinds are influenced and structured by moral dispositions and norms, and how in turn these norms may be compromised, overridden or reinforced by economic pressures. The thesis used the concept to explain the social and cultural mechanisms that influence borrowing in modern Nigeria. Oral tradition, interviews and questionnaires were used to collect data from a sample of 60 small and medium sized business owners. The results showed that 54 percent of the sample had not obtained credit from banks or financial institutions, while 42 percent had obtained credit from indigenous credit sources. The result attributes the continued existence of the indigenous credit institution largely to its availability and accessibility, and described the modern system as an inaccessible alternative. Commenting on the relationship between the moral economy of borrowing and corruption, it showed that some people access credit for opportunistic ventures, citing the case of 'Umannah-Umannah' (get rich quick schemes), and concludes that there is the belief by people that money/wealth does not only come by hard work. It adds that the desire to meet social responsibilities and to 'survive' has inflamed the need to create wealth sometimes through get rich quick schemes which in turn has affected credit and enterprise.

This thesis therefore concluded that there are difficulties with the legal transplantation of foreign laws in countries where the 'moral economy' is not

immediately compatible with the laws which are to be transplanted. And as a result whilst it is the policy of the Nigerian government to foster entrepreneurship through initiatives such as the now defunct Community Banking Scheme, Microfinance Banks (MFBs) and the National Poverty Eradication Programme (NAPEP), this may prove challenging to accomplish without the government also addressing the stigma associated with business failure as well as certain aspects of the moral economy of Nigeria that hinder entrepreneurial activity by restricting access to credit generally.

On the issue of debt recovery, the thesis drew attention to the mechanisms adopted by indigenous creditors in Nigeria to recover their debts namely:

- Extended family system
- Community action
- The Nigerian Police force
- Juju shrine and witchcraft

However, the thesis affirms that irrespective of the creditor remedy mechanism adopted, there is always the problem of limited assets encountered by any creditor, with its consequential limitations on debt recovery. It therefore opined that a debt recovery method that was efficient and did not stifle entrepreneurship was essential and that an insolvency law system met both requirements as its two historical functions are to provide a collective debt collection forum/procedure and to give debtors the opportunity of a fresh financial start. The thesis however revealed that although a bankruptcy law has

existed in Nigeria since 1979, the first bankruptcy proceeding was only initiated in 1992, which nevertheless failed. It concluded that in view of the nature of Nigeria's bankruptcy law where the bankruptcy proceedings are not 'first charge proceedings' or primary actions, it is unlikely for debtors in Nigeria to initiate a debtor bankruptcy proceeding given the undue time and expense that were likely to be incurred. Apart from the undue time and expense that would make bankruptcy proceedings unattractive to debtors in Nigeria, the thesis revealed that there is a general consensus that the stigma associated with bankruptcy has also led to the avoidance of bankruptcy proceedings by debtors in Nigeria. The thesis therefore concluded that whilst insolvency practice in Nigeria can be said to have considerable experience in debt recovery cases through the application of winding up procedures, unfortunately debtors are still not accessing the opportunity of a fresh financial start and as a result entrepreneurship is not being encouraged. The thesis also concluded that much work needs to be done to Nigeria's insolvency law regime to reduce not only the stigma of bankruptcy but also to promote fresh starts and hence entrepreneurial activity. The study therefore advocates for a reform of Nigeria's insolvency law, which it describes as outdated. It needs to be reformed so that the several beneficial purposes served by modern insolvency laws can be achievable in Nigeria's insolvency law. Such reformed law would serve as a collective debt recovery tool in the case of corporate insolvency and offer the opportunity of a fresh start in the area of personal insolvency.

On the issue of what impact insolvency law reforms would have on the

provision and availability of credit for SMEs in Nigeria, the thesis demonstrated that a good and efficient insolvency law system as opposed to an outdated one is able to promote the availability and provision of credit because as a debt recovery tool it was an incentive that motivated creditors to lend whilst at the same time offering when required a 'fresh start' as an incentive to encourage entrepreneurship. If this is the case, then there is the likelihood that creditors become more willing to increase lending to SMEs as the risks of lending to SMEs can be better managed with the assistance of insolvency law. In other words the thesis focused on Nigeria's insolvency law as a vital tool for promoting access to credit. Furthermore debt recovery via insolvency law will serve to deal with the challenges posed to debt recovery in Nigeria's indigenous credit markets. By managing the risks in lending to SMEs and the challenges of debt recovery in indigenous credit markets, insolvency law will serve to bridge indigenous and formal credit markets. It however conceded as well that it would take more than insolvency law reforms to broaden access to credit for SMEs in Nigeria as there are other regulatory and institutional reforms that are required across the breadth of Nigeria's financial services sector.

In an attempt to identify and benchmark insolvency norms that would provide a valuable source for what should constitute the key objectives and the core features of a reformed Nigerian Insolvency Law, the thesis considered such sources as the UNCITRAL Legislative Guide on Insolvency Law 2004, the European Commission Best Project on Restructuring, Bankruptcy and a Fresh Start 2003 and the 10 core principles for a modern insolvency law regime

developed by the European Bank for Reconstruction and Development. Drawing support from these sources of key objectives and core features of an insolvency law, the thesis concluded as it had argued, that a modern insolvency law regime for Nigeria should provide for liquidation and reorganization, a good insolvency law can and should influence and change society's views about failure and stigmatization, a good insolvency law should provide for the efficient resolution of insolvency that minimizes costs such as those presented by bankruptcy proceedings under the Nigerian Bankruptcy Act 1978.

The thesis also identified that the lack of the existence of a specialized body of insolvency practitioners as well a specialized judiciary in Nigeria may well create problems for the implementation of a more complex insolvency system in Nigeria. The thesis concluded that this is bound to create a lack of confidence in the competence of insolvency law practitioners in Nigeria and in the expertise of the Judiciary to deal with complex insolvency matters. The thesis identified the role played by insolvency professionals in reforming insolvency law in the US and the UK and opined that irrespective of whether insolvency professionals acted in their own interests (for instance, for wider jurisdictions of work, higher status and monetary rewards), or in the interest of clients (such as creditor or debtor groups), or with the idea of fulfilling some public good, the fact still remained that the 'bankruptcy legislation has several of the attributes most conducive to expert influence' and therefore the expert influence of Nigerian insolvency professionals would be required in the reform

process.[4]

From the foregoing, the thesis provided the following answers to the research questions it sought to answer. The thesis revealed that colonialism did have an impact on credit institutions in Nigeria in positive and negative ways confirming Douglass C. North's assertion that institutional reforms have negative and positive effects and that the legacy of colonialism to formal and informal credit institutions in Nigeria today continues to be both positive and negative effects. The thesis also demonstrated that, again colonialism and the legacy of colonialism impacted on the indigenous value system in Nigeria in positive and negative ways and that this had knock-on effects for the provision and availability of credit for SMEs in Nigeria. In other words, the thesis conceded that it is a combination of external and internal factors that affects the provision and availability of credit for SMEs in Nigeria and is responsible for financial exclusion in general in Nigeria. There are external factors such as British colonial policies regarding lending to Nigerian people and internal factors such as an indigenous value system, what is however certain is that colonialism has influenced these factors.

In view of the foregoing answers to the research questions, the following recommendations are made.

---

[4] Bruce G. Carruthers and Terence C. Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*, (Oxford: Oxford University Press, 1998), 148-149.

