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TRANSNATIONAL REGULATION, LENDERS' RESPONSES AND THE NEEDS OF CONSUMER BORROWERS IN NIGERIA

By

Philemon Iko-Ojo Omede

A thesis submitted for the degree of Doctor of Philosophy, Kent Law School, University of Kent.

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ABSTRACT

This thesis undertakes an analysis of the developing international paradigm and rationale for regulating consumer credit and their application to Nigeria. The thesis makes an original contribution by problematising the simple application of the transnational model to Nigeria, which currently produces counterproductive outcomes for consumer borrowers. The thesis argues that the emerging transnational paradigm since the Global Recession presents an opportunity for stronger consumer protection and access to credit in Nigeria only if the framework is adapted to the existing institutional structures. To effectively address the research question, the thesis engages with economic neoliberalism as an analytical framework, the influences of psychology (behavioural science) on law, and the historical relationship of Nigeria with transnational institutions. Through a careful analysis of existing literature and a small scale qualitative study, the thesis found: (a) links between transnational regulation and decreased lending by formal sector lenders to consumer borrowers in Nigeria; (b) a weak coalition of change agents at the national level to advance the interests of consumer borrowers, and thus, forsee a role for transnational actors as change agents within the Nigerian credit market; (c) that International Financial Institutions (IFIs) like the World Bank and the International Monetary Fund (IMF) must approach this role from a social protection prism that rests on a new pro-poor 'conditionality', distinct from how conditionality has traditionally been used in Africa. The thesis is a scoping exercise that engages with the research question primarily from the perspective of formal lenders, and designed to facilitate more in-depth studies of the issues in the longer term. It is hoped that the findings of this thesis will stimulate further study. While making policy recommendations, the thesis was careful to avoid broad generalisations.

TABLE OF CONTENT

TRANSNATIONAL REGULATION, LENDERS' RESPONSES AND THE NEEDS OF CONSUMER BORROWERS IN NIGERIA i
ABSTRACT ii
TABLE OF CONTENT iii
TABLE OF ABBREVIATIONS..... viii
ACKNOWLEDGEMENTS..... xi
LIST OF LEGISLATION..... xiii
LIST OF CASES xvi
TABLES xviii
CHAPTER ONE: INTRODUCTION 1
1.1 BACKGROUND OF THE STUDY 1
1.2 RESEARCH QUESTION 4
1.2.1 Neoliberalism..... 7
1.2.2 Consumer Credit/Debt 9
1.3 SIGNIFICANCE OF THE STUDY 10
1.4 RESEARCH METHODOLOGY 16
1.4.1 Background to Interviews..... 17
1.4.2 Interview Sample 17
1.4.3 Sampling technique and Limitations of Study 18
1.4.4 Summary of Interview Findings 19
1.5 OVERVIEW OF THESIS..... 20
CHAPTER TWO..... 24
2.1 AN OVERVIEW OF THE NIGERIAN LEGAL SYSTEM 24
2.1.1 Statutory Law 24
2.1.2 Case Law/Common Law..... 25
2.1.3 Customary Law 27
2.1.4 International Law..... 30
2.2 THE STRUCTURE OF LENDING IN NIGERIA 30
2.3 FORMAL SECTOR..... 31
2.3.1 Commercial Banks 31
2.3.2 Microfinance Institutions 34
2.4 SEMI-FORMAL SECTOR..... 36
2.4.1 Moneylenders, Hire-purchase, and Pawnbrokers..... 36
2.4.2 Cooperative Societies..... 41

2.4.3 Fintech Start-Ups 42
2.5 THE REGULATORY FRAMEWORK FOR FINTECH IN NIGERIA 44
2.5.1 Mobile Money Regulations 45
2.5.2 Agent Banking Regulations 47
2.5.3 Credit Reporting Act 47
2.6 INFORMAL SECTOR 50
2.7 MARKETS EMERGING IN RESPONSE TO REGULATION ('BLACK MARKET') 56
2.8 CUSTOMARY MONEYLENDERS 58
2.8.1 Family and Friends 59
2.8.2 Rotating Savings and Credit Associations (ROSCAs) 59
2.8.3 Vendor Credit 61
2.9 JURISDICTION OVER INFORMAL CREDIT CONTRACTS 62
2.10 SUMMARY 63
CHAPTER THREE 65
RATIONALE FOR CONSUMER CREDIT REGULATION 65
3.1 THE UTILITY OF CONSUMER CREDIT 65
3.2 THE SCHOOLS OF THOUGHT 66
3.2.1 Credit as Lubricant: The Permanent Income Hypothesis Theory (PIH) 66
3.2.2 The PIH and Consumer Borrowing in Nigeria 69
(i) Future Incomes Will Continue to Grow 70
(ii) Demand for Credit is a *Choice* 71
(iii) There is an Endless Pool of Lenders to Borrow From 71
3.3 CONSUMER CREDIT AS A PERILOUS PRODUCT 72
3.3.1 Consumer Credit Hurts More Than It Helps Low-Income Consumers 72
3.3.2 Consumer Credit as a Smokescreen for Rolling Back the Welfare State 75
3.3.3 Consumer Credit Distorts Resource Allocation Within the Economy 79
3.4 RATIONALE FOR REGULATING CONSUMER CREDIT 80
3.4.1 Market Construction 80
3.4.2 Correcting Market Failures 82
(i) Monopoly and Coordination 83
(ii) Information Failures 84
(iii) Credit Rationing and Adverse Selection 85
(iv) Moral Hazard 86
3.4.3 Prevention of Systemic Risk and Externalities 87
3.4.4 Behavioural Economics (BE) 91

(i) Hyperbolic Discounting 92
(ii) Overconfidence 93
(iii) Framing Effects and Status Quo Bias 94
3.5 A HUMAN RIGHT RATIONALE FOR CONSUMER CREDIT REGULATION 99
3.5.1 Economic Rights and Human Capability 100
3.5.2 Consumer Credit as a Human Capability 101
(i) A Right to Consumer Credit 102
(ii) Consumer Protection as a Human Right 109
3.5.3 An American Case Study: The Community Reinvestment Act 1977 111
3.6 SUMMARY 114
CHAPTER FOUR 116
4.0 PARADIGMS IN CONSUMER CREDIT REGULATION 116
4.1 MAPPING AN EVOLVING PARADIGM: THE NEW APPROACH TO CREDIT REGULATION AFTER THE GLOBAL RECESSION 117
4.2 THE REIGN OF THE CONSUMER 118
4.2.1 The Legitimation of Consumer Protection Agencies 119
4.2.2 A Robust Understanding of 'Fair Treatment' in Financial Markets 120
4.3 THE COLLAPSE OF THE INFORMATION PARADIGM 127
4.3.1 Form 131
4.3.2 Format and Plain Language 132
4.3.3 Key Fact Statements 132
4.3.4 Consumer Testing 133
4.4 FROM COMPENSATION TO APPREHENSION/PREVENTION 134
4.5 THE NEW ASSUMPTIONS ABOUT CONSUMER WELFARE 136
4.5.1 The Lost Allure of Credit and Reversal of the Democratisation Narrative 137
4.5.2 Financialisation and the Perpetuation of Class Disparity to Credit Access 142
4.5.3 Human Rights and Access to Consumer Credit: From Boon to Foil 145
4.6 A NEW PARADIGM FOR CREDIT REGULATION? 148
4.7 SUMMARY 153
CHAPTER FIVE 155
5.0 A SYNOPSIS OF CONSUMER LENDING PATTERNS IN FORMAL FINANCIAL INSTITUTIONS AND LENDERS' RESPONSES TO REGULATORY REFORMS IN NIGERIA 155
5.1 BACKGROUND TO INTERVIEWS 158
5.2 FINDINGS: HOW FORMAL LENDING PRACTICES RESPOND TO FINANCIAL REFORMS 159

5.2.1 Unintended Outcomes of Financial Reforms 159
5.2.2 Prudential Regulation: Banking Consolidation 159
5.2.3 Credit for Production 162
5.2.4 Anti-Money Laundering Regulation 166
5.2.5 From a Regime of Control to a Regime of Transparency 169
5.3 SUMMARY AND DISCUSSION OF FINDINGS ON LENDERS' ATTITUDES TO CONSUMER CREDIT 171
5.4 STRUCTURES OF LENDING AND CONSUMER WELFARE IMPLICATIONS: FORMALITY v INFORMALITY 175
5.5 COMMERCIAL BANKS AND MFIs 175
5.6 INFORMAL AND SEMI-FORMAL LENDERS 178
5.6.1 Family and Friends 178
5.6.2 Cooperatives 179
5.6.3 Fintech Start-Ups 181
5.7 DEFAULT RISK AND CONSEQUENCES ACROSS LENDING CHANNELS 182
5.7.1 A Familiar Tale of Corruption and Institutional Weknesses 187
5.8 MONEYLENDERS AND EXTREME ABUSES OF CONSUMER RIGHTS 191
5.8.1 Formal Lenders: Same Medicine, Subtler Methods 195
5.9 SUMMARY 197
CHAPTER SIX 201
6.0 IMPLICATIONS OF FINDINGS FOR THEORY AND POLICY 201
6.1 THE GULF BETWEEN IDEOLOGY AND POLICY IN NIGERIA 203
6.2 THE CASE FOR CONSUMER CREDIT IN NIGERIA 209
6.2.1 Consumer Credit as a Form of Social Insurance 209
6.2.2 Consumer Credit and Institutional Efficiency 213
6.3 WHO SHOULD BORROW IN NIGERIA? 215
6.4 'SUBPRIME' BORROWERS 216
6.5 MIDDLE- AND LOWER-INCOME BORROWERS 218
6.5.1 The American Model 218
6.5.2 Digital Credit 222
6.6 SELF-EXCLUDING BORROWERS 223
6.7 HOW TO PROTECT CONSUMER BORROWERS 224
6.7.1 From Consumer Access [As an End] to Consumer Welfare in Nigeria 224
6.7.2 Freedom of Contract and Social Legislation: The Doctrine of *Force Majeure* 226
6.8 NON-DEBT INCOME SOURCES 229
6.8.1 Universal Basic Income 229

6.8.2 Consumer Debt and Labour Policy 232
6.9 RETHINKING THE ROLE OF TRANSNATIONAL INSTITUTIONS IN INITIATING POLICY SHIFT IN NIGERIA 235
6.10 SUMMARY 240
6.11 SUGGESTIONS FOR FURTHER STUDY 241
APPENDICES 246
BIBLIOGRAPHY 258

TABLE OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AML	Anti-Money Laundering
ATM	Automated Teller Machines
BCBS	Basel Committee on Banking Supervision
BE	Behavioural Economics
BOFIA	Banks and Other Financial Institutions Act
CAR	Capital Adequacy Ratio
CBN	Central Bank of Nigeria
CCS	Core Civil Servants
CFPB	Consumer Financial Protection Bureau
CFAN	Cooperatives Financing Agency of Nigeria
CGAP	Consultative Group to Assist the Poor
CJEU	Court of Justice of the European Union
CPC	Consumer Protection Council of Nigeria
CRA	Community Reinvestment Act
DG SANCO	Directorate-General for Health and Consumers
EEC	European Economic Community
EIU	Economist Intelligence Unit
EU	European Union
FATF	Financial Action Task Force (FATF)
FCA	Financial Conduct Authority
FCMB	First City Monument Bank PLC
FG	Federal Government of Nigeria
Fintech	Financial Technology
FSAP	Financial Sector Assessment Programme

FSB	Financial Stability Board
GDP	Gross Domestic Product
GDPR	General Data Protection Regulations
GSIBs	Global Systemically Important Banks
G20	Group of World's top 20 economies
HLA	Higher Loss Absorbency
IBRD	International Bank for Reconstruction and Development
IFC	International Finance Corporation
IFI	International Financial Institutions
IIF	The International Institute of Finance
IMF	International Monetary Fund
ISIL	Islamic State in Iraq and the Levant
KYC	Know Your Customer
MDA	Ministries, Departments, and Agencies
MDG	Millennium Development Goals
MFI	Microfinance Institutions
MMO	Mobile Money Operator
MNO	Mobile Network Operator
M-POS	Mobile Point of Sale
MPR	Monetary Policy Rate
MSME	Micro, Small and Medium Enterprises
NAPEP	National Poverty Eradication Programme
NBS	National Bureau of Statistics
NDIC	Nigerian Deposit Insurance Corporation
NGN	Nigerian Naira
NGO	Non-Governmental Organisation
NIBSS	Nigeria Inter-Bank Settlement Systems PLC

NIT	Negative Income Tax
NLC	Nigerian Labour Congress
NNPC	Nigeria National Petroleum Corporation
NPF	Nigeria Police Force
NSE	Nigeria Stock Exchange
OECD	Organisation for Economic Cooperation and Development
PCGS	Partial Credit Guarantee Scheme
PIH	Permanent Income Hypothesis
PIN	Personal Identification Number
ROSCA	Rotating Savings and Credit Associations
SAP	Structural Adjustment Programme
SARS	Special Anti-Robbery Squad
SDG	Sustainable Development Goals
SME	Small and Medium Scale Enterprises
SMEDAN	Small and Medium Scale Enterprises Development Agency
SMS	Short Message Service
TELCO	Telecommunication Company
TV	Television
UBI	Universal Basic Income
UK	United Kingdom
US	United States of America
USD	United States Dollars
USSD	Unstructured Supplementary Service Data
WJP	World Justice Project

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Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC [2002] OJ L 133/66 (Consumer Credit Directive 2008)

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TABLES

TITLE	PAGE
Table 1: Depository Institutions Earn One of Five Possible Ratings for Lending, Investment and Service Activities	97

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Globalisation and the transnational legal order impact consumer policy in developing countries in ways that are not fully understood.[1] In Nigeria, colonial legacies such as the inherited legal system and banking model continue to operate with mixed outcomes for consumers. At the same time, policies of high-income countries on trade and investment,[2] security and intellectual property rights continue to influence domestic policy and impact significantly on economic growth and living standards in developing countries.[3]

In the sphere of credit market regulation, the donor-beneficiary and creditor-debtor relationships between developed and developing countries have resulted in the latter adopting and implementing rules and codes of business conduct made by the former.