RECOMMENDATIONS

1. The commissioning of in-depth study into traditional understandings of credit, studies on the causes and challenges of financial exclusion and exploitation, cost-benefit analysis of insolvency law models, etc.
2. In-depth research and wide consultation on insolvency law reforms by the Nigerian Reform Commission.
3. Financial education and financial literacy campaign programmes, as well as campaign programmes to reduce the stigma of bankruptcy and to encourage fresh financial start and entrepreneurial activity.
4. Prioritizing insolvency law education and training for insolvency practitioners.
5. Establishing a specialized insolvency administration within the Nigerian judiciary.

The thesis will now conclude by addressing these recommendations in turn.

The commissioning of in-depth study into traditional understandings of credit, studies on the causes and challenges of financial exclusion and exploitation, cost-benefit analysis of insolvency law models, etc:

The research methodology applied in this thesis produced significant results, in particular by means of the Survey conducted. The study on the moral economy of borrowing in Nigeria was however limited by way of time and resources. From a sample of 60 taken, only 33 responses were received. Another challenge posed by the survey was the choice of the preferred tool of

measurement. In this case, it was the 'interview' versus the 'questionnaire'. Although both were eventually used, the researcher found the 'interview' to be the most fruitful because of its ability to manage any issues of ambiguity or understanding that arose from the questions. The results of the study on the moral economy of borrowing in Nigeria helped the researcher to gain some understanding of how pre-colonial traditional norms and colonial elements impact on credit institutions and the provision and availability of credit in Nigeria. In Chapter Four, the thesis asserted that the ultimate starting point for reform should be a knowledge and understanding of institutions, which hitherto has been lacking in discourses on Africa. The study on the moral economy of borrowing in Nigeria which is found in this thesis was limited and it is imperative that a more in-depth study on traditional understandings of credit and debt is commissioned for Nigeria as it will unearth knowledge and give insights which will be useful in shaping the philosophical foundation or policy prescriptions for Nigeria's insolvency law regime. In other words, understanding the nature and operation of credit institutions in Nigeria will produce knowledge relevant for the regulation of insolvency law in Nigeria, given that insolvency law is considered as a response to credit.[5] This could be carried out in conjunction with other in-depth studies such as studies on the causes and challenges of financial exclusion and exploitation, cost-benefit analysis of insolvency law models, etc.[6] As Chapter Four indicated, in Nigeria

[5] See Thomas H. Jackson, *The Logics and Limits of Bankruptcy Law*, (Cambridge Mass.: Harvard University Press, 1986), 7, where he states that 'bankruptcy law is a response to credit'.

[6] On the issue of studies into the causes and challenges of financial exclusion for instance,

there have been past initiatives commissioned to tackle the issue of financial exclusion and these initiatives have focused on the area of access to banking services and affordable credit. This thesis would however recommend that access to debt advice should also be an area of research that the Nigerian government needs to focus resources on. And as highlighted in this thesis, debt education and credit counselling should be pre-emptive rather than reactive.

In-depth research and wide consultation on insolvency law reforms by the Nigerian Reform Commission:

Following on from what has just been stated about the need to commission various research studies, the Nigerian Law Reform Commission can and should make contributions in this direction. In England for instance the key aims of the Law Reform Commission are:

> To ensure that the law is as fair, modern, simple and as cost-effective as possible;
>
> To conduct research and consultations in order to make systematic recommendations for consideration by Parliament;
>
> To codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes.[7]

---

consider for example a similar project known as the Financial Inclusion Fund project which was initiated by the UK Government to tackle three key priority areas namely: access to banking services, access to affordable credit, and access to debt advice. Consequently, 'the Financial Inclusion Fund of £120 million was created to support initiatives to tackle financial exclusion'. See Evaluation of Financial Inclusion Fund Face-to-Face Debt Advice Project, 3, at http://www.berr.gov.uk/files/file41405.pdf last accessed on 18 July 2011.

[7] See Law Reform Commission Website at http://www.justice.gov.uk/lawcommission/about-us.htm last accessed on 18 July 2011.

Compare this with the wording of the Nigerian Law Reform Commission Act provision below and again it is quite apparent the link between Nigerian law and English Law:

> It shall be the duty of the Commission generally to take and keep under review all Federal laws with a view to their systematic and progressive development and reform in consonance with the prevailing norms of the Nigerian society including, in particular, the codification of such laws, the elimination of anomalies, the repeal of obsolete, spent and unnecessary enactments, the reduction in number of separate enactments, the reform of procedural laws in consonance with changes in the machinery of the administration of justice and generally, the simplification and modernization of the law.[8]

The work carried out by the Law Commissioners in England involves a lot of 'in-depth research and wide consultation' and they are supported in these tasks by several other staff including research assistants. And as a result of the work carried out by the Law Reform Commission in England, the government has implemented more than two-thirds of its recommendations. In the case of the Nigerian Law Reform Commission, although it has an approved staff establishment of 221 persons, 60 positions are currently vacant; about 50 lawyers are required but the Commission has less than 20. The lack of recruitment of the necessary staff at the Nigerian Law Reform Commission which is due to a lack of funds is a serious drawback to law reform in Nigeria

[8] Nigerian Law Reform Commission Act 1990, s 5(1).

and highlights the fact that those in authority appear to be paying lip service instead of giving priority to a very serious matter as law reform.

Financial education and financial literacy campaign programmes, as well as campaign programmes to reduce the stigma of bankruptcy and to encourage fresh financial start and entrepreneurial activity:

The financial education or financial literacy of Nigerians as to rights and responsibilities in credit and debt matters is also recommended. In many countries today, there are various financial literacy programmes which are funded and run by the state. In the UK for example, apart from the work carried out by the Citizens Advice to promote financial education, organizations such as the Financial Services Authority operates a national strategy on financial capability. The use of intermediaries can serve to facilitate any national strategy of financial literacy, as the communal structures that are already in place in Nigerian societies can be the vehicle for achieving this. It may be possible that intermediaries can also serve as advice providers who are trained: to give debt advice, to signpost persons towards relevant insolvency mechanisms and insolvency practitioners, as facilitators of informal credit arrangements, monitors of debt recovery, etc. Research has shown that free face-to-face debt advice is an effective method of reaching certain financially excluded individuals.[9]

The use of community intermediaries is also recommended to implement a national campaign to reduce the stigma of bankruptcy and to

[9] n 6 above, 3.

encourage fresh financial start and entrepreneurial activity. Such undertaking would support the various initiatives by the Nigerian Government which are aimed at encouraging entrepreneurship. The benefit of using community intermediaries would ensure that such national campaign and education could be tailored to be local-specific and adapted to the numerous Nigerian communities. Research such as The Best Project has shown that the most effective way in eradicating negative social attitudes starts by education.

Prioritizing insolvency law education and training for insolvency practitioners:

The discussion of priorities for insolvency law reform in Nigeria revealed among other things the fact that the practice of insolvency law is not as developed or specialized, as it should be and that generally insolvency law is simply a synonym for 'winding up' of corporate organizations. Lawyers in Nigeria are clearly stakeholders in insolvency matters in Nigeria and the likelihood of complex insolvency reforms succeeding in Nigeria is likely to be dependent on there being in place a more specialized body of insolvency law practitioners. Therefore the interests of lawyers in Nigeria and the reform process itself would be best served if specialized education and training in the area of insolvency law was readily available. Specialized insolvency law education needs to be on offer to law students, preferably at a graduate level and in addition to this, continued professional education in order to specialize in the area of insolvency law is crucial. It may also be practical to establish a

body that licenses Insolvency Practitioners to ensure that they have the right training, qualifications and experience to carry out insolvency work.

The analysis of the role of interest groups in insolvency law reform in the US carried out by Skeel and referred to in the introductory chapter of this thesis revealed that apart from creditor and debtor groups, the American Bar (whether the Reorganization Bar or the General Bankruptcy Bar) was a key interest group in bankruptcy matters in the US and consequently fuelled the conflict that led to the enactment of the first permanent bankruptcy legislation in the US. In Nigeria, the Nigerian Bar Association, the professional body of all persons admitted to the practice of law in Nigeria has a section dedicated to business law. This business law section functions through 21 committees whose work involves making valuable input to various initiatives aimed at reforming business law practice in Nigeria. One of the section's 21 committees is a committee dedicated to Banking, Finance and Insolvency. The objectives of the business law section of the Nigerian Bar Association include among other things guiding, assisting and organizing legislative bodies in deliberations, drafting and enactment of legislation that pertain to commercial and business issues of the nation; and the provision of continuing education to its members.[10]

Apart from the Nigerian Bar Association, one key interest group that has declared its interest in insolvency law reform in Nigeria is a body known as the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN). Clearly positioning itself as 'the voice' of Nigerian legal

[10] See http://www.nba-sbl.org/committees.htm last accessed on 18 July 2011.

professionals engaged in the practice of business recovery and insolvency, BRIPAN identifies the lack of a professional body to regulate and coordinate the activities of insolvency practice as a major drawback to the development of the practice of insolvency in Nigeria. As a result, the objectives of BRIPAN include among other things, impacting legislative reform by evaluating and focusing attention on the development of Nigerian law in the areas of bankruptcy, receiverships and liquidations, business restructuring and turn around management. BRIPAN also has as its objectives, developing a body of persons skilled and experienced in insolvency administration through training and education as well as improving the standard of performance, discharge of functions, powers and duties that are attached or incidental to the offices of those involved in insolvency administration.[11] Apart from 'the voice' of BRIPAN, there does not appear to be much activity in the way of debtor or creditor groups canvassing for insolvency law reform in Nigeria.

Establishing a specialized insolvency administration within the Nigerian judiciary:

In addition to prioritizing insolvency law education and training for insolvency practitioners, there is the need for the establishment of specialized insolvency administration within the Nigerian judiciary. The Federal High Court is vested with exclusive jurisdiction to deal with insolvency matters and appeals from the Federal High Court may be made to the Court of Appeal and then to the

[11] See BRIPAN's website at www.bripan.org last accessed 4 February 2011. However the link was inaccessible on 18 July 2011.

Nigerian Supreme Court.[12] Unfortunately the lack of judicial experience in the area of insolvency matters is illustrated by the apparent lack of local case law on receivership that has been decided by the Nigerian Supreme Court. So whilst there is some judicial experience in dealing with insolvency matters brought by way of winding up procedures, there is a lack of experience in dealing with the other technicalities of insolvency.[13] Therefore reforming and modernizing Nigeria's insolvency law is likely to create a more complex insolvency system that can hardly be efficient or effective without the existence of a specialized insolvency administration within the Nigerian judiciary, and in addition to specialized insolvency law practitioners.

The aim of this thesis as outlined at the very beginning was to study how to promote access to credit for SMEs in Nigeria through the vehicle of insolvency law reform. Although in contrast to the various other approaches to promoting access to credit for SMEs, this thesis was supportive of those various approaches as it agreed that a holistic approach to the issue was best. However the thesis achieved the aim set for it by demonstrating that a modern insolvency law provides for creditors a collective and orderly process for the collection of debts and a means to encourage entrepreneurship by ensuring that viable businesses can benefit from a fresh start and that these goals of insolvency law provide incentive that should encourage creditors to advance credit and as a result promote entrepreneurship.

---

[12] See s 251(1) of the Constitution of the Federal Republic of Nigeria 1999.

[13] See Akinwunmi and Busari Legal Practitioners, *Insolvency Practice in Africa- The Nigerian Experience*, last accessed at http://www.akinwunmibusari.com/images/documents/Insolvency%20Practice%20in%20Africa%20-%20The%20Nigerian%20Experience.pdf on 18 July 2011.

QUESTIONS

1) Have you ever considered obtaining credit?

2) What is your first choice for accessing credit?

3) What is your preferred method for obtaining credit?

4) Have you utilized any indigenous credit arrangement to obtain credit?

5) What indigenous credit arrangement(s) have you used?

6) What did you use the credit obtained for?

7) Do you believe that credit should be used for investment and to assist production?

8) Do you believe that credit should only be used for ceremonies such as weddings, funerals, etc?

9) Do you believe that if credit is given to you, it will make your business prosper?

10) Do you believe that credit should be avoided at all costs?

11) Do you believe that because credit often leads to debt, it should be avoided at all costs?

12) Does debt hold any stigma for you?

13) Do you believe that debt and stress are related?

14) Do you believe that debt and health are related?

15) Do you agree that 'many are the sorrows of a man who borrows'?

16) Do you think taking credit is responsible for poverty?

17) Do you think lack of credit is responsible for poverty?

18) If you were advanced credit would it increase production in your business?

19) Has your business been advanced credit by banks or other financial institutions?

20) How easy was it for your business to secure credit from the banks?

21) Was it secured or unsecured?

22) Do you think that it is easier for big businesses to access credit than it is for individuals or small and medium sized businesses?

23) Do you save?

24) What do you save for?

25) What steps do you take to manage financial risk?

26) Are the financial decisions you make targeted at survival than taking risks?

27) What do you plan for: the present or the future?

28) Do you believe there is some 'magic' surrounding money?

29) Do you believe the same 'magic' surrounds credit?

30) Do you believe wealth is acquired by hard work or by 'magic'?

31) What avenues of credit are available to you in your community?

32) Is there a Community Bank in your community?

33) Have you benefited from credit from a Community bank?

34) Has your business benefited from credit from a Community bank?

35) What comes to your mind when credit is mentioned?

PARTICIPANT INFORMATION STATEMENT

Research Project Title: Reforming Nigeria's Insolvency Law: A Tool for Improving Access to Credit

(1) What is the study about?

This project looks at how law reform particularly in the area of insolvency can impact on credit in Nigeria. It also considers how the indigenous value system surrounding credit is important and should be taken into consideration in the policy that informs insolvency law reform. Accessing credit through the banks and indigenous credit arrangements are therefore studied and compared. This survey will enable me acquire information about the specific characteristics of indigenous credit institutions, cultural beliefs surrounding borrowing, the impact of law reform and the implications for accessing credit in Nigeria.

(2) Who is carrying out the study?

The study is being conducted by Edem Andah in support of her research towards acquiring the degree of PhD at The University of Kent under the supervision of Dr Robin Mackenzie.

(3) What does the study involve?

Answering questionnaires or taking part in an interview or both.

(4) How much time will the study take?

It is estimated that interviews will last at least one hour. Where questionnaires are given out, participants have a time limit of two weeks within which to complete and return.

(5) Can I withdraw from the study?

Participation in this study is entirely voluntary: you are not obliged to participate and - if you do participate - you can withdraw at any time without prejudice or penalty.

(6) Will anyone else know the results?

All aspects of the study, including results, will be strictly confidential and only the researchers will have access to information on participants. A report of the study may be submitted for publication, but individual participants will not be identifiable in such a report.

(7) Will the study benefit me?

Ultimately yes, as it will provide Nigeria with valuable information for improving access to credit.

(8) Can I tell other people about the study?

If you wish to, yes.

(9) What if I require further information?

When you have read this information, Edem Andah will discuss it with you further and answer any questions you may have. If you would like to know more at any stage, please feel free to contact Edem Andah via email on ena2@kent.ac.uk or by telephone on 0803 338 9096 or +44 776 021 8859. To be able to receive feedback as to the results of this research, please provide the researcher with your email contact information. For those without access to the internet, but who desire feedback, paper-based information of research results will be made available at the following designated addresses:

C/o Mr. Okogbule Nlerum
Faculty of Law
Rivers State University of Science
And Technology
Nkpolu-Oroworukwo
Rivers State

C/o Manuchim Chambers
171D Aba Road
Port Harcourt
Rivers State

(10) What if I have a complaint or concerns?