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[1] CN Murphy, 'Global Governance: Poorly Done and Poorly Understood' (2000) 76 (4) International Affairs 789-803; JE Stiglitz, 'The Overselling of Globalization' (2017) 52(3) Business Economics 129–137; D Moyo, *Edge of Chaos* (London, Little, Brown 2018).

[2] See for instance World Bank, '*Doing Business 2019: Training for Reform (Vol. 2) (English)*' (Washington, DC, World Bank Group 2018) <http://documents.worldbank.org/curated/en/975621541012231575/Doing-Business-2019-Training-for-Reform> accessed 16 May 2019. See also D Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (Hart 2010).

[3] This thesis focuses on transnational regulatory models for consumer credit. However, background knowledge of the debates within the development policy community on what is now best known as the Washington Consensus could be relevant but certainly not mandatory for a full appreciation of the discussion in this thesis. Although the Consensus has morphed into various things, it originally consisted of ten sets of policy recommendations for developing countries including amongst other things fiscal policy discipline, elimination/redirection of public subsidies, tax reforms, privatisation, liberalisation, and deregulation (of interest rates, exchange rates, industries). See J Williamson, 'What Washington Means by Policy Reform' in J Williamson (ed), *Latin American Readjustment: How Much has Happened* (Washington, Peterson Institute for International Economics 1989). The Consensus has been described as a tract for neoliberalism and has had a much negative impact on developing countries. See J Stiglitz, *Globalization and its Discontents* (New York, WW Norton & Company 2002) 53.

Immediately after gaining independence from Britain in 1960, the Nigerian government adopted an interventionist social policy to stimulate economic development via measures including free education and healthcare programmes, interest rate controls and direct allocation of credit to priority sectors and rural areas where private financial institutions would not ordinarily direct resources.[4] These policies presented significant social and economic benefits to Nigerians of all economic strata.[5] These welfare programmes between 1960 and 1983, however, were in part made possible by the oil booms of the 1970s and massive borrowing from international financial institutions (IFI) mainly the World Bank and the International Monetary Fund (IMF). This borrowing and the subsequent dependence on foreign technical support made it possible for the IFIs to gain a foothold on the domestic policy landscape of Nigeria.[6] This period (1983-89) also marked the rebirth of monetarism in Nigeria through the Structural Adjustment Programme (SAP). The World Bank's solutions to the economic problem of Nigeria consisted mainly in privatisation, liberalisation, and formalisation.[7] Privatisation and liberalisation, according to the institutions, would make for better competition. Credit controls and various subsidies were removed, such that access to credit products was left to market forces. Thus, SAP emphasised credit availability but ignored the distributional impact on consumers.

The international institutions were right to point out the implementation failures of the state-centric model riddled by official corruption, rapid inflation and other macroeconomic imbalances. However, monetarism and financial liberalisation ignore the social and economic well-being objectives that the previous model sought to achieve by promoting access to affordable finance. As far as SAP went, the individual

[4] O Sofola, 'The Nigerian Law of Consumer Credit and Security' (PhD thesis, King's College, University of London 1988).

[5] N Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (New York, Cornell University Press 2006) 141.

[6] ibid 141.

[7]World Bank, *World Development Report: Financial Systems and Development World Development Indicators* (Oxford, Oxford University Press 1989).

welfare of consumers was an afterthought. Although this thesis is not primarily a critique of SAP, the implications of SAP continue to be relevant in the present day for consumers of financial services in sub-Saharan Africa and indeed all affected countries.[8] By devaluing the Nigerian currency (Naira) and implementing austerity measures, including the introduction of tuition and surcharges for education and health services, the government undermined access to essential services like education and healthcare.[9] For instance, Woods characterised the impact of SAP on consumer welfare as follows:

> Public sector job retrenchments, job losses in other areas, cutbacks in food subsidies and welfare provisions, as well as a loss in the quality of welfare provisions, the general economic slowdown, and the lack of any political voice in the process of adjustment all exacted a high price on the poor in sub-Saharan Africa.[10]

SAP increased the demand for consumer credit and decreased the opportunity to access safe credit products in the newly deregulated market. The resulting adverse conditions grossly diminished individual and collective capacities to save, invest, and fund consumption without borrowing.[11] Beyond these immediate consequences, Nigeria continues to follow the policy path charted by SAP despite the World Bank and the Organisation for Economic Cooperation and Development (OECD) countries having made a fundamental shift in regulatory policy since the early 2000s and particularly since the Global Recession of 2008.[12]

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[8]K Konadu- Agyemang, *IMF and World Bank Programs in Africa: Ghana's Experience, 1983–1999* (Aldershot, Hampshire, UK, Ashgate International 2001).

[9] Woods (n 5) 141-155.

[10] ibid 158.

[11] D Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's "Economic Growth in the 1990s: Learning from a Decade of Reform"' (2006) 44 (4) Journal of Economic Literature 973-987; World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform* (Washington, DC, World Bank 2005).

[12] For instance, the World Bank's Good Practices for Financial Consumer Protection 2017 promotes *ex ante* approaches to consumer protection and embraces behavioural science in regulatory policy. This shift in approach by the World Bank from *ex post* to *ex ante* regulation is a departure from the neo-

This chapter is structured into four parts. Part one which follows directly below sets out the research question and clarifies the context in which recurring terms are used throughout this thesis. Part two outlines the contributions of this thesis to knowledge. Part three presents the research methodology. It offers a background to the qualitative interviews undertaken in the course of this study. Part four provides an overview of the entire thesis by providing summaries of the structure and contents of all the chapters in the thesis.

1.2 RESEARCH QUESTION

The thesis poses the following research question: How beneficial is the evolving international approach to consumer credit regulation to consumers of credit products and services in Nigeria?

Implicit in the research question is the assumption that there is an approach common to credit policies made by the different international financial institutions. However, international rules on consumer credit derive from diverse sources. The thesis will consider three sources of transnational regulation. The first source is rules made by the World Bank (The Bank) and the IMF. The Bank has two main goals which are to 'end extreme poverty by decreasing the percentage of people living on less than USD 1.90 a day to no more than 3% (sic)', and to 'promote shared prosperity by fostering the income growth of the bottom 40% (sic) for every country'.[13] The Bank's strategy involves providing 'low-interest loans, zero to low-interest credits, and grants to developing countries'.[14] It also co-finances development projects with 'governments, other multilateral institutions, commercial banks, export credit agencies, and private sector investors'.[15] The IMF ensures 'the stability of the international monetary

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classical economics assumption of consumers as rational agents. See World Bank, *Good Practices for Financial Consumer Protection* (Washington, DC, World Bank 2017); O Bar-Gill and E Warren, 'Making Credit Safer' (2008) 157(1) University of Pennsylvania Law Review 1-101.

[13] World Bank, 'What We Do' (*World Bank*, 3 May 2019) <http://www.worldbank.org/en/about/what-we-do> accessed 3 May 2019.

[14] ibid.

[15]ibid.

system—the system of exchange rates and international payments that enables countries (and the [ir] citizens) to transact with each other'.[16] The IMF achieves this by combining economic and financial surveillance, technical assistance and training, direct lending to member countries, and providing a robust statistics and research database to assist global economic policymaking.

As highlighted earlier, the Bank and the IMF's goals involve inevitably shaping domestic regulatory policies of member states. There is no doubt that both institutions have evolved ideologically since the Global Recession (Chapter four). However, the legacies of SAP continue to define consumer credit regulation in Nigeria.

The second group of influential rule-makers is transnational non-governmental associations like the G20, the OECD, and the Basel Committee on Banking Supervision. Together, these bodies have initiated various reforms to (i) strengthen the resilience of financial institutions, mainly, Global Systemically Important Banks (GSIBs); and (ii) protect consumers of financial products and services especially since the Global Recession (Chapter four).[17] Rules made by these otherwise informal associations even though designed to apply voluntarily become soft law and binding in jurisdictions unrepresented in these associations, including many developing countries. For example, the IMF's Financial Sector Assessment Programme (FSAP) considers the observance of standards and codes issued by these bodies as part of its assessment of prudential regulations and supervision even where the country under assessment is not a member of the institution issuing the standard or code.[18]

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[16] International Monetary Fund, 'The IMF at a Glance' (*IMF*, 3 May 2019) <https://www.imf.org/en/About> accessed 03 May 2019.

[17] Bank for International Settlements, 'Basel Committee on Banking Supervision High-Level Summary of Basel III Reforms' (BIS, 2017) <https://www.bis.org/bcbs/publ/d424_hlsummary.pdf> accessed 13 August 2019.

[18] C Brummer, 'Post-American Securities Regulation' (2010) 98 California Law Review 327, 384; GA Onagoruwa, 'Legitimacy Deficit of Soft Law Institutions in Cross-Border Bank Regulation: An African Perspective' (2014) 34 Journal of International Banking Law and Regulation 258.

The third group of influential rules considered in this thesis are those made by advanced countries of the European Union (EU),[19] the UK and the United States because of the amount of influence they have on other countries.

Despite this diversity of sources and institutional missions, collectively, the international approach is defined by its commitment to neoliberal market policies. There are three areas of tensions between the international approach and consumer credit policy in Nigeria. First, there is confusion about the meaning of neoliberalism. The regulatory tools available to neoliberal governments across the world continue to change and expand particularly after each major crisis, but the extent to which regulators in Nigeria and developing countries are shaping or following this evolution is debatable (Chapters three and four). According to Hall,[20] for a shift in paradigm to occur, an idea, or a set of ideas existing on the periphery requires proximity to power to translate to official policy. In Nigeria, there is a dissonance between politics and policy outcomes. Elections are won and lost (and by extension appointment of regulators) on the bases of primordial factors like ethnicity, religion, available campaign funds, rather than the strength of party manifestoes, political ideology or the intellectual abilities of candidates.[21] Individual actors in the financial system are occasionally sacrificed after significant scandals,[22] but the ideological backlash of the sort that leads to a paradigm shift rarely materialises (Chapters five and six). Secondly,

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[19] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC [2002] OJ L 133/66 (Consumer Credit Directive 2008). See also G20, 'High-Level Principles on Financial Consumer Protection' (*OECD* October 2011) <https://www.oecd.org/daf/fin/financial-markets/48892010.pdf> accessed 13 August 2019 which endorsed the approach.

[20] PA Hall, 'Policy Paradigms, Social Learning, and the State: The Ease of Economic Policy-Making in Britain' (1993) 25(3) Comparative Politics 275-296.

[21] J Campbell, 'Nigeria: Political Parties' Limitations' (*Council on Foreign Relations*, 10 February 2014) <https://www.cfr.org/blog/nigeria-political-parties-limitations> accessed 13 August 2019. Political parties are hardly distinguishable by reference to ideology, which explains why politicians cross-carpet all the time.

[22]eg, the bankers behind the credit crisis of 2009 and the banking reforms that followed.

international institutions have the means to enforce[23] their own rules in developing countries when the incentive exists (eg, to foster international financial stability or minimise exposures to sovereign default), but the motivation to impose reforms that do not directly benefit them or their influential members (eg, consumer protection) is often absent. Instead of focusing on the legitimacy of transnational rules vis-à-vis state sovereignty, this thesis will focus on the merits of specific transnational regulations, the nature of the role that IFIs perform in developing countries, and how they can perform this role to improve the wellbeing of low-income consumer borrowers in Nigeria. Lastly, context matters to effective rule-making. One rule can have opposite outcomes in developing and developed countries (Chapter five).