Any person with concerns or complaints about the conduct of this research study can contact the researcher's Supervisor, Dr Robin Mackenzie, R.Mackenzie@kent.ac.uk (Email).

This information sheet is for you to keep

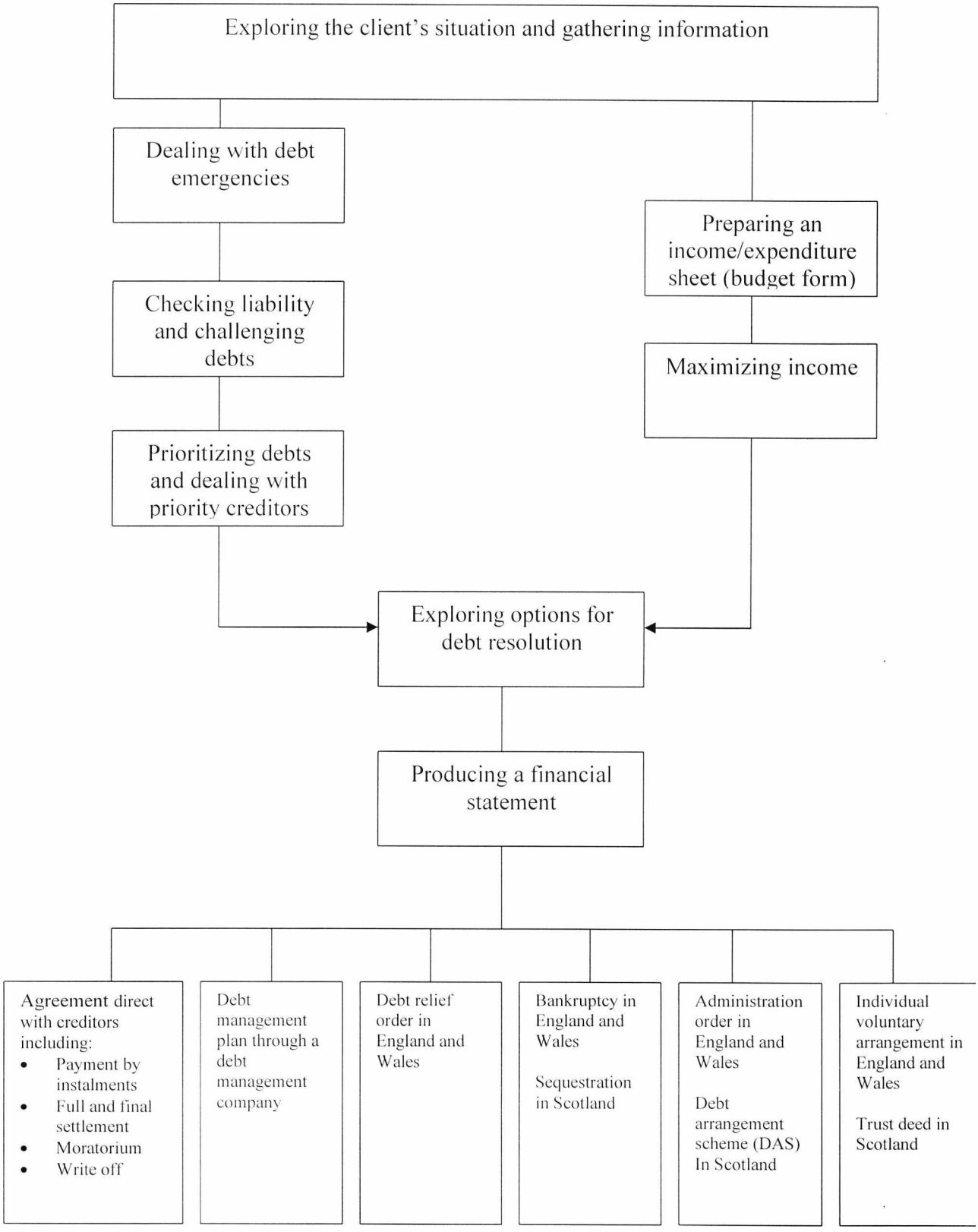
VERBAL EXPLANATION STATEMENT

My name is Edem Andah. I am conducting this interview as part of my research which I am undertaking at the University of Kent at Canterbury.

This interview seeks information about your attitudes and beliefs regarding credit and debt matters as well as credit institutions. I would be grateful if you would agree to take part in my study by answering my questions. To be able to answer my questions your consent is required and I would be more than happy to answer any questions you have regarding this survey as it is important I obtain only your informed consent.

I must however point out that your informed consent to participating in this interview does not oblige you to answer any questions that you may consider embarrassing or distressful. You are at liberty to withhold answers should you deem it necessary and at any time during the interview you are at liberty to end it. Should you decide to refuse answer to any question or to withdraw prematurely from this interview, no penalties will be incurred.

Debt advice overview diagram



BIBLIOGRAPHY

Ács, Zoltán J.; Karlsson, Charlie and Carlsson, Bo; *Entrepreneurship, Small and Medium-Sized Enterprises and the Macroeconomy* (Cambridge: Cambridge University Press, 1999).

Austin, Gareth, Indigenous Credit Institutions in West Africa, c.1750-c.1960 in Austin, Gareth and Kaoru Sugihara (eds), *Local Suppliers of Credit in the Third World, 1750-1960* (London and Basingstoke: Macmillan, 1993).

Austin, Gareth and Kaoru Sugihara (eds), *Local Suppliers of Credit in the Third World, 1750-1960* (London and Basingstoke: Macmillan, 1993).

Beck, Thorsten, Asli Demirgüc-Kunt and Vojislav Maksimovic, Bank Competition, Financing Obstacles and Access to Credit (Policy Research Working Paper, World Bank, Washington, D.C. 2003).

Berkowitz, Jeremy and Michelle J. White, Bankruptcy and Small Firms' Access to Credit (Working Paper Series/National Bureau of Economic Research, National Bureau of Economic Research, Cambridge, Mass. 2002).

Boahen, Adu A., *African Perspectives on Colonialism* (Baltimore: John Hopkins University Press, 1987)

Burges, James Bland, Sir, Bart, Considerations on the Law of Insolvency: With a Proposal for a Reform (London: Printed for T. Cadell, 1783), 391)

Caprio, Gerard, Honohan, Patrick and Dimitri Vittas (eds), *Financial Sector Policy for Developing Countries: A Reader* (World Bank and Oxford University Press, 2002).

Carruthers, Bruce G.; Halliday, Terence C., *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*, (Oxford: Oxford University Press, 1998).

Chakrabarty, Dipesh, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press, 2000).

Chowdhury, Mohammad Tarequl Hasan, Access to Microfinance Services: Evidence from Bangladesh (M.T.H. Chowdhury, Ås 2005).

Clarke, George R. G.; Cull, Robert; Peria, Maria Soledad Martinez; Does Foreign Bank Penetration Reduce Access to Credit in Developing Countries?: Evidence from Asking Borrowers (Policy Research Working Paper, World Bank, Washington, D.C. 2001).

Coleman, Peter; *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (Madison: State Historical Society of Wisconsin, 1974).

Crozier, Brian, *Neo-Colonialism* (London: The Bodley Head, William Clowes and Sons Ltd., 1964)

De Soto, Hernando, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Bantam, 2000).

Dennis, Vernon; Fox, Alexander, *The New Law of Insolvency: Insolvency Act 1986 to Enterprise Act 2002* (London: Legislation Guides, The Law Society, 2003).

Diagne, Aliou and Manfred Zeller, Access to credit and its Impact on Welfare in Malawi (Research Report/International Food Policy Research Institute, International Food Policy Research Institute, Washington, D.C. 2001).

Dzikunu, Bridget, The Informal Sector and Access to Credit: A Study of Women Entrepreneurs in the Informal Sector in Ningo, Ghana (Dissertation, Oslo: Universitetet i Oslo Institutt, 2001).

Edholm, Nina, Informal Credit in Rural Tanzania: A Study on Access to Credit for Small-Scale Farmers (Ås 1997).

Ekechi, Felix K., Pawnship in Igbo Society in Lovejoy, Paul E. and Toyin Falola (eds), *Pawnship in Africa* (Colorado: Westview Press, 1994).

Elias, T. O. (ed), *Law and Social Change in Nigeria* (University of Lagos and Evans Brothers Ltd., Lagos 1972).

Falke, Mike. Insolvency Law Reform in Transition Economies (Doctoral Dissertation, Berlin: Humboldt University, 2003).

Falola, Toyin, Money and Informal Credit Institutions in Colonial Western Nigeria in Guyer, Jane I. (ed), *Money Matters: Instability, Values and Social Payments in the Modern History of West African Communities* (Portsmouth: Heinemann & London, 1995).

Falola, Toyin, Pawnship in Colonial Southwestern Nigeria in Lovejoy, Paul E. and Falola, Toyin (eds), *Pawnship in Africa* (Colorado: Westview Press, 1994).

Falola, Toyin and Paul E. Lovejoy, Pawnship in Historical Perspective in Lovejoy, Paul E. and Falola, Toyin (eds.), *Pawnship in Africa* (Colorado: Westview Press, 1994).

Fanon, Franz, *The Wretched of the Earth*, (London: Penguin Books, 1967).

Finch, Vanessa, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge: Cambridge University Press, 2002).

Fletcher, Ian F.; Crabb, Letitia; *The Law of Insolvency* (London: Sweet & Maxwell, 3rd ed, 2002).

Furness, Eric L.; *Money and Credit in Developing Africa* (London: Heinemann, 1975).

Gatti, Roberta and Inessa Love, Does Access to Credit Improve Productivity?: Evidence from Bulgarian Firms (Policy Research Working Paper, World Bank, Washington, D.C. 2006).

Gillepsie, John S.; *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam*, (England: Ashgate Publishing Ltd, 2006).

Insolvency Service, Bankruptcy: A Fresh Start: A Consultation on Possible Reform to the Law Relating to Personal Insolvency in England and Wales (London: Insolvency Service, 2000)

Halliday, Terence C.; Carruthers, Bruce G., Foiling the Financial Hegemons: Limits to the Globalisation of Corporate Insolvency Regimes in Indonesia, Korea and China in Antons, Christoph; Gessner, Volkmar (eds), *Globalisation and Resistance: Law Reform in Asia Since the Crisis* (Hart Publishing, 2007).

Handler, Joel F., *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (New York: Institute for Research on Poverty Monograph Series, Academic Press, 1978).

Helms, Brigit; Consultative Group to Assist the Poor, Access for All: Building Inclusive Financial Systems (World Bank, Washington, D.C. 2006).

Hoogvelt, Ankie, Globalisation, Imperialism and Exclusion, in Zack-Williams, Tunde; Frost, Diane; Thompson, Alex (eds.), *Africa in Crisis, New Challenges and Possibilities* (London: Pluto Press, 2002).

Jackson, Thomas H., *The Logic and Limits of Bankruptcy Law* (Beard Books, 2001).

Johnston, Ronald John, *The Dictionary of Human Geography* (Oxford: Blackwell Publishers, 4th ed., 2000).

Justice Society, *Insolvency Law: An Agenda for Reform* (JUSTICE, 1994).

Klein, Michael W.; Peek, Joe; Rosengren, Eric, Troubled Banks, Impaired Foreign Investment: The Role of Relative Access to Credit (Cambridge, Mass.: NBER Working Paper Series No.7845, National Bureau of Economic Research, 2000).

Kumar, Anjali and World Bank, Access to Financial Services in Brazil (Washington, D.C: Directions in Development, World Bank, 2005).

Larsen, Neil, Imperialism, Colonialism, Postcolonialism, in Schwarz, Henry; Ray, Sangeeta (eds.) *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000).

Lester, Vernon Markham; Insolvency and Reform of English Bankruptcy Law, 1831-1914 (PhD Dissertation, University of Oxford, 1990).

Lovejoy, Paul E. and Falola, Toyin (eds), *Pawnship in Africa* (Colorado: Westview Press, 1994).

Lycette, Margaret A., Improving Women's Access to Credit in the Third World: Policy and Project Recommendations (Washington: International Center for Research on Women, 1984).

Mabogunje, Akin L., The Capitalization of Money and Credit in the Development Process: The Case of Community Banking in Nigeria in Guyer, Jane I. (ed), *Money Matters: Instability, Values and Social Payments in the Modern History of West African Communities* (Portsmouth: Heinemann & London, 1995).

Malhotra, Mohini and World Bank, Expanding Access to Finance: Good Practices and Policies for Micro, Small, and Medium Enterprises (Washington, D.C.: WBI Learning Resource Series, World Bank, 2007).

Martin, Nathalie, American Bankruptcy Laws: Encouraging Risk-Taking and Entrepreneurship, (U.S. Department of State, International Information Programs, Entrepreneurship and Small Business, 2006).

Mbembe, Achille, *On the Post Colony* (Berkeley: University of California Press, 2001).

McGregor, O. R., *Social History and Law Reform* (London: 1981).

Milman, David, *Personal Insolvency Law, Regulation and Policy* (Aldershot: Ashgate, 2005).

Mokal, Rizwaan Jameel, *Corporate Insolvency Law: Theory and Application* (Oxford: Oxford University, 2005).

Niemi-Kiesilainen, Johanna; Ramsay, Iain and Whitford, William C. (eds.), *Consumer Bankruptcy in Global Perspective* (Oxford, U.K. and Portland, Oregon: Hart Publishing, 2003).

Oecd, Credit Risk and Credit Access in Asia (Paris: Oecd, 2006).

Olaniyan, Tejumola, Africa: Varied Colonial Legacies, in Schwarz, Henry; Ray, Sangeeta (eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000).

Pease, Donald E., US Imperialism: Global Dominance without Colonies, in Schwarz, Henry; Ray, Sangeeta (eds.), *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000).

Perraudin, W., Bankruptcy Risk and Strategic Behaviour: Insolvency Law Reform in the UK (Birkbeck College, Department of Economics, 1995).

Quayson, Ato; Goldberg, David Theo, Introduction: Scale and Sensibility, in Quayson, Ato; Goldberg, David Theo (eds.) *Relocating Postcolonialism*, (Oxford: Blackwell Publishers, 2000), xvi.

Quayson, Ato; Goldberg, David Theo (eds.) *Relocating Postcolonialism*, (Oxford: Blackwell Publishers, 2000).

Sacerdoti, Emilio, Access to bank credit in Sub-Saharan Africa: key issues and reform strategies (IMF working paper, International Monetary Fund, Washington, D.C. 2005).

Sayer, Andrew. 'Moral Economy'

Scott, James C., *The Moral economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (New Haven: Yale University Press, 1976).

Schwarz, Henry, Mission Impossible: Introducing Postcolonial Studies in the US Academy inSchwarz, Henry; Ray, Sangeeta (eds.) *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000).

Schwarz, Henry; Ray, Sangeeta (eds.) *A Companion to Postcolonial Studies* (Oxford: Blackwell Publishers, 2000).