1.2.1 Neoliberalism

[23] The IMF and World Bank wield enormous persuasive influence on borrowing countries. They persuade borrowers through political and diplomatic pressures by some of their wealthiest board members (eg the United States) and their strong bargaining powers built on penalties and conditionality vis-à-vis the practically desperate circumstances of their borrowers. They can also decline to lend to applicants (borrowing states) who fail to comply with these, which also can be construed as an indictment of the country's economic policy. A borrowing state in default could also be sanctioned. See N Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (New York, Cornell University Press 2006) 65-67, 70-71. However, the persuasive capacity of the IMF and the World Bank is not always built on forceful measures. Rather, through a system of elite networks that straddle national and international establishments (eg Ivy league trained economists with a shared worldview), described by some as 'epistemic communities', the IMF and World Bank can 'penetrate' national institutions to impose their policies. See E Adler and PM Haas, 'Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program' (1992) 46 (1) International Organization 367-390. For example, to counter national trade ministries' resistance to liberalisation, the World Bank might work through a country's Central Bank as it did with Mexico in the 1980s, in effect playing national institutions against each other. See B Heredia, 'Profits and Politics' in S Maxfield and R Anzaldua (eds), *Government and the Private Sector in Contemporary Mexico* (San Diego, CA, Center for US-Mexican Studies 1987).

There are, at least, three different connotations of neoliberalism as: (a) an ideology; (b) a mode of governance; and (c) a policy package.[24] As an ideology, neoliberalism embraces strong individual property rights, rule of law, freedom of contract, and state monopoly of violence to enforce these rights.[25] This ideology favours:

> A minimised role for the state and a maximised role for the market (the private business sector) in the belief that the market is: (a) the most efficient and equitable distributor of resources and rewards; (b) the best guarantor of economic growth; and (c) the most able protector of individual liberty.[26]

As a mode of governance, neoliberalism connotes 'a normative order… [a] widely and deeply disseminated governing rationality' that radically transforms 'every human domain and endeavor (sic), including humans themselves, according to a specific image of the economic'.[27] This dimension of neoliberalism is famously expressed in the Foucaldian idea of 'governmentalities' rooted in 'entrepreneurial values such as competitiveness, self-interest, and decentralization (sic)'.[28] The Marxist account of neoliberalism also falls within this dimension. According to the Marxist account, the main objectives of neoliberalism are 'the restoration and increase of the power, income, and wealth of upper classes…a phase of managerial capitalism…'.[29]

The third dimension of neoliberalism and the most precise sense in which it is used in this thesis expresses itself as a concrete set of policies namely, deregulation (of the

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[24] MB Steger and RK Roy, *Neoliberalism: A Very Short Introduction* (Oxford, Oxford University Press 2010) 11.

[25] D Harvey, *A Brief History of Neoliberalism* (Oxford, Oxford University Press 2005) 66-70; S Hall, 'The Neo-Liberal Revolution' (2011) 25 Cultural Studies 705–728; P Bennett, *Popular Culture and the Austerity Myth: Hard Times Today* (New York, Routledge 2017).

[26] G Gall, R Hurd and A Wilkinson, 'Labour Unionism and Neo-Liberalism' in G Gall, R Hurd and A Wilkinson (eds), *The International Handbook of Labour Unions Responses to Neo-Liberalism* (Cheltenham, Edward Elgar Publishing Limited 2011) 1-12.

[27] W Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York, Zone Books 2015) 9-10.

[28] Steger and Roy (n 24) 11; M Foucault, *The Birth of Biopolitics*: *Lectures at the Collège de France, 1978-1979* (M Senellart ed, G Burchell tr, New York, Palmgrave MacMillan 2008) 27.

[29] G Dumenil and D Levy, *The Crisis of Neoliberalism* (Cambridge, Harvard University Press 2012).

economy); liberalisation (of trade and industry); and privatisation (of state-owned enterprises).[30] In this sense, the term enables the discussion of the role of regulation in facilitating access to consumer credit in Nigeria and strengthening the rights of consumers within the market. This is not to say that the other dimensions of neoliberalism, namely as ideology and mode of governance are irrelevant to this analysis. However, as the goal of this thesis is to examine the practical manifestation of neoliberalism in the context of the Nigerian consumer credit market, a debate about the ideological content of neoliberalism is a secondary exercise- to the extent that the analysis of the utility of consumer credit to low-income individuals in developing countries, and the expanding role of the state in global financial markets are as ideological as they are policy-oriented. Similarly, understanding neoliberalism in the Foucauldian sense minimises the analytical risk to obfuscate neoliberalism as advocating non-state intervention or to confuse neoliberalism for libertarianism. Accordingly, examining policies helps to highlight the point that neo-liberalism does not seek to challenge state power and authority. Rather, it is the use of state authority by advocates and agents of neoliberalism (in this case Nigerian and transnational regulators) to advance among other things the globalisation of financial rules.[31] In other words, neoliberalism depends on state interventions (change in laws and regulations) to come into existence.[32]

1.2.2 Consumer Credit/Debt

Consumer credit/debt, as used in this thesis, embraces:

> both money that is lent and borrowed as money, without being specifically tied to the purchase of any particular goods and services, and also any part of the purchase price of specific goods and services that is not paid on the spot but deferred for later settlement.[33]

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[30] Steger and Roy (n 24) 11; A Fraser, E Murphy and S Kelly, 'Deepening Neoliberalism via Austerity and "Reform": The Case of Ireland' (2013) 6 Human Geography 38–53.

[31] Gall, Hurd and Wilkinson (n 26) 1-12.

[32] M Fisher, *Capitalist Realism: Is There No Alternative?* (Winchester, Zero Books 2009).

[33] Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971) 13.

For convenience, the term 'individual credit' is used throughout this thesis in appreciation of the difficulty of sorting the consumer needs of individual borrowers in Nigeria from their entrepreneurial ventures. Indeed, the boundary between consumer credit and micro, small and medium enterprises (MSME) credit is fluid as individual borrowers could apply loans to both uses. For example, an individual borrower can spend a consumer loan on educating a child who works part-time for the family's small business after school hours.[34]

Secondly, although the study sought to emphasise the experiences of lower-end borrowers in accessing consumer credit, it inevitably captures people from the middle-classes[35] due to the wide brackets of exclusion. This is especially so for consumer credit. Accordingly, the analyses will focus on the protection of consumer borrowers rather than consumers of banking/financial services generally.

1.3 SIGNIFICANCE OF THE STUDY

The thesis makes three significant contributions to knowledge. First, it highlights the inattention of regulators at transnational and national institutions to the impact of regulatory reforms post-Global Recession on access to consumer credit in developing countries, even though government policies since the 1970s across the world have increased the borrowing needs of the poorest consumers. Policy debates on consumer credit have orbited around the glut of household credit in developed countries and overleveraged positions of financial institutions since the Global Recession.[36] The scale

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[34] Formal lenders interviewed in Nigeria preferred 'retail credit' to individual or consumer credit. Most of the respondents from the formal sector apply identical criteria for individual and business loan assessments. Hence, several responses in the interviews mention MSME and business plans when discussing loan approval process because the creditworthiness assessment is practically indistinguishable.

[35] For example, civil servants, people who execute government contracts, traders.

[36] BS Bernanke, TF Geithner, and HM Paulson, *Firefighting: The Financial Crisis and its Lessons* (New York, Penguin Books 2019) 11-12; E Liikanen and others, 'High-Level Expert Group on Reforming the Structure of the EU Banking Sector' *(*Liikanen Report*)* (2012) <http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/liikanen-report/final_report_en.pdf> accessed 13 August 2019; HM Treasury, 'Reforming Financial Markets'

of economic losses and social displacement occasioned by the Recession shifted regulatory attention from deregulation, privatisation, and liberalisation in developed markets,[37] to addressing systemic risks, strengthening consumer protection, and fostering market discipline. However, the focus of this thesis on consumer credit in Nigeria stems from the fact that the extent of engagement, if not dependence, of individuals on borrowing in order to meet basic needs in developing countries is underestimated, hence the cost of borrowing and its impact on the welfare of poor consumers has not received adequate policy attention. In many developing countries, most households and businesses have no access to formal credit, and as a result, are exposed to unsafe credit, particularly in informal markets. Unfortunately, this has neither received significant attention from transnational regulators nor legal scholars.[38]

(2009) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238578/7667.pdf> accessed 13 August 2019; US Department of the Treasury, 'Financial Regulatory Reform: A New Foundation' (2009) <http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf> accessed 13 August 2019.

[37]For instance, the Crowther report on consumer credit in the UK advocated a liberal regulatory framework and less government intervention. See Committee on Consumer Credit Law (n 33).

[38] There have been studies arguing for mainstream bank lending to the poor and in poor communities across developed countries on the ground that such lending can be profitable. See T Wilson, 'Responsible Lending or Restrictive Lending Practices? Balancing Concerns with Addressing Financial Exclusion' in M Kelly-Louw, JP Nehf and P Rott (eds), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Aldershot, Ashgate Publishing Limited 2008) 91-106; MS Barr, 'Credit Where It Counts: The Community Reinvestment Act and Its Critics' (2005) 80 (2) New York University Law Review 513-652; IDC Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 Oxford Journal of Legal Studies 177. Financial exclusion in developing countries is also broadly recognised as a fact by IFIs. However, the plight of the consumer borrower in developing countries has neither been *central* to financial inclusion advocacy, nor an independent argument for opening up formal sector credit to consumer borrowers. Rather, the focus of such advocacy has been the promotion of entrepreneurship. See International Monetary Fund, 'Regional Economic Outlook: Sub-Saharan Africa Restarting the Growth Engine' (Washington, DC, International Monetary Fund 2017). During the course of this study, despite concerted efforts, no substantive studies on this topic by

The second significant contribution is that it updates the existing literature on consumer credit in Nigeria while deploying a critical approach. Existing studies on consumer credit in Nigeria fall into three categories. The first category consists of doctrinal overviews of the legal framework for consumer credit in Nigeria.[39] The most significant work on the legal framework of consumer credit in Nigeria was a doctoral thesis completed in 1988, which lays out the legal structure for consumer credit in Nigeria and mentions the economic impact of SAP on access to consumer credit. It, however, does not engage with the economic assumptions behind SAP and how those assumptions shaped regulation and institutional setup for consumer lending in Nigeria. The second category of studies uses sociological methods to document indigenous practices of consumer credit, particularly, indigenous lending forms and practices in pre and post-colonial Nigeria.[40] The third category of studies includes economic analyses. This category uses mainly quantitative methods to present micro and macro-economic accounts of credit supply to different sectors of the Nigerian economy and generally analyses the market efficiency aspect with little focus on the distributional impact of credit and the role of regulation.

This thesis provides a socio-legal account of the impact of transnational regulation on the welfare of users of consumer credit in Nigeria. Although this thesis is not the first to study credit regulation from a socio-legal perspective in Nigeria, previous studies on the link between international regulation and the behaviours of actors in the Nigerian credit market have focused on corporate or business credit rather than individual credit.[41] This thesis provides an account of the role of law in financial markets and the utility of credit to consumers, drawing on law and economics

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academics, including Nigerian scholars was found. The limited online presence of some of the leading academic journals in Africa may be partly accountable for this outcome.

[39] See for example Sofola (n 4).

[40] T Falola, 'My Friend the Shylock': Money-Lenders and their Clients in South-Western Nigeria' (1993) 34 Journal of African History 403-423; C Udry, 'Credit Markets in Northern Nigeria: Credit as Insurance in a Rural Economy' (1990) 4(1) The World Bank Economic Review 251–269.

[41] B Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (PhD thesis, UCL 2013) 191; O Odetola, 'Corporate Debt Restructuring and the Global Harmonisation Process: Emerging Trends in Africa' (PhD thesis, University of Kent 2018) 207.

literature.[42] It introduces a new perspective to the analysis of the use of consumer credit to borrowers in developing countries by focusing on the welfare implications of *deregulating access* to consumer credit. The traditional approach assumes that direct lending to the poor does not reduce poverty significantly, but that lending to micro-entrepreneurs does have trickle-down effect from non-poor middle-class to the poor.[43] This thinking formed the foundation for the promotion and proliferation of microfinance institutions in developing countries as the way out of poverty. Microfinance institutions were meant to rescue poor borrowers from exploitation by moneylenders and loan sharks generally.

The thesis examines the content and impact of transnational rules on access to individual credit in Nigeria primarily, while analyses of the constitutional legitimacy of transnational soft law is undertaken to provide a contextual background.[44] Although IFIs have evolved a more robust consumer protection paradigm since the Global Recession, scepticism towards consumer lending remains strong amongst formal lenders and prudential supervisors around the world.[45] The Bank to its credit has in recent years promoted digital finance as a fast route to financial inclusion,[46] but concerns remain that digital finance in Nigeria has overwhelmingly benefitted traditional commercial bank clients as opposed to the integration of low-income

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[42] RJ Van den Bergh and AM Pacces (eds), 'Regulation and Economics', *Encyclopedia of Law and Economics* (2nd edn, 2012) <https://www.elgaronline.com/view/nlm-book/9781782547457/b9_int01.xml>accessed 01 December 2019. See also TS Ulen, 'Methodologies of Law and Economics', *Encyclopedia of Law and Economics* (2nd edn, 2017) https://www.elgaronline.com/view/nlm-book/9781782547457/b9_int01.xml>accessed 01 December 2019.

[43] World Bank, 'Finance for All? Policies and Pitfalls in Expanding Access' (2009) 24 (1) The World Bank Research Observer 143.

[44] cf Onagoruwa (n 18) 258; Brummer (n 18) 327-384.

[45] World Bank, 'Finance for All? Policies and Pitfalls in Expanding Access' (n 43) 143.

[46] Bill and Melinda Gates Foundation, 'A G7 Partnership for Women's Digital Financial Inclusion in Africa' (July, 2019) <https://docs.gatesfoundation.org/Documents/WomensDigitalFinancialInclusioninAfrica_English.pdf> accessed 13 August 2019.

consumer borrowers. The experience in Nigeria with the digital evolution challenges fundamentally the assumption by IFIs that access to a bank account is the most important step towards accessing formal credit. To the contrary, rules designed to maintain global financial stability continue to discriminate against weaker borrowers systematically even after holding savings accounts.[47] First, they tend to emphasise market protection over the protection of consumer borrowers. In Nigeria, market protection measures disproportionately affect weaker borrowers while accommodating riskier but wealthy consumers.[48] Secondly, the preference of transnational and Nigerian regulators for producer credit over consumer credit deviates from neoliberalism in that it subjugates borrower autonomy, but more fundamentally raises the question: If it is acceptable to dictate responsibilities for MFIs, why is it unacceptable to mandate commercial banks to lend to all categories of eligible borrowers?[49] This sets the tone for analysis of the reluctance of IFIs to recommend regulation along the lines of the Community Reinvestment Act 1977 in the US and similar statutes that universalise consumer lending responsibilities to all formal sector banking institutions as opposed to the IFIs' MFI-driven approach.

Besides highlighting the impact of deregulation (of access), the thesis highlights the broader impact of privatisation of financial markets for weaker borrowers in Nigeria. Privatisation made it possible for political and business elites to convert public assets to private wealth, for instance, taking over public schools, hospitals, and financial institutions for which, they charge premium fees that the newly disempowered groups cannot afford.[50] By focusing on the impact of transnational rules, this study serves as a reminder to credit regulators at the international level of the need to take

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[47] See, for example, analysis of the impact of Basel II and anti-money laundering regulations in chapters four and five.

[48] S Apati, *The Nigerian Banking Sector Reforms: Power and Politics (First Edition)* (Palgrave Macmillan Studies in Banking and Financial Institutions 2012).

[49] S Rutherford, 'The Savings of the Poor: Improving Financial Services in Bangladesh' (1998) 10 (1) Journal of International Development 1–15.

[50] P Lewis and H Stein, 'Shifting Fortunes: The Political Economy of Financial Liberalization' (1997) 25 (1) World Development 5-22.

into account the context of different countries when enacting rules intended to have universal application.

The third contribution of this thesis is that it draws attention to the complicity of transnational regulation in generating fissures in regulatory protection for different consumer groups. Regulation impacts consumers in developed and developing countries differently. The fact of uneven protection for consumers in developed and developing countries is widely understood and is itself a criterion for assessing a country's performance on the Human Development Index,[51] but the role of transnational regulation in perpetuating unequal protection for consumer borrowers in developing countries is less appreciated.[52] The subordination of consumer protection to market protection by IFIs since the Global Recession has fed the growth of informal markets in Nigeria and widened the protection gap between consumers of formal and informal credit products. The thesis finds that overall, stronger market protection measures since the Global Recession have generated a bigger group of under-protected consumers in Nigeria and that transnational regulation is directly instrumental to this outcome.[53] The focus of this thesis is on *how* formal rules cause more consumers to patronise informal lenders, rather than any in-depth discussion of informal credit markets. This thesis will argue that formal and informal markets are not binary and that both can present welfare enhancing benefits and risks that require effective regulation to balance.[54]

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[51] United Nations Development Programme, 'Human Development Reports' (*UNDP* 2019) <http://hdr.undp.org/en/content/human-development-index-hdi>accessed 5 December 2019.

[52] See discussion at para 6.10 at 212.

[53] Some of the main arguments of this thesis have now been published in PI Omede, 'A Tale of Two Markets: How Lower-End Borrowers are Punished for Bank Regulatory Failures in Nigeria' (2019) Journal of Consumer Policy <https://doi.org/10.1007/s10603-019-09439-8>accessed 28 March 2020.

[54] E Hobson, WK Sameh, and M Angus, 'Uganda - From Regulators to Enablers: Role of City Governments in Economic Development of Greater Kampala' (Washington DC, World Bank 2017) <http://documents.worldbank.org/curated/en/860311505816462189/Uganda-From-regulators-to-enablers-role-of-city-governments-in-economic-development-of-greater-Kampala> accessed 5 May 2019.

1.4 RESEARCH METHODOLOGY

This thesis adopted a socio-legal research method in answering the research question. This approach considers law as a 'social phenomenon', and a concept that cannot be fully understood in its pure abstract form.[55] Social and economic theories provide a robust framework for articulating the case for consumer credit regulation (chapter three). To effectively address the research question, the thesis engages with economic neoliberalism as an analytical framework, the influences of psychology (behavioural science) on law, and the historical relationship of Nigeria with transnational institutions.[56] The thesis acknowledges the difficulty of articulating a strong case for reforming consumer credit in Nigeria without addressing the social and political spaces within which regulation is made. The emergence of the current international regulatory paradigm had its roots in the economic losses, social displacement, and public outrage that followed the Global Recession. The decision of regulators to act and the tools adopted to enforce the new rules are legal, political, and economic.

The processes through which national regulators adopt international rules involve a lot of behind-the-scenes political negotiations, lobbying of policymakers, and subtle economic threats. Therefore, the socio-legal approach enhances the legal analysis in this thesis in that, according to Grabham, it helps to comprehend how regulations 'are fabricated, understood and circulated as law by those who have drafted them, negotiated them, argued against them, the people for whom they form part of a terrain of common knowledge and intervention.'[57]The approach also aids this thesis to examine the norms, political and economic underpinnings of international financial regulation and simultaneously to consider how legal forms impact outcomes such as financial access and protection for consumers in developing countries.[58]

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[55] R Wacks, *Philosophy of Law – A Very Short Introduction* (2nd edn, OUP 2014).

[56] R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' *(*1998*)* 25 (2) Journal of Law and Society 171, 173.

[57] E Grabham, 'Time and Technique: The Legal Lives of the 26-Week Qualifying Period' (2016) 45 (3-4) Economy and Society 379-406.

[58] A Riles, 'New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 (3) Buffalo Law Review 973–1033.

1.4.1 Background to Interviews

The thesis employed qualitative interviews in chapter five to understand the ideological influences of regulators in Nigeria, the behavioural responses of lenders to regulation, and the socio-cultural factors that shape consumers' borrowing choices.

1.4.2 Interview Sample

Data collection was completed using the semi-structured interview format. The interviews were conducted on a small-scale (28 participants). Despite its small size, the sample is nevertheless appropriate for this type of qualitative study.[59] A total of nine out of twenty-one commercial banks,[60] one Islamic Bank[61] and five Microfinance Institutions with State Operating Licenses in two states,[62] were interviewed from the formal sector. This is considered substantially representative of formal lenders whose

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[59] Generally, there is no set minimum number of respondents for a qualitative study. See S Baker and R Edwards, '*How Many Qualitative Interviews Is Enough? Expert Voices and Early Career Reflections on Sampling and Cases in Qualitative Research'* (National Centre for Research Methods Review Paper 2012); F Garland and M Travis, 'Legislating Intersex Equality: Building the Resilience of Intersex People through Law' (2018) 36 (4) Legal Studies 587-606; PI Fusch and LR Ness, 'Are We There Yet? Data Saturation in Qualitative Research' (2015) 20 (9) The Qualitative Report 1408-1416. See also S Wong and R Cain, 'The impact of Cuts in Legal Aid Funding of Private Family Law Cases' (2018) Journal of Social Welfare and Family Law 1-12 <https://www.tandfonline.com/doi/full/10.1080/09649069.2019.1554784>accessed 17 December 2019.

[60] First City Monument Bank Plc (FCMBa), Unity Bank Plc (UnBb), Skye Bank PLC (now Polaris Bank, PBc), United Bank For Africa Plc (UBAd), Access Bank Plc (ABe), Guaranty Trust Bank Plc (GTBf), Sterling Bank Plc (SBg), Union Bank of Nigeria Plc (UBNh), Zenith Bank Plc. (ZBi). See Central Bank of Nigeria, 'List of Financial Institutions: Commercial Banks' (*CBN 2018*). <https://www.cbn.gov.ng/supervision/Inst-DM.asp> accessed 31 August 2018.

[61] Jaiz Bank PLC (JBq).

[62] Located in the Federal Capital Territory Abuja and Kogi State respectively, they are Fortis Microfinance Bank PLC (FMBj), Hasal Microfinance Bank (HMBk), Ife Community Bank Ltd (ICBl), Odagba CB (OCBm), and Mutual Trust Microfinance Bank (MTMBn).

perspective is central to the study. The sample also consists of thirteen other respondents including individual borrowers,[63] regulators,[64] and legal practitioners.[65]

1.4.3 Sampling technique and Limitations of Study

The study used purposive sampling to interview individuals who were likely to have knowledge of, and account for, the impact of regulation on access to finance as well as the global context of it, namely bankers, regulators and practitioners. Suitable participants were identified and contacted via organisational websites, responses to administered questionnaires, and snowballing. The sample is fairly distributed geographically drawing participants from seven locations across three of the six geopolitical zones in Nigeria.[66]

The study was limited by time and funding, such that the findings are meant to provide only a synopsis of the lending behaviour of formal lenders and to complement the general analyses of the research topic undertaken throughout this thesis.[67] One

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[63] They are named for ease of reference Consumer Borrower 1, 2, 3, 4, 5, 6, 7 and 8. Questionnaire for this set of respondents broadly covered questions on individual attitudes to borrowing, reasons for borrowing, the type of loan obtained, whom they borrowed from, satisfaction with the process of borrowing and the overall satisfaction with the loan.

[64] The Central Bank of Nigeria (Regulator 1), the Federal Ministry of Finance [Budget and Planning] (Regulator 2), the Small and Medium Scale Enterprises Development Agency (Regulator 3), and the Consumer Protection Council of Nigeria (Regulator 4). Questionnaires for regulators were structured to elicit responses on the CBN's regulatory purpose (monetary policy target, credit expansion, approach to banking supervision, informal financial markets, consumer protection, non-performing loans, and bailouts), the role of SMEDAN (advisory role, financing, and collaboration with other agencies), Ministry of Finance's role (fiscal policy, public debt, employment, and social security), and the Consumer Protection Council (data on consumer complaints, types of complaints received, process of lodging complaints, and the typical time taken to process complaints).

[65] These include three lawyers and a police officer to help shed some light on lending practices in the informal markets. It was difficult to get hold of informal lenders for the interviews.

[66] Abuja (Federal Capital Territory), Lagos (Lagos State), Lafia (Nassarawa State), Ankpa, Anyigba, and Abejukolo (Kogi State), and Nsukka (Enugu State).

[67] Also known as 'triangulation', it involves the employment of multiple external methods to collect and analyse data. See NK Denzin, 'Triangulation 2.0' (2012) 6 (2) Journal of Mixed Methods Research

additional challenge of investigating consumer borrowing through a qualitative study is that it is difficult to sign up participants for interviews. This was the case in Nigeria where cultural sensitivities about money debts made it difficult to recruit consumer borrowers and informal lenders for interviews. Consequently, broad generalisations and policy conclusions are not made from the responses of participants outside of the formal sector lenders. Instead, what these interviews sought to capture are the *ramifications* of lenders' reactions to specific policy reforms and the impact on *some* consumers' experiences, and to bring these to the attention of policymakers as they contemplate future reforms in Nigeria and at the transnational levels. Certainly, there is a need for a larger scale enquiry into this topic in the future.[68]

1.4.4 Summary of Interview Findings

The thesis[69] found that a lot of Nigerians borrow for consumption smoothing purposes, but only a fraction has access to formal sector loans. Formal sector loans are not necessarily affordable, and yet, relative to many informal sector loans, are safer. Reforms introduced to recapitalise commercial banks, check bank fraud and terrorism, and to attract international investment capital have produced some unintended consequences such as a distortion of the supply of credit to different segments of the market with many safe products reserved for the wealthy urban consumers while poor and rural borrowers turned to unregulated products in the informal markets. The findings particularly highlighted the impact of BASEL II and Anti-Money Laundering (AML) regulations and how as part of their compliance strategy, commercial lenders in the formal market narrowed their services to wealthy consumers, thus compounding financial exclusion and undermining consumer welfare. Commercial banks in Nigeria, for instance, do not lend to lower-income

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80-88; C Stavros and K Westberg, 'Using Triangulation and Multiple Case Studies to Advance Relationship Marketing Theory' (2009) 12 (3) Qualitative Market Research 307-320.