Skeel, David, Debt's Dominion: A History of Bankruptcy Law in America (Princeton: Princeton University Press, 2004).

Southern Methodist University School of Law, Queen Mary and Westfield College Centre for Commercial Law Studies, Bank Failures and Bank Insolvency Law in Economies in Transition (International Economic Development Law ; v. 9, Kluwer Law International, The Hague ; London 1999).

United Nations Economic and Social Commission for Asia and the Pacific, Improving the Access of Women to Formal Credit and Financial Institutions: Windows of Opportunity (New York: U.N, 1995).

United Nations Economic and Social Commission for Asia and the Pacific, Improving the Access of Women to Formal Credit and Financial Institutions: Windows of Opportunity (Vol. II) (New York: U.N, 1997).

Venn, Fiona, *The New Deal* (Edinburgh: Edinburgh University Press, 1998).

Warren, Charles, *Bankruptcy in US History* (Cambridge: Harvard University Press, 1935).

Watson, Alan, *Legal Transplants: An Approach to Comparative Law* (Georgia: The University of Georgia Press, 2ed, 1993).

Wieland, Robert C., J. D. von Pischke and Mwangi S. Kimenyi, Strategic Issues in Microfinance (Ashgate, Aldershot: Contemporary Perspectives on Developing Societies, 1998).

Wihlborg, Clas, Insolvency and Debt Recovery Procedures in Economic Development: An Overview of African Law (Helsinki: WIDER Discussion Paper, United Nations University, World Institute for Development Economics Research, 2002).

Wilson, Inam, *Bankruptcy Proceedings as a Tool for Debt Recovery* (Lagos: Olisa Agbakoba & Associates, [200-?], 15.

Wood, Philip R., *Principles of International Insolvency* (Sweet & Maxwell, London 2007).

Zack-Williams, Tunde; Frost, Diane; Thompson, Alex (eds.), *Africa in Crisis, New Challenges and Possibilities* (London: Pluto Press, 2002).

Ziegel, Jacob S., *Comparative Consumer Insolvency Regimes- A Canadian Perspective* (Hart Publishing, Oxford, U.K. and Portland, Oregon 2003).

Zoli, Edda, Credit Rationing in Emerging Economies' Access to Global Capital Markets (Washington, D.C.: IMF working paper, International Monetary Fund, 2004).

JOURNALS

Adler, Barry E., Bankruptcy and Risk Allocation, (1992) 77 Cornell L. Rev.

Baird, Douglas G., A World without Bankruptcy (1987) 50(2) *Law and Contemporary Problems*, 173.

Baird Douglas G.; Rasmussen, Robert K., The End of Bankruptcy, (2002) 55 Stan. L. Rev.

Balz, Manfred, Schiffman, Henry, Insolvency Law Reform for Economies in Transition – Comparative Law Perspective (1996) *Butterworths Journal of International Banking and Financial Law.*

Balz, Manfred, Schiffman, Henry, Insolvency Law Reform for Economies in Transition – Comparative Law Perspective (1996) *Butterworths Journal of International Banking and Financial Law.*

Benderson, Judith, Introduction: A History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (2006) 54 *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 1.

Braucher, Jean, Theories of Overindebtedness: Interaction of Structure and Culture (2006) 7 *Theoretical Inquiries in Law*, 323-346.

Bufford, Samuel, Romanian Bankruptcy Law: A Central European Example (1997)17 *New York Law School Journal of International and Comparative Law Review*, 251.

Bufford, Samuel, What is Right about Bankruptcy Law and Wrong about its Critics' (1994) 72 *Washington University Law Quarterly*, 829.

Christianson, David, Is a Missing Middle Market Tripping Africa's Banks? (2005) *Africa Magazine*, 30.

Duru, Evans, Is it Lawful for Police to Act as Debt Recovery Agents? (2008) *The Sun Newspaper*.

Efrat, Rafael; The Evolution of Bankruptcy Stigma (2006) *7 Theoretical Inquiries in Law*.

Gross, Karen, Taking Community Interests into Account in Bankruptcy: An Essay (1994) 72 *Washington University Law Quarterly*, 1031.

Harris, Ron; Albin, Einat, Bankruptcy Policy in Light of Manipulation in Credit Advertising (2006) 7 *Theoretical Inquiries in Law*, 431-466.

Honsberger, John; Conflict of Laws and the Bankruptcy Reform Act of 1978 (1980) 30 *Case Western Reserve Law Review*.

Klein, Michael W.; Peek, Joe; Rosengren, Eric, Troubled Banks, Impaired Foreign Investment: The Role of Relative Access to Credit (2002) 92 *American Economic Review*, 664-682.

Lastra, Rosa Maria, Cross-Border Bank Insolvency: Legal implications in the Case of Banks Operating in Different Jurisdictions in Latin America (2003) 6(1) Journal of International Economic Law, 79.

Legrand, Pierre, The Impossibility of 'Legal Transplants', (1997) 4 *Maastricht Journal of European and Comparative Law*, 111.

LoPucki, Lynn M., The Trouble With Chapter 11, (1993) Wis. L. Rev.

Lubben, Stephen J., Railroad Receiverships and Modern Bankruptcy Theory (2004) 89 *Cornell Law Review*.

Martin, Nathalie, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation (2005) 28 B.C. College Int'L & Comp. L. Rev. 1.

Mosley, Paul, Micro-macro Linkages in Financial Markets: The Impact of Financial Liberalization on Access to Rural Credit in Four African Countries (1999) 11(3) *Journal of International Development*, 367-384.

Olaitan, M. A., Finance for Small and Medium Enterprises: Nigeria's Agricultural Credit Guarantee Scheme Fund (2006) 3(2) *Journal of International Farm Management*, 2.

Panigyrakis, G.; Theodoridis, P.; Veloutsou, C., All Customers are not Treated Equally: Financial Exclusion in Isolated Greek Islands, (2002) Vol. 7 No. 1 *Journal of Financial Services Marketing*, 54-66.

Ramsay, Iain D.C, Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales (2006) 7 *Theoretical Inquiries in Law*, 625-666.

Ramsay, Iain, Models of Consumer Bankruptcy: Implications for Research and Policy (1997) 20 *Journal of Consumer Policy*, 269-287.

Small, Richard G., Towards a Theory of Contextual Transplants, (2005) Vol. 19 *Emory International Law* Review, 1433-1436.

Tamanaha, Brian Z., Understanding Legal Pluralism: Past to Present, Local to Global (2008) *Legal Studies Research Paper Series*, 1.

Thompson, E. P., Moral Economy of the English Crowd in the Eighteenth Century (1971) 50 *Past and Present*, 76.

Watson, Alan, Comparative Law and Legal Change, (1978) Cambridge L.J., 313.

Ziegel, Jacob, Facts on the Ground and Reconciliation of Divergent Consumer Philosophies (2006) 7 *Theoretical Inquiries in Law*, 299-321.

WEBSITES

Abasiekong, Edet M., Pledging Oil Palms: A Case Study on Obtaining Rural Credit in Nigeria' (1981) 24(1) African Studies Review, 73. <http://links.jstor.org>.

Adeyemo, Remi, Women in Rural Areas: A Case Study of Southwestern Nigeria (1984) 18(3) *Canadian Journal of African Studies,* 563 <http://links.jstor.org/sici?sici=0008-3968(1984)18%3A3%3C563%3AWIRAAC%3E2.0.CO%3B2-H>.

Agbakoba, Olisa and Tunde Fagbohunlu, Bankruptcy and Winding Up Proceedings: Potential Mechanisms for Speedier Debt Recoveries in <http://www.agbakoba-associates.com/admin/uploads/pubs/BANKRUPTCY%20AND%20WINDING%20UP.pdf> last accessed 18 July 2011.