[68] A study of the issues raised in this thesis from a consumer borrower perspective will further the reader's understanding of scope of the issues raised in this thesis. A detailed description of the ethics approval process, interview format, data storage, and analytical tool is provided in the appendix to this thesis.

[69] The qualitative findings are supported by other studies discussed throughout the thesis.

borrowers, especially when it is for consumption purposes. It is common for financial institutions to resist attempts to impose social obligations that do not further the firm's profit motives,[70] but the thesis did not find any direct evidence to indicate that consumer lending is unprofitable in Nigeria.

The findings also show that lenders are vigorously opposed to *ex ante* approaches like responsible lending legislation and recognition of Behavioural Economics (BE) in policy formulation. Most of them questioned the theoretical premises of BE and complained that it would add to the cost of operation.[71]

1.5 OVERVIEW OF THESIS

Chapter one provides a background to the Nigerian credit market and discusses the approaches to regulation across two time-periods, ie, pre-Structural Adjustment Programme and post-Structural Adjustment Programme. The thesis traces the onset of neoliberal market ideas to the intervention of the World Bank and the IMF in Nigeria as part of efforts to address the sovereign debt crisis across the developing world particularly in the 1980s. The chapter explains the contributions of this thesis: (a) It points out that the extent of engagement, if not dependence, of individuals on borrowing in order to meet basic needs in developing countries, is underestimated by transnational regulators. Hence the cost of borrowing and its impact on the welfare of poor consumers has not received adequate policy attention; (b) Nigerian regulators, seeking to implement specific transnational rules, contribute to the perpetuation of financial exclusion in Nigeria by preserving neoliberal policy orthodoxies with disproportionate negative impact on low-income borrowers; (c) It updates the

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[70] AV Banerjee and E Duflo, 'Do Firms Want to Borrow More? Testing Credit Constraints Using A Directed Lending Program' (2014) 81 *Review of Economic Studies 572–607.* A less formal account of the moral wavelenths of financial firms is provided in J Luyendijk, *Swimming with Sharks: My Journey into the Alarming World of the Bankers* (Guardian Faber 2015).

[71] Interview with ZBi, Credit Officer, ZB (Lafia, Nigeria, 2018); Interview with PBc, Head of Credit Operations, PB (Abuja, Nigeria, 2018); Interview with UBAd, Credit Risk Manager, UBA (Abuja, Nigeria, 2018).

literature on consumer credit regulation in Nigeria and provides recommendations for improving consumers' experiences within the market.

Chapter two introduces the structure of the Nigerian legal system and establishes the plurality of the sources of financial regulation in Nigeria. It dissects the consumer credit market in Nigeria into the formal, semi-formal and informal sectors. The chapter provides the reader with a clear understanding of the regulatory framework for the Nigerian consumer credit market which is salient to a full appreciation of the core arguments of this thesis. The chapter introduces some of the critiques of the Nigerian regulatory framework, which are subsequently explored in detail in chapters three to five.

Chapter three considers various theories about the welfare benefits and risks of consumer credit. This chapter consists of four parts. The first part considers the utility of consumer credit and explores the welfare implications of consumer credit. The second part discusses the rationale for credit market regulation and makes the case for providing access to consumer credit through regulation if necessary. The third part draws upon Amartya Sen's human rights and capability theory as a rationale for regulation. This section highlights the growth of the influence of human rights principles in articulating the role of regulation in consumer protection. Throughout the chapter, the dynamics of different markets and the divergent rationale for regulatory intervention in critical aspects of developed and developing markets are carefully highlighted.

Chapter four presents a dialectical account of the various social phenomena that have influenced the gradual global shift from the more orthodox free-market approach to credit regulation to a more regulatory paradigm since the Global Recession of 2007-09. This chapter explains how economic neoliberalism (deregulation, privatisation, financialisation, economic rights) and social neoliberalism (cultural shifts in consumer tastes, human rights) between 1970 to the year 2000[72] fuelled the growth of consumer borrowing in Western countries, and produced the Global Recession, which in turn

[72] See F Trentmann, *Empire of Things: How We Became A World of Consumers, from the Fifteenth Century to the Twenty-First* (London, Allen Lane 2016).

produced the emerging paradigm for consumer credit regulation. It discusses the Global Recession as a critical juncture,[73] the point where behavioural science became more influential in international consumer credit regulation. The central narrative in chapter four is that consumer exposure to unregulated credit products undermines individual welfare, as well as the safety and soundness of the financial system. The chapter argues that while the new international approach addresses the problem of consumer over-indebtedness in developed countries, it may further reduce access to safe credit products in developing countries. It, therefore, sets the context for the qualitative interviews in Nigeria to examine the impact of banking reforms and lending practices on low-income consumer borrowers in Nigeria.

Chapter five tests the narrative in chapter three. Due to the minimal *direct* impact of the Global Recession on the Nigerian market, the chapter aims to study the *indirect* impact of post-Recession policies within the context of longer-term lending practices and regulatory policies in Nigeria. Using qualitative interviews, it investigates the impact of neoliberal reforms on critical participants in the formal credit market with an emphasis on formal lenders' responses, but also the mindset of regulators. The chapter finds that access to consumer credit in the formal sector in Nigeria is encumbered by historical, institutional, and regulatory obstacles. The Central Bank of Nigeria (CBN) which regulates commercial banks in Nigeria has demonstrated a fervent commitment to promoting financial stability in Nigeria through policy frameworks like BASEL II and III in 2005 and 2009, respectively, and AML regulations. The interviews, however, indicate that policy reforms have disproportionately impacted individual credit, and especially consumer lending to those in the middle to the bottom of the credit market pyramid. These groups of consumers find it harder to access loans from commercial banks and are more likely to subscribe to more expensive products. One of the CBN's solutions to the problem of exclusion is the establishment of MFIs to fill the gap in the market left by commercial banks. The solution follows the reform template of transnational financial regulators. They include the following ideas and assumptions that consumer debt is unsuitable for

[73]See chapter three for a full discussion of 'critical juncture' as a concept.

developing countries, that financial institutions should not be statutorily required to lend to any particular group of consumers, and that MFIs are more appropriate institutions to serve low-income borrowers.

The findings of this chapter reveal that these assumptions do not necessarily hold in the context of developing countries. Individuals from all economic backgrounds continue to borrow for consumption purposes regardless of assumptions about their capacity to save or become entrepreneurs. In the case of Nigeria, most individuals source consumer loans from informal markets. Regulation fails the group of borrowers that borrow from the black market, and by failing to promote informal channels such as cooperative societies and credit unions that offer welfare-enhancing products to borrowers. Secondly, MFIs are neither willing nor capable of serving people exclusively in the lower-rung of the market due to the size of this market and the limited resources available to them.

Chapter six consists of two parts considering the implications of the findings for theory and policy. The first part reflects on credit access democratisation as a form of incremental welfare state in Nigeria, against the backdrop of the critique in chapter four which associates the decline of the welfare state to the democratisation of credit access in developed markets. The second part discusses ways that the shift in regulatory policy focus from consumer access [as an end] to consumer welfare at the transnational level can learn from the behaviours of lenders in Nigeria, but also benefit Nigerian regulators.

The thesis will conclude by outlining policy areas in need of further research.

CHAPTER TWO

2.1 AN OVERVIEW OF THE NIGERIAN LEGAL SYSTEM

Nigeria operates a constitutional democracy and a federal system of government. On account of its colonial heritage, the Nigerian legal system derives from English Law and customary law. Nigerian law could, therefore, be classified according to form or historical origin. For analytical convenience, the sources of Nigerian law will be discussed here according to form.

2.1.1 Statutory Law

This is an essential source of Nigerian law. Statutory law is the superstructure upon which the entire legal system rests. It consists of the Constitution of the Federal Republic of Nigeria from which all other laws and institutions derive validity.[74] The constitution establishes a three-tiered federal system of government with the national and state houses of assembly empowered to enact primary legislation.[75] The power to regulate financial services such as the establishment of the Central Bank, licensing of banks and insurance companies, is invested in the National Assembly. Federal institutions like the Central Bank of Nigeria are empowered to make subsidiary legislation to govern financial services.

Historically, Nigerian legislation includes British proclamations and ordinances issued during the colonial period and the statutes of general application, ie, Acts of the English parliament which were in force in England on the first of January 1900.[76] It also includes decrees and edicts of the military governments that ruled Nigeria between 1966 and 1999.[77] As crucial as statutes are to the Nigerian jurisprudence,

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[74] Section 1, Constitution of the Federal Republic of Nigeria (as amended) 1999. The constitution establishes the three arms of government (executive, legislature, and judiciary), the three tiers of government (federal, state and local governments) and grants the authority upon which key regulatory institutions like the central bank and courts of law are established. See O Oyewo, *Constitutional Law in Nigeria* (Kluwer Law International 2013).

[75] Sections 1-7, Constitution of the Federal Republic of Nigeria (as amended) 1999.

[76] Subject to the Revised Laws Order 1990 which enumerates abrogated imperial statutes in Nigeria.

[77] C Mwalimu, *The Nigerian Legal System (*Vol 2, Private law, Peter Lang 2009).

many relevant statutes are overdue for updates and amendments. Obsolete legislation indeed is one of the critical explanations for weak consumer protection in Nigeria.

2.1.2 Case Law/Common Law

The constitution establishes a system of superior and inferior courts of record.[78] Superior courts enjoy both criminal and civil jurisdiction to try disputes between private individuals; individuals and the government; as well as disputes between branches and tiers of government.[79] Common law doctrines of judicial precedent apply to Nigerian courts, and decisions of English courts together with the statutes of general application and the doctrines of Equity applied under Nigerian law as Received English law.[80] However, the decisions of the Supreme Court of Nigeria are final and binding on all other courts in Nigeria. English judgments are not binding on Nigerian courts but are influential in the light of the shared legal history.[81]

Case law has played a big role in consumer credit regulation in Nigeria since 1960 due to the obsolescence of Nigerian legislation on consumer credit.[82] Much of consumer credit regulation in Nigeria is made through contract law and subsidiary legislation by the Central Bank. Weak statutory protection is problematic for three reasons. Legislation is an essential tool for implementing durable reforms in a democracy such that the failure to update the relevant statutes makes it challenging to make long-lasting reforms, and cedes too many powers to unelected judges and bureaucrats. It is even more alarming because the judiciary in Nigeria is defined by its conservatism and institutional weaknesses. Thirdly, regulation by private initiative guarantees the continuity of the *ex post* recourse that has failed to serve the interests of poorer consumers in financial markets.

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[78] The superior courts of record include High Courts, Court of Appeal, and the Supreme Court whereas the inferior courts include Customary Courts, Magistrate Courts, Area Courts, and Sharia Courts. See Chapter VII, Constitution of the Federal Republic of Nigeria (as amended) 1999 (CFRN).

[79] Section 6, CFRN.

[80] N Tobi, *Sources of Nigerian Law* (MIJ Professional 1996).

[81] ibid.

[82] The current statutory position on consumer credit mainly reflects the English position before the enactment of the Consumer Credit Act (as amended) 1974.

Other criticisms of the legal system touch on institutional inefficiency, affordability, and elite capture of the justice system. The judiciary as an institution is very slow in Nigeria in processing the claims of litigants. Lenders and practitioners agree that the judicial system is a major setback to lenders in terms of loan recovery, and thus a check on lending.[83]The judiciary is plagued by issues of mal-administration, procedural technicalities, and corruption.[84] On the administrative burden, judges have unmanageable workload and take notes in long-hand such that, if a defendant comes into a case with lawyer intent on delaying or buying time, 'it is the easiest thing to do!'[85] According to the OECD, devoting a larger share of the judiciary's budget to investing in computerising court processes and proceedings and establishing specialised courts for commercial cases correlate positively with the productivity of judges and shorter trial lengths.[86] However, without strong institutions of justice delivery,[87] there is a growing perception that the common law has become a drag on economic life in Nigeria and a sense of judicial capture by elite litigants. In Nigeria, lawyers often exploit procedural rules around injunctions, 'no case' submissions, and

[83]World Bank, 'Economy Profile of Nigeria: Doing Business 2020 Indicators' (*World Bank*, 2019) 96 <https://www.doingbusiness.org/content/dam/doingBusiness/country/n/nigeria/NGA.pdf>accessed 06 December 2019. See also A Adesomoju, 'Supreme Court of Living, Dying and Dead Cases (1)' *Punch Newspaper* (Lagos, 5 April 2018) <https://punchng.com/supreme-court-of-living-dying-and-dead-cases-1/>accessed 31 December 2018.

[84] Interview with Legal Practitioner 3, Professor, Faculty of Law, University of Nigeria (Nsukka, Nigeria, 2018). See for example Vanguard, 'Why NJC Dismissed Two Judges, Asked 26 Others to Face the Probe' *Vanguard* (Lagos, 5 October 2018) <https://www.vanguardngr.com/2018/10/why-njc-dismissed-two-judges-asked-26-others-to-face-probe/ >accessed 13 January 2019.

[85] Interview with Legal Practitioner 1, Associate, S.I. Ameh (SAN) & Company (Abuja, Nigeria, 2018).

[86] OECD, 'Judicial Performance And Its Determinants: A Cross-Country Perspective: A Going for Growth Report' (2013) *5 OECD Economic Policy Papers* <http://www.oecd.org/eco/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf>accessed 31 December 2018.

[87] A Stone, B Levy, and R Paredes, 'Public Institutions and Private Transactions: The Legal and Regulatory Environment for Business Transactions in Brazil and Chile' (1992) *World Bank Policy Research Working Paper 891* <https://ideas.repec.org/p/wbk/wbrwps/891.html>accessed 25 September 2019.

'trial within trial', to delay enforcement for years, 'depending on how smart your lawyer is'.[88] According to Legal Practitioner 1:

> I have a client who is currently in court. Our defence strategy is to buy her time within which to recover economically so she can start paying off these debts. The case started in 2016, and now this is 2018. We can be there for about six years.[89]

Incessant case adjournment is another reason for such delays, 'the judge would sit today and not sit tomorrow, the judge is on recess, on break, or is not feeling well, and it can be like that for years'.[90] Lawyers routinely offer flimsy excuses such as having 'just been briefed', 'bereaved' or 'suddenly taken ill' in court, whereby they tie the hands of judges who must consider constitutional rights, cultural norms and medical fitness in writing their ruling.[91]

2.1.3 Customary Law

Customary law constitutes a significant part of Nigerian Law. Customary law is a question of fact, which if proven, becomes law under the Nigerian Evidence Act.[92] Customary law consists of the local customs and traditions of a people of a particular locality, including Islamic (sharia) law. Under the Nigerian constitution, customary law is only applicable to civil but not criminal matters because it is unwritten.[93] Also, for a customary rule to apply it must satisfy three validity tests: (i) It must not be repugnant to natural justice, equity and good conscience (ii) It must not be contrary to

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[88] PBc (n 71).

[89] Interview with Legal Practitioner 1, Associate, S.I. Ameh (SAN) & Company (Abuja, Nigeria, 2018).

[90] PBc (n 71).

[91] Interview with Legal Practitioner 2, Associate, Abdullahi & Santino (Lagos, Nigeria, 2018)

[92] Sections 16-19, Evidence Act 2011.

[93] Section 36 (12) CFRN. Although Sharia law derives from the Holy Quran and Hadiths of Prophet Mohammed, they do not count as 'written law' as intended under this provision because the legislature did not enact them.

public policy; and (iii) It must not be incompatible with any other law for the time being in force.[94]

These validity tests have been used to eliminate customary credit practices in the past, such as forms of peonage in some parts of the country, and customs that negate privity of contract.[95] For example, it used to be acceptable under Yoruba custom to detain the corpse of a debtor until a family member offsets their debt. Similarly, it is acceptable to use nuisance as a method of debt recovery in many cultures in Nigeria. Such customs are now invalidated by the validity tests and section 36 of the constitution under which trial by ordeal is unlawful.

There is a technical point to make at this point. To the extent that customs that pass the validity tests are binding on parties to civil transactions who agree to be governed by said custom, some customary lending forms and channels continue to operate side-by-side with formal lending institutions governed by statutes, case law, and prudential oversight bodies like the CBN and Nigerian Deposit Insurance Corporation (NDIC). In other words, there is a plurality of financial rules and institutions. Examples of such customary institutions are Rotating Savings and Credit Associations, and customary credit clubs regulated entirely by the custom of the locality and enforced by traditional rulers and local chiefs. Decisions of traditional rulers (monarchs) are usually dispositive of customary disputes. However, where such disputes were referred to the court, traditional rulers were called upon to give authoritative evidence for civil trials, and all courts in Nigeria have jurisdiction to apply customary law, except for sharia law which is exclusively administered by

[94] Section 18 (3) Evidence Act, 2011. See IO Babatunde, 'English Jurisprudence and African Law Need to Revisit R v Udo Aka Ebong' (2009) 1 OOU LJ 201; AO Obilade, *The Nigerian Legal System* (Ibadan, Spectrum Books Limited 2001) 17-52.

[95] O Sofola, 'The Nigerian Law of Consumer Credit and Security' (PhD thesis, King's College, University of London 1988); T Falola, 'My Friend the Shylock': Money-Lenders and their Clients in South-Western Nigeria' (1993) 34 Journal of African History 403-423; C Udry, 'Credit Markets in Northern Nigeria: Credit as Insurance in a Rural Economy' (1990) 4(1) The World Bank Economic Review 251–269.

Sharia Courts.[96] In the light of this reality, the discussion of informal markets in this thesis deviates from the common understanding in advanced markets where the phrase would typically refer to unlicensed operators in a market that requires operators to be licensed.[97] According to Maloney, defining informality remains a challenge because it means:

> …different things to different people, but almost always bad things: unprotected workers, excessive regulation, low productivity, unfair competition, evasion of the rule of law, underpayment or non-payment of taxes, and work 'underground' or in the shadows.[98]

For this thesis, a distinction is, however, made between lenders required to own a license who fail to do so (black market lenders) and customary lenders who fall outside of the purview of formal regulation (customary lenders).[99] One critical distinguishing element is that customary agreements usually lack the *intention to create legal relations*, which is a litmus test under moneylender regulations.[100] However, such transactions remain enforceable under the customary honour codes of most rural communities. The remedy for a party to such a transaction may be a social blacklisting of the counterparty within the community.[101] However, where a given transaction is recognised to be binding according to ordinary customs, a party will be able to seek

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[96] Section 277, CFRN.

[97] WF Maloney, '*Informality Deconstructed'* (Washington, DC, World Bank 2006). See also K Hart, 'Informal Income Opportunities and Urban Employment in Ghana' (1973) 11 Journal of Modern African Studies 61–89, 68.

[98] Maloney (n 97).

[99] The size of customary markets varies depending on the area of the country. In a study of rural women in one of the 36 states in Nigeria, 77.5% of respondents claimed to have sourced funds from a customary lender. See SJ Ibitoye and others, 'Assessment of Informal Credit in Mobilizing Funds for Agricultural Production in Ijumu Local Government Area of Kogi State, Nigeria' (2015) 7 (1) Asian Journal of Agricultural Extension, Economics & Sociology 4.

[100] See discussions of semi-formal markets below at para 2.4.

[101] E Osabuohien and O Ola-David, 'Esusu (Nigeria)' in A Ledeneva (ed), *The Global Encyclopaedia of Informality: Understanding Social and Cultural Complexity, Volume 2*. (London, UCL Press 2018) 66-69.

enforcement through law courts because the existence of a customary contract, unlike at common law, is a question of fact to be proven by evidence.[102] The applicable remedies where a court finds a breach of contract are those offered under the relevant custom,[103] not necessarily the remedies for breach of contract at common law. This background is necessary because the majority of Nigerians continue to borrow from informal markets, and while some customary transactions may have terms comparable to those of loan sharks, many customary lending channels originate safe welfare-enhancing credit products.

2.1.4 International Law

International law is one of the sources of Nigerian law. Nigeria is a signatory to the Vienna Convention on the Law of Treaties and an active participant in the international community. International treaties only obtain the force of law upon domestication under section 12 of the Nigerian constitution.[104] International regulations also apply to Nigeria in the form of soft law (Chapter three). This type of regulation is technically not international law because they derive legitimacy from Nigerian authorities; however, normatively they are foreign. Examples of such regulations are the Received English Law and Basel II recommendations. Historically, these rules are adopted for purposes of convenience, and external political and economic incentives.[105]

2.2 THE STRUCTURE OF LENDING IN NIGERIA

Consumer lending in Nigeria occurs concurrently in three sectors of the market with separate and often parallel operations, ie, the formal, semi-formal, and informal sectors. Each of these sectors is now discussed below.

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[102] Sections 16-19, Evidence Act 2011.

[103] This is subject to the validity tests. See (n 94).

[104] See EB Omoregie, 'Implementation of Treaties in Nigeria: Constitutional Provisions, Federalism Imperative, and the Subsidiarity Principle' (International Conference on Public Policy, Milan, July 2015) <https://www.ippapublicpolicy.org/file/paper/1433585864.pdf> accessed 14 August 2019.

[105] UO Umozurike, *Introduction to International Law* (Ibadan, Spectrum Books Limited 1993).

2.3 FORMAL SECTOR

Formal sector lenders, for this thesis, refer to financial institutions operating under defined regulatory frameworks and subject to prudential oversight by the Central Bank of Nigeria (CBN). They include commercial banks, development banks, mortgage banks, microfinance institutions, and Islamic banks. However, because development and mortgage banks do not engage in consumer lending, the discussion is restricted to commercial banks and microfinance institutions.

2.3.1 Commercial Banks

There are twenty-one licenced commercial banks in Nigeria. The applicable laws include the Banks and Other Financial Institutions Act (BOFIA),[106] which provides for bank licensing, capital and liquidity requirements, and ethical codes of conduct for bank officials.[107] BOFIA prohibits commercial banks from engaging in proprietary trading, insider lending to bank officials and concentration of loans to a few individuals. Another critical legislation is the Central Bank of Nigeria Act 2009, which, along with BOFIA, grants supervisory powers to the CBN to implement the provisions of both laws.[108]

Commercial bank lending in Nigeria constitutes the most crucial source of credit both to individuals and businesses in terms of monetary value, but only a tiny minority of Nigerians can access loans from commercial banks. According to the Financial Inclusion Secretariat, Central Bank of Nigeria, formal sector credit penetration as a ratio of the adult population in Nigeria was below 5.3 per cent in 2017,[109] while interest rates range from 16.68 to 49 per cent.[110]There were a total of five thousand eight hundred and nine commercial bank branches across the thirty-six states and the Federal Capital Territory in the year 2010, with most branches located in urban centres

[106] Laws of the Federation of Nigeria, 2004.

[107] See sections 2(1), 13 (1&2), 15(4)c, and 20 BOFIA.

[108] See sections 56-59 BOFIA and generally the Central Bank of Nigeria Act, 2007.

[109] Euromonitor, Country Report: Consumer Lending in Nigeria (*Euromonitor International* October 2018).

[110] T Arikenbi, 'Credit Bureaus and Access to Credit: The Nigerian Reality' (2013) 1 (9) Credit Channel 6-7.

like Lagos, Abuja and Kano, and a high degree of loan concentration amongst the rich and influential, mostly elite businessmen, civil servants and politicians.[111] Meanwhile, there exists a huge disparity in access to physical and digital bank branches in rural locations with a ratio of 46, 700 potential customers to a physical bank branch in rural states like Kogi and Kwara in north-central Nigeria.[112]

Historically, commercial banks in Nigeria have been resistant to consumer lending to lower-end borrowers, especially those in the informal markets. As a result, the CBN between 1977-87[113] had its 'Rural Banking Programme' in place, under which commercial banks were mandated to establish a targeted number of rural branches. The legislation produced a considerable increase in the number of rural branches within the period. Several commercial banks attempted to circumvent this rule by pooling deposits from rural depositors and lending to urban borrowers which again prompted the CBN to require that banks on-lend 40 per cent of deposits received in any given area to borrowers in those areas.[114] The goal of the government was to influence the purposes, amounts, tenure and interest rates, of loans granted.[115] Following the removal of these restrictions, interest rates increased from 15 per cent to 21 per cent while access declined simultaneously. This outcome contradicted the predicted outcome of SAP, which promised higher credit supply upon market liberalisation.[116] In fact, in addition to liberalisation, the government had earlier

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[111] National Bureau of Statistics, Selected Banking Sector Data – Q2 2018.

[112] NBS, 'Population 2006-2016' (National Bureau of Statistics 2019) <https://nigerianstat.gov.ng/elibrary?queries[search]=POPULATION> accessed 14 August 2019. See also CBN Statistical Bulletin (*CBN* 2010) <https://www.cbn.gov.ng/OUT/2011/PUBLICATIONS/STATISTICS/2010/PartA/PartA.html> accessed 14 August 2019.