Akinwunmi and Busari Legal Practitioners, Insolvency Practice in Africa- The Nigerian Experience in <http://www.akinwunmibusari.com/images/documents/Insolvency%20Practice

%20in%20Africa%20-%20The%20Nigerian%20Experience.pdf> last accessed 18 July 2011.

Akinwunmi, Seyi, Corporate Insolvency Law in Nigeria in <http:www.akinwunmibusari.com/images/documents/Corporate%20Insolvency%20Practice.pdf> last accessed 18 July 2011.

Amaeshi, Kenneth et al in, Financial Exclusion and Strategic and Strategic Corporate Responsibility: A Missing Link in Sustainable Finance Discourse? <http://www.nottingham.ac.uk/nubs/ICCSR/research.php?action=single&id=30> , 5, last accessed on 15 July 2011.

Anderson, Benedict R., Review of the Book, The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia (1977) 37(1) *Journal of Asian Studies,* 172 <http://links.jstor.org/sici?sici=0021-9118(197711)37%3A1%3C172%3ATMEOTP%3E2.0.CO%3B2-6>.

Armour, John, The Law and Economics of Corporate Insolvency: A Review, <http://www.cbr.cam.ac.uk/pdf/wp197.pdf>last accessed 14 July 2011.

Austin, Gareth, Moneylending and Witchcraft: The Moral Economy of Accumulation in Colonial Asante (Modern Economic History Seminar, LSE 2003)

<http://www.lse.ac.uk/collections/economicHistory/pdf/Gareth%20Austin%20Documents/Austin-MoneylendingWitchcraft.pdf>.

Benderson, Judith, Introduction: A History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

<http://www.justice.gov/usao/eousa/foia_reading_room/usab5404.pdf> last accessed on 14 July 2011.

BRIPAN, <www.bripan.org> last accessed 4 February 2011, however the link was inaccessible on 18 July 2011.

Brownbridge, Martin, The Causes of Financial Distress in Local Banks in Africa and Implications for Prudential Policy, <http://www.unctad.org/en/docs/dp_132.en.pdf >last accessed on 15 July 2011.

Bufford, Samuel, Bankruptcy Law in Eastern European Countries Emerging from Communism: The Special Legal and Economic Challenges (1996) 70 American *Bankruptcy Law Journal*, <http://heinonline.org.chain.kent.ac.uk/HOL/Pagehandle=hein.journals/ambank 70&id=1&size=2&collection=journals&index=journals/ambank>.

Central Bank of Nigeria < http://www.cenbank.org/Supervision/framework.asp > last accessed on 15 July 2011.

Charitonenko, Stephanie, The Nigerian Legal and Regulatory Framework for Microfinance: Strength, Weaknesses and Recent Developments <http://www.microfinancegateway.org/gm/document-1.9.25182/25979_file_Nigeria.pdf> last accessed on 18 July 2011.

Commission of the European Communities, *Action Plan: The European agenda for Entrepreneurship*, <http://ierc.bia-bg.com/Conf2009/DATA/KK7001EN.PDF> accessed on 18 July 2011.

Conway, Lorraine, A Comparison: Company Rescue under UK Administration and US Chapter 11,

<http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snha-05527.pdf> last accessed on 14 July 2011.

Core Principles for an Insolvency Law Regime <http://www.ebrd.com/country/sector/law/insolve/core/principle.pdf> accessed 29 December 2009.

Cranston, Ross, A Theory for International Commercial Law? <http://www.juridicas.unam.mx/sisjur/mercant/pdf/8-434s.pdf> last accessed on 18 July 2011.

Creating Opportunities for Small Businesses, <http://www.ifc.org/ifcext/sme.nsf/AttachmentsByTitle/ifcandsmes_brochure2007/$FILE/IFCandSMEs_Brochure2007.pdf > last accessed on 18 July 2011.

Department of Trade and Industry (now Department of Business Innovation and Skills), *Insolvency –A Second Chance*, 2001, Cm 5234 <http://www.insolvency.gov.uk/cwp/cm5234.pdf> last accessed on 14 July 2011.

DFID's Programme in Nigeria-International Development Committee, <http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmselect/cmintdev/840/84006.htm#n90 >last accessed on 14 July 2011.

Doing Business in Nigeria 2008, <http://www.doingbusiness.org/Documents/Subnational/DB08_Subnational_Report_Nigeria.pdf> last accessed on 18 July 2011.

Doing Business 2010 Nigeria, <http://www.doingbusiness.org/reports/subnational-reports/~/media/FPDKM/Doing%20Business/Documents/Profiles/CountryOLD/DB10/NGA.pdf> last accessed on 18 July 2011.

Duru, Evans, Is it lawful for police to act as debt recovery agents?, <http://www.nlrc.gov.ng/index.php> <http://www.sunnewsonline.com/webpages/features/managinglawfirm/2008/sept/24/managinglaw-24-09-2008-001.htm> first accessed 11 December 2009, however both links were inaccessible on 18 July 2011.

European Bank for Reconstruction and Development, *Core Principles for an Insolvency Law Regime* <http://www.ebrd.com/downloads/legal/insolvency/principle.pdf> last accessed 18 July 2011.

European Commission (2003), *Best Project on Restructuring, Bankruptcy and a Fresh Start*, <http://ec.europa.eu/enterprise/policies/sme/files/sme2chance/doc/failure_final_en.pdf> last accessed 18 July 2011.

Evaluation of Financial Inclusion Fund Face-to-Face Debt Advice Project, <http://www.berr.gov.uk/files/file41405.pdf> last accessed on 18 July 2011.

Falola, Toyin, My Friend the Shylock: Money-Lenders and Their Clients in South-Western Nigeria' (1993) 34(3) *Journal of African History*, 403 <http://links.jstor.org>.

Federal Republic of Nigeria: Assessment of Community Banks, <http://www.microfinancegateway.org/gm/document-1.9.26321/30162_file_ng_assessment_of_co.pdf > last accessed on 17 July 2011.

Federation of Small Businesses, <http://www.fsb.org.uk/default.aspx?id=1&loc=pressroom> last accessed on 18 July 2011.

Financial Services Authority, <http://www.fsa.gov.uk> last accessed on 15 July 2011.

Financial Services Provision and Prevention of Financial Exclusion Manuscript, <http://www.scribd.com/doc/46148457/Financial-Exclusion-Study-En> last accessed 15 July 2011.

FTC Facts for Consumers, <http://www.usdoj.gov/ust/eo/bapcpa/ccde/docs/FTC_Consumer_AlertCC.pdf > last accessed on 18 July 2011.

Giné, Xavier, Access to Capital in Rural Thailand: An Estimated Model of Formal Versus Informal Credit, <http://siteresources.worldbank.org/DEC/Resources/Access_to_Capital_in_Rural_Thailand_WP.pdf> last accessed on 14 July 2011.

Hart, Oliver, Different Approaches to Bankruptcy in <http://www.bankofengland.co.uk/publications/events/conf0209/hart.pdf> last accessed on 18 July 2011.

http://www.insol.org/pdf/consdebt.pdf

Hupkes, Eva, Insolvency- Why a Special Regime for Banks? < http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/hupkes.pdf> last accessed 15 July 2011.

Ihegbu, Nnamdi, Colonialism and Independence: Nigeria as a Case Study in <http://www.southernct.edu/organzations/hcr/2002/nonfiction/colonialism.htm >last accessed 15 July 2011.

INSOL International, *Consumer Debt Report: Report of Findings and Recommendations*, <http://www.insol.org/pdf/consdebt.pdf > last accessed 18 July 2011.