[113] See the Nigerian Enterprises Promotion Decrees of 1972 and 1977 respectively.

[114] Credit Policy Guidelines for the 1987 fiscal year.

[115] Monetary Policy Circular No 21 for the 1987 fiscal year. CBN, 'Policy Measures' (CBN 2019) <https://www.cbn.gov.ng/MonetaryPolicy/policy.asp> accessed 14 August 2019.

[116] C Thomas and P Wilkin, *The South in Global Politics* (Macmillan 1997); Oxfam International, *Towards Global Equity Report 2000/2001- Tracking Poverty* (New York, Oxford University Press 2000); Apati (n 48).

enacted legislation to boost lenders' rights notably through the Banks (Motor Vehicle Loans) (Miscellaneous Provisions) Act 1979 which made the disposition of a loaned car before repayment criminal. This enactment was made in capitulation to lenders' demands to guarantee loan repayments and as part of its efforts to incentivise consumer lending to low-income consumers.

Since the full implementation of SAP in 1989, and despite government efforts to promote lending to rural borrowers, commercial banks no longer bear any legal responsibility to abide by interest rate controls (except to not go below the Monetary Policy Rate (MPR)), open branches in rural communities or to provide consumer loans to any specific group of borrowers.[117] While neoliberal economists have criticised interventionist policies for macroeconomic costs, it is increasingly difficult to justify cutting off lower-income consumers from formal financial markets with the onset of financial technology (fintech).[118] With fintech innovations, financial institutions no longer require physical branches in rural areas in order to extend financial services to such places, and individual credit risk assessments are expected to become more manageable with credit scoring algorithms, amongst many other benefits.[119] A

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[117] CBN, The Guide to Charges by Banks and Other Financial Institutions in Nigeria 2017; CBN, Prudential Guidelines for Deposit Money Banks in Nigeria (CBN 2010) <https://www.cbn.gov.ng/out/2010/publications/bsd/prudential%20guidelines%2030%20june%202010%20final%20%20_3_.pdf> accessed 14 August 2019; CBN, Guidelines on the Establishment and Rationalization of Branches and Other Outlets for Banks in Nigeria (CBN 2014) <https://www.cbn.gov.ng/out/2014/bsd/guidelines%20on%20the%20establishment%20and%20rationalization%20of%20branches%20and%20other%20outlets%20for%20banks%20in%20nigeria.pdf> accessed 14 August 2019.

[118] See para 2.4.3 below for a discussion of fintech.

[119] World Bank, 'Credit Reporting Knowledge Guide 2019' (*World Bank*, 2019) <http://documents.worldbank.org/curated/en/262691559115855583/pdf/Credit-Reporting-Knowledge-Guide-2019.pdf>accessed 07 December 2019.

substantive discussion of credit reporting and regulatory framework for fintech lending is undertaken below.[120]

2.3.2 Microfinance Institutions

The CBN on its part initiated the Microfinance Policy Framework for Nigeria in 2005 [revised and updated in 2011], which set the groundwork for the establishment of microfinance institutions in the country, to provide financial services to the poor. There are nine hundred and forty-one MFIs across Nigeria, many of which were established under the 2005 Framework while others transformed from community banks which had been in existence before the period.[121]

A Microfinance bank or institution is:

> Any company licensed to carry on the business of providing microfinance services, such as savings, loans, domestic funds transfer, and other financial services that are needed by the economically active poor, micro, small and medium enterprises…[122]

The CBN's justification for establishing MFIs include amongst others the existence of a substantial un-served market, poor banking culture and low level of financial literacy, economic empowerment of the poor, the increasing interest of local and international investors in microfinance, and urban bias in banking services.[123]

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[120] See para 2.4.3. Although commercial banks in Nigeria have adopted fintech to various degrees in their operations, the regulatory framework for fintech is separate, hence the decision to discuss them separately in this chapter.

[121] CBN, 'List of Financial Institutions: Micro-Finance Banks' (*CBN* 2019) <https://www.cbn.gov.ng/Supervision/Inst-MF.asp?NAV=48> accessed 5 May 2019.

[122] CBN, 'Microfinance Policy Framework for Nigeria Revised' (CBN 2011) <https://www.cbn.gov.ng/Out/2011/publications/dfd/Reviewed%20Microfinance%20Policy%20July%2012%202011.pdf> accessed 14 August 2019.

[123] ibid.

The Framework is unambiguous in its primary objective to provide business credit as opposed to consumer credit. Also, even though their focus is meant to be on meeting the financial needs of the 'economically active poor', nothing in the framework precludes wealthy individuals from accessing MFI loans, which they often do at the expense of the poor. According to the CBN, many of the MFIs were former commercial banks that could not meet the recapitalisation requirement imposed on commercial banks in 2005; hence they migrated into microfinance banking but continued to operate as 'mini-commercial banks'. As a result of the proximity in the operational model and business focus of MFIs and commercial banks in Nigeria, the former has also been significantly impacted by domestic and external shocks to the banking system. For example, the CBN found in 2011 that as a result of the Global Recession of 2009, 'Credit lines dried up, competition became [more] intense, and credit risk increased to the extent that many clients of MFBs were unable to pay back their loans owing to the hostile economic environment'.[124] Meanwhile, CBN reforms to avert a domestic banking crisis in 2009 led to panic withdrawals by MFI customers, which affected the capacity of MFIs to discharge their mandates.[125]

There are three categories of licences issued by the CBN, and promoters can choose to apply to be a unit, state, or a national microfinance bank, subject to satisfying applicable prudential and regulatory requirements.[126] The framework also permits MFIs to convert from one category of licence to another, subject to satisfying prescribed conditions. In terms of funding, the Framework requires the federal, state and local governments to contribute 1 per cent of the annual budget to micro-credit initiatives in addition to channelling development aid and NGO-funding to boost MFI capacity to attain its objectives.[127]

Ownership of MFIs is open to public, non-profit, and private entities including commercial banks which can operate micro-credit products via a unit, department or

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[124]ibid.

[125] ibid.

[126] ibid.

[127] ibid.

a subsidiary company but cannot own stakes in more than one MFI at a time. In order to ensure the success of MFIs, the Framework established the MFI Development Fund to operate as a Partial Credit Guarantee Scheme (PCGS) and established Credit Bureaus and Registries to ease information asymmetries in the lower-end market.[128] Prudential guidelines for MFIs are similar to those of commercial banks but significantly less stringent.

2.4 SEMI-FORMAL SECTOR

2.4.1 Moneylenders, Hire-purchase, and Pawnbrokers

Moneylenders, hire-purchase, and pawnbrokers are essential sources of consumer credit in Nigeria. These three forms of lending are regulated by separate legislation, unlike the UK where a harmonised Consumer Credit Act 1974 (as amended) along with the Financial Conduct Authority's (FCA) conduct of business rules[129] govern all consumer credit transactions. Each of the respective laws in Nigeria has become obsolete and inapplicable to most consumer credit transactions either because of restrictions on the transaction value or inadequacy of prescribed penalties.

The Moneylenders Law requires moneylenders to be licenced and contains tight provisions designed to protect individual borrowers from exploitation. The Law in addition to the requirement of licensing stipulates the form of loan contracts, controls the rate of interest that could be charged by a moneylender depending on whether the loan is secured or unsecured (capped at 48 per cent for unsecured loans),[130] and makes it mandatory for the moneylender to issue receipts for each repayment by the borrower. Failure to comply with these provisions does attract civil and criminal liabilities for the moneylender, but concerns about the readability of loan agreements

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[128] BE Ntiedo, 'Informal Capital Markets and Integrated Rural Development in Nigeria' (2016) 12 (22) European Scientific Journal 305-323.

[129] See FCA, 'FCA Handbook Structure and Overview' (*FCA*, 7 December 2019) <https://www.handbook.fca.org.uk/structure-and-overview> accessed 07 December 2019.

[130] Section 11.

remain.[131] The Law also prohibits aggressive loan marketing and misleading advertising.[132] The effect of the law is, however, watered down by a few obsolete provisions. By virtue of section 12 (2), criminal actions cannot be initiated against the infringing moneylender without the consent of the Attorney General of the state,[133] and where the same action succeeds, the penalty is a pittance hundred Naira fine.[134]

Moneylending in Nigeria was exclusively governed by customary law in pre-colonial times until the introduction of English law, ie, the Common Law and the Moneylenders Act of 1927, which later metamorphosed into the Moneylenders Ordinance 1939.[135] The Act was subsequently repealed and replaced by the Moneylenders laws of the respective (thirty-six) states of the federation. The state laws essentially re-enacted the provisions of the Act *mutatis mutandis* and as such are practically identical.[136] Consequently, the Moneylenders Law of Cross Rivers State[137] is adopted in this thesis to guide the discussion of moneylending. Section 31 of the Moneylenders Law defines the business of moneylending thus:

> Moneylender includes every person whose business is that of money lending or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business, whether or not he also possesses or owns property or money derived from sources other than the lending of money and whether or not he carries on the businesses as a principal or as an agent; but shall not include… Co-operative Societies… any body Corporate, incorporated or

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[131] Section 17.

[132] Sections 16 and 23. These sections, for example, cover solicitation by loan sharks and merchants accosting civil servants and military officers to buy goods on credit at multiple times the actual market price.

[133] This merely adds extra administrative red tape in view of the delays and practical costs of obtaining the Attorney-General's consent especially for the typically small amounts of consumer loans.

[134] For context, a decent loaf of bread costs from three hundred and fifty Naira at current inflation levels.

[135] Cap 124, Laws of the Federation of Nigeria, 1958.

[136] I Sagay, *Nigerian Law of Contract* (Ibadan, Spectrum Books 2000) 380.

[137] Cap M7, Laws of Cross River State of Nigeria, 2004.

> empowered by special Law to lend money under such Law…business of banking or insurance…[and] pawnbroker licensed under the Pawn Brokers Law where the loan is made under the provisions of the Pawn Brokers Law and does not exceed the sum of forty Naira.

This definition broadly admits four categories of moneylenders, namely finance companies, financiers, unlicensed moneylenders, and customary money lenders. Finance companies were the most compliant with the regulation because they had internal legal departments that scrutinised loan contracts for compliance.[138] Financiers were typically licensed individual lenders who however were often ignorant of the details of the law, for example, they often charged above interest limits, failed to issue receipts for repayment, and sometimes made oral contracts. However, both finance companies and financiers strictly provided loans for business purposes only, and very occasionally, consumer loans to wealthy customers.[139] Finance companies offered credit sales and a departmental store credit to the wealthiest consumers and were the least accessible non-bank lender, while financiers were more like MFIs but charged higher interest. Both however recorded very low customer defaults because they knew their clients very well and customers, in turn, respected obligations in order to keep the 'privileges' open.[140] Moneylending by finance companies, however, declined drastically post-SAP as workers' purchasing power declined due to cuts in wages and salaries, and a rise in unemployment. The activities of unlicensed moneylenders and customary moneylenders would be discussed in more detail under informal markets.

A pawnbroker, on the other hand, is defined as 'a person whose business is to lend money, usually in small sums, on the security of personal property deposited with him or left in pawn'.[141] Section 5 of the Pawnbroker's Law of 1917, does not cover transactions exceeding the sum of forty Naira. As such, practically all pawnbrokers'

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[138] Sofola (n 4).

[139] ibid.

[140] ibid.

[141] Black's Law Dictionary Free Online Legal Dictionary (2nd edn, 2019) <https://thelawdictionary.org/> accessed 14 August 2019.

transactions fall within the realm of the English Common Law and customary law in Nigeria. A discussion of the provisions of the Law is thus considered redundant for this thesis and accordingly omitted.

Finally, Nigerians have historically relied on hire purchase[142] to buy such goods as radios, television sets, and motor vehicles.[143] Hire-purchase presented significant risks for consumers ranging from hirer confusion about the transfer of ownership and vendors' deliberate frustration of the hirer's ability to meet preconditions for ownership.[144] Other significant risks include repossession of vehicles without consideration given to the proportion of hire-purchase price already paid or reasons for default, and without recourse to court as required by statute;[145] excessive

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[142] Hire purchase is defined as: '…an agreement, other than a conditional sale agreement, under which- (a) goods are bailed in return for periodical payments by the person to whom they are bailed, and (b) the property in the goods will pass to that person if the terms of the agreement are complied with and one or more of the following occurs- (i) the exercise of an option to purchase by that person, (ii) the doing of any other specified act by any party to the agreement, (iii) the happening of any other specified event.' See section 42 Consumer Credit Act 1974. See also JAM Agbonika and JAA Agbonika, *Hire-Purchase: Commercial Law* (1st Edition, Ibadan, Ababa Press Limited 2014).