Kelland, Kate; Freke, Tome, For Some Britain's Insolvency Laws Add To Pain, < http://www.reuters.com/article/idUSL372925020090212 > last accessed on 18 July 2011.

Kempson, Elaine; Whyley, Claire; Caskey, John; Collard, Sharon, Financial Services Authority In or Out? Financial Exclusion: A Literature and Research Review, at <http://www.fsa.gov.uk/pubs/consumer-research/crpr03.pdf > last accessed on 15 July 2011.

Kempson, Elaine; Whyley, Claire, Kept Out or Opted Out? Understanding and Combating Financial Exclusion, <http://www.pfrc.bris.ac.uk/Reports/Kept_out_opted_out.pdf> last accessed on 18 July 2011.

Law Reform Commission, <http://www.justice.gov.uk/lawcommission/about-us.htm> last accessed on 18 July 2011.

Mabogunje, Akin L., City and Community: Towards Environmental Sustainability: Box 6.5 Nigeria's Community Banks: A Capital Idea, <http://archive.wri.org/newsroom/wrifeatures_text.cfm?ContentID=893> last accessed 17 July 2011.

Martin, Nathalie, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, <http://law.bepress.com/expresso/eps/172> last accessed on 15 July 2011.

Mattei, Ugo, Efficiency in Legal Transplants: An Essay in Comparative Law and Economics, <http://works.bepress.com/cgi/viewcontent.cgi?article=1013&context=ugo_mattei> last accessed on 19 July 2011.

Meckling, William H., Financial Markets, Default and Bankruptcy: The Role of the State (1977) 41(4) Law and Contemporary Problems 13 <http://www.heinonline.org>.

National Office of Statistics, <http://www.statistics.gov.uk/pdfdir/lmsbrief0809.pdf> last accessed on 18 July 2011.

Nigerian Bar Association Section on Business Law, <http://www.nba-sbl.org/committees.htm> accessed on 4 February 2011.

Microfinance Policy, Regulatory and Supervisory Framework for Nigeria Central Bank <http://www.cenbank.org/OUT/PUBLICATIONS/GUIDELINES/DFD/2006/MICROFINANCE%20POLICY.PDF> last accessed on 15 July 2011.

National Bankruptcy Conference, <www.nationalbankruptcyconference.org> last accessed on 14 July 2011.

Nigerian Law Reform Commission, <http://www.nlrc.gov.ng> last accessed on 4 February 2011 but inaccessible on 18 July 2011.

Nkrumah, Kwame, Neocolonialism, The Last Stage of Imperialism <http://www.marxists.org/subject/africa/nkrumah/neo-colonialism/ch01.htm> last accessed 15 July 2011.

Obadina, Tunde. The Myth of Neo-colonialism <http://www.afbis.com/analysis/neo-colonialism.html> last accessed 15 July 2011.

Okagbue, Sam N.; Aliko, Taiwo B., Banking Sector Reforms in Nigeria <http://www.imakenews.com/iln/e_article000336415.cfm?x=b11,0,w> last accessed 15 July 2011.

Reichenbach, Horst; Rada, Sonia H.; European Commission, *Entrepreneurship, Business Failure and Starting Afresh: The Work of the European Commission*, <http://www.europeanrestructuring.com/05intro/022_025.htm> last accessed on 18 July 2011.

Sak, Pamela Bickford and Henry Schiffman, Bankruptcy Law Reform in Eastern Europe (1994) 28 *The International Lawyer* 927 <http://heinonline.org.chain.kent.ac.uk/HOL/Page?handle=hein.journals/intlyr28&id=1&size=2&collection=journals&index=journals/intly.

Sardan, J. P., A Moral Economy of Corruption in Africa? (1999) 37(1) *The Journal of Modern African Studies* 25 <http://links.jstor.org>.

Sayer, Andrew, Moral Economy, <http://www.lancs.ac.uk/fass/sociology/papers/sayer-moral-economy.pdf> last accessed 15 July 2011.

Schimdhauser, John R., European Origins of Legal Imperialism and its Legacy in Legal Education in Former Colonial Regions (1997) 18(3) *International Political Science Review* 337 <http://ips.sagepub.com/cgi/content/abstract/18/3/337> last accessed 15 July 2011.

Schimdhauser, John R., Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems (1992) 13(3) International Political Science Review 321 <http://ips.sagepub.com/cgi/content/abstract/13/3/321> last accessed 15 July 2011.

Shuchman, Philip, Theory and Reality in Bankruptcy: The Spherical Chicken (1977) 41(4) Law and Contemporary Problems 66 <http://www.heinonline.org>.

The Report of the Vision 2020 National Technical Working Group on Small and Medium Enterprises (SMEs) <http://www.npc.gov.ng/downloads/Small%20&%20Medium%20Enterprises%20Report.pdf> accessed 23 October 2009.

Small, Richard G., Towards a Theory of Contextual Transplants, 1433- 1436, <http://www.law.emory.edu/fileadmin/journals/eilr/19/19.3/Small.pdf> accessed 15 July 2011.

South Africa: Technology and Access to Financial Services, <http://siteresources.worldbank.org/DEC/Resources/41114_South_Africa_Access_to_Finance.pdf> last accessed on 18 July 2011.

Statement of Insolvency Practice 16 (E&W), Pre-packaged sales in administrations, <http://tmp.co.uk/_media/docs/SIP_16.pdf > last accessed on 18 July 2011.

Steele, Stacey, Towards a 'Modern' Corporate Bankruptcy Regime, <http://kirra.austlii.edu.au/au/journals/MULR/1999/5.html> last accessed 15 July 2011.

Tamanaha, Brian Z., Understanding Legal Pluralism: Past to Present, Local to Global, <http://www.law.usyd.edu.au/slr/slr30_3/Tamanaha.pdf> last accessed 14 July 2011.

The Report of the Vision 2020 National Technical Working Group on Small and Medium Enterprises (SMEs), <http://www.npc.gov.ng/downloads/Small%20&%20Medium%20Enterprises%20Report.pdf > last accessed 23 October 2009, however the link was inaccessible on 14 July 2011.

Twining, William, Lecture IV: Generalizing about Law: The Case of Legal Transplants,

<http://www.ucl.ac.uk/laws/jurisprudence/docs/others/twi_til_4.pdf > last accessed on 18 July 2011.

Uche, Chibuike Ugochukwu, Foreign Banks, Africans, and Credit in Colonial Nigeria, c.1890-1912 (1999) 52(4) *Economic History Review* 669 <http://links.jstor.org>.

UNCITRAL (2004), *UNCITRAL Legislative Guide on Insolvency Law*, <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> last accessed 18 July 2011.

United States Courts, Chapter 11, <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter11.html#business> last accessed on 18 July 2011.

Valderrama, Irma, Legal Transplants and Comparative Law, <http://redalyc.uaemex.mx/redalyc/pdf/824/82400207.pdf> last accessed on 19 July 2011.

Weistart, John C., Costs of Bankruptcy (1977) 41(4) Law and Contemporary Problems 107 <http://www.heinonline.org>.

Weston, J. Fred, Some Economic Fundamentals for an Analysis of Bankruptcy (1977) 41(4) *Law and Contemporary Problems* 47 <http://www.heinonline.org>.

White, Michelle J., Bankruptcy and Small Business- Lessons from the US and Recent Reforms < http://weber.ucsd.edu/~miwhite/dice-white-final.pdf > last accessed on 18 July 2011.

World Bank, Building Effective Insolvency Systems <http://www.worldbank.org/ifa/ipg_eng.pdf> last accessed 20 July 2011.

Yunusa, Mariam L., The Community Banking System in Nigeria, <http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN004228.pdf> last accessed on 15 July 2011.