[143] Falola (n 95) 403.

[144] For example, it was common for vendors to make themselves unavailable to receive instalments to force default since hirers had to forgo all advances leading up to the default. Vendors were also known to conspire with customs and police officers to seize the hire purchase good thereby undermining the hirer's capacity to keep up as instalments fall due. See *Udekwu v Abosi (1974) ECCSLR 298.*

[145] In *Atere v Dada (1957) WRNLR 1 76* the court held the seizure of a lorry to be lawful despite the hirer having paid Nine Hundred and Ninety-Five Pounds out of One Thousand Pounds. In *Animashaun v CFAO (1960) LLR 151,* the court went further to state that the hirer would be liable for all instalments that would have accrued at the time of repossession, while the owner owed no obligation, upon exercising the right of sale, to account to the hirer for the excess. Although the owner is now required to repossess by a court action under section 9 of the Hire Purchase Act, in practice they continue to resort to self-help, such that the burden is on the hirer, often with very little means, to commence an action for judicial intervention. See *Abubakar Yusuf v Alhaja BA Mobolaji (1999) NWLR (Part. 631) 374 at 387.*

'minimum payment clauses'[146] express exclusion of warranties and conditions as to the fitness and quality of the goods, amongst others.[147]

Hire purchase in Nigeria was governed by the Common Law until 1965 when the Hire Purchase Act was enacted. Although the Hire-Purchase Act was meant to cure the mischiefs highlighted above, its impact in terms of consumer protection is open to question. For example, the Act neither mandates vendors to disclose to the hirer the real effective rate of interest charged nor does it control the rate of interest chargeable. Like the other consumer credit legislation discussed above, the Act has become obsolete over time and in urgent need of an update. Section 1 of the Act, for example, limits the scope of transactions to two thousand Naira.[148] Hire-purchase as a form of consumer credit has also become less prevalent since the devaluation of the Naira and a fall in consumer incomes in the 1980s.

To conclude, although the legislative objectives of the moneylender, pawnbroker, and hire-purchase laws were not expressly stated in the respective legislation, the leading texts on commercial law in Nigeria contend that the laws were admitted into the body of Nigerian law to 'protect civil servants from predatory lending in colonial times'[149] which was found to have hurt the efficiency and productivity of government workers.[150] The laws also seek to protect 'impecunious, and sometimes foolish, individuals who resort to callous and heartless moneylenders for accommodation in order to solve their financial problems'.[151]

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[146] *Amusan & Anor v Bentworth Finance (Nigeria) Ltd (1966) NMLR 276.*

[147] M Ekpo, E Alobo, and J Enyia, 'Impediments to the Development of a Strong Consumer Credit System in Nigeria' (2018) 5(1) World Journal of Social Science 36-45.

[148] This amount is insufficient to finance any meaningful purchase by the current value of the currency.

[149] Sofola (n 4).

[150] G Ezejiofor, CO Okonkwo and CU Illegbune, *Nigerian Business Law* (London, Sweet & Maxwell 1982) 145.

[151] ibid.

2.4.2 Cooperative Societies

The Nigerian Cooperative Societies Act regulates cooperative societies. The Act defines a co-operative society as 'a voluntary association of individuals, united by a common bond, who have come together to pursue their economic goals for their [own] benefits'.[152] It must have as its object 'the promotion of the socio-economic interests of its members in accordance with co-operative principles' and commit to 'facilitating the operation of those principles'.[153]

The Act vests the authority to oversee cooperatives on a day-to-day basis in the director of cooperatives appointed by the president or state governors at the federal and state levels respectively.[154] The Act requires cooperatives to register in order to access privileges under the law and regulates membership.

Although individuals have always cooperated to promote shared interests such as the case of Rotating Savings and Credit Associations discussed below, the emergence of formally organised cooperatives as envisioned under this legislation has been traced to cocoa farmers in western Nigeria in early colonial times.[155] However, cooperative societies are now national phenomena, from thrift societies, produce marketing societies to consumer societies.

Cooperative societies are an essential source of consumer credit for members. They can lend to members only,[156] and are empowered to fix their interest rates following their bye-laws.[157] Co-operative societies present benefits of speedy disbursement, lower interest rates relative to banks and moneylenders, offer flexible loan restructuring, and lower qualification criteria subject to membership. They are the most appropriate source of consumer credit in the semi-formal sector in Nigeria because they are not profit-oriented and are flexible in dealing with borrowers due to

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[152]Section 57.

[153]Section 2.

[154] Section 1.

[155] Falola (n 95).

[156] Section 30.

[157] Section 11.

an exemption from prudential requirements.[158] Furthermore, borrowers from co-operative societies under the law enjoy a simple, inexpensive, and *ex ante* dispute resolution through the Director of Co-operatives.[159] This procedure, in principle, is cheaper and faster for borrowers than adversarial mechanisms such as litigation, and in part made possible by the collegial nature of cooperatives. Parties identify first as colleagues, and this relationship takes priority over the creditor-debtor dynamic. As most co-operative societies, by design, withhold contributions from members' incomes, borrowers have more incentive to repay loans and default less.

2.4.3 Fintech Start-Ups

Fintech or financial technology refers to a set of 'computer programs [sic] and other technology used to provide banking and financial services'.[160]The term admitted a broad range of technologies from coins and paper notes to the handheld calculator historically. It has evolved in modern times to include more sophisticated technologies like Automated Teller Machines (ATM), cryptocurrencies and Mobile Point of Sale (M-POS) devices.

The Fintech revolution is happening on a global scale and is impacting consumer experiences of financial services across the world. In the developing world, financial markets are growing in depth and scale, but services continue to exclude a vast population of consumers. Thus, fintech presents immense opportunities for consumer credit expansion. It supports incumbent financial services providers to serve the poor better. But more critically, it has the potential to institute a new lending model that by-passes traditional financial institutions. In Nigeria, third party payments service providers like Paylater and Pagatech have helped consumers to access banking

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[158] Ntiedo (n 128) 308.

[159] Section 49, Nigerian Co-operative Societies Act.

[160]H Gimpel, D Rau, and M Röglinger, 'Understanding FinTech Start-Ups - A Taxonomy of Consumer-Oriented Service Offerings' (2018) 28(3) Electronic Markets https://doi.org/10.1007/s12525-017-0275-0 > accessed 15 August 2019.

services using smartphones and other electronic devices,[161] but much of the progress in fintech has been in the area of payment infrastructure aimed at improving services for existing customers. Formal financial institutions mainly have focused on investing in fintech products that move customer traffic out of the banking hall to external or virtual channels.[162]

Studies measuring the impact of fintech have primarily focused on financial inclusion rather than consumer credit provision *per se*. Financial inclusion, understood as 'access to a full suite of quality financial services, ensuring that customers possess the financial capability and ensuring that services are provided via a diverse and competitive marketplace'[163] certainly go beyond access to payments services, which take centre stage in many of these studies. Although formal credit providers in Nigeria have invested in more accessible channels such as the Unstructured Supplementary Service Data (USSD) to attract deposits from poor and rural customers,[164] fintech penetration into the credit market remains low at 3 per cent. Furthermore, gaps in access to fintech in Nigeria are differentiated based on gender, urban/rural divide, age, region, and Corporate/SME divides.[165] This finding is consistent with broad

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161 A Demirgüç-Kunt and others, 'The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution' (Washington, DC, IBRD/World Bank 2018) <https://globalfindex.worldbank.org/> accessed 15 August 2019.

162 Access to ATM and POS may be hampered by slight declines in the number of registered ATMs and POS from a total of 199999 POS in 2017 to 182806 by March 2018 and 17808 to 17449 ATMs across the country. See NIBSS, 'E-Payments Fact Sheet for Jan-Mar 2018' (NIBSS Enterprise Intelligence Unit 2018) <https://nibss-plc.com.ng/wp-content/uploads/2017/08/eFactSheet_-Jan-Mar.-2018.pdf>accessed 29 September 2019.

163 Economist Intelligence Unit, 'Global Microscope 2018: The Enabling Environment for Financial Inclusion' (New York, EIU 2018) <https://content.centerforfinancialinclusion.org/wp-content/uploads/sites/2/2018/11/EIU_Microscope_2018_PROOF_10.pdf> accessed 15 August 2019.

164 M Hanouch, 'What is USSD & Why Does it Matter for Mobile Financial Services?' (*CGAP* 17 February 2015) <http://www.cgap.org/blog/what-ussd-why-does-it-matter-mobile-financial-services> accessed 15 August 2015.

165 Demirgüç-Kunt and others (n 161); T Suri and W Jack, 'The Long-Run Poverty and Gender Impacts of Mobile Money' (2016) 354 (6317) Science 1288–92.

disparities in financial inclusion in Nigeria with higher exclusion levels recorded amongst women, rural dwellers, youth, people living in North East and North-West Nigeria, the disabled and MSMEs.[166] Thus, from the perspective of low-income consumers, there is a common trend in terms of exclusion from both traditional and digital credit products and processes, which again presents the pertinent regulatory questions of the role for regulation to address these disparities and whether deregulation can fully unleash the benefits of fintech for lower-end household borrowers.

2.5 THE REGULATORY FRAMEWORK FOR FINTECH IN NIGERIA

The working assumption of IFIs for regulating fintech, especially in developing economies follows their vision for traditional lenders closely. The government: (a) creates a favourable environment through incentives for the private sector to thrive; (b) ensures prudential stability and financial integrity through supervision and monitoring; (c) evaluates consumer protection and privacy regulation and enforcement; and (d) sets up the infrastructures such as digital identification and credit reporting; and financial inclusion materialises.[167] This approach affirms faith in private sector initiative and considers credit reporting and data protection as principal consumer protection tools. Moreover, it associates the relevance of consumer protection most significantly to financial stability, but not necessarily as an independent priority. This model has worked in Kenya where Safaricom, partnered

[166] CBN, 'Financial Inclusion Strategy' (CBN 2018) <https://www.cbn.gov.ng/Out/2018/CCD/Exposure%20Draft%20of%20the%20National%20Financial%20Inclusion%20Strategy%20Refresh_July%206%202018.pdf> accessed 5 May 2019. See also Consumers International, 'Connecting Voices: A Role for Consumer Rights in Developing Digital Society' (*Consumers International* 2017) <https://www.consumersinternational.org/media/154869/ci_connecting-voices_2017_v2.pdf> accessed 5 May 2019.

[167] M Johnson, 'Financial Sector Reform in Structural Adjustment Programmes' in WV der Geest (ed), *Negotiating Structural Adjustment in Africa* (New York, United Nations Development Programme 1994) 176. See also World Bank, 'Finance for All? Policies and Pitfalls in Expanding Access' (2009) 24 (1) The World Bank Research Observer 143.

with the Commercial Bank of Africa, to introduce M-Shwari, on the back of M-Pesa to provide deposit and lending products directly to mobile phone borrowers. M-Shwari performed well, mobilizing deposits of USD1.5 billion and advancing loans of USD277.2 million.[168] Nevertheless, consumer concerns about service costs, connectivity, and network quality, and fraud continue to subsist.[169]

As fintech has followed a different trajectory in Nigeria, mostly as an interface between consumers and financial institutions, several additional regulatory problems emerge. The CBN has implemented the following regulatory policies to support fintech in Nigeria.[170]

2.5.1 Mobile Money Regulations

The CBN issued two guidelines in 2009 on mobile money and mobile payment services. Under the Mobile Money Regulations 2009, it established a bank-led mobile money framework. Under the bank-led framework, licenses are issued to Mobile Money Operators (MMOs) which can either be banks, Micro-Finance Institutions (MFI) or bodies corporate other than Mobile Network Operators/Telecommunication Companies (TELCOs).[171]

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168 International Finance Corporation, 'Digital Financial Services: Challenges and Opportunities for Emerging Market Banks' (2017) 42 EMCompass <https://www.ifc.org/wps/wcm/connect/067d6a0c-f1b5-4457-97aa-2982a7dfda69/EMCompass+Note+42+DFS+Challenges+updated.pdf?MOD=AJPERES&CVID=lTM-26u> accessed 15 August 2019.

169 GSMA, 'M-Pesa Responds: Benefits and Challenges of Using Mobile Money to Reduce Poverty for Women in Kenya' (*GSMA*, 2012) <https://www.gsma.com/mobilefordevelopment/country/kenya/m-pesa-responds-benefits-and-challenges-of-using-mobile-money-to-reduce-poverty-for-women-in-kenya/> accessed 5 May 2019.

170 CBN, 'Retail Payments' (*CBN,* 5 May 2019) <https://www.cbn.gov.ng/Paymentsystem/RetailPayments.asp> accessed 5 May 2019.

171 CBN regulation is supplemented by the Nigerian Communications Commission which makes and publishes regulations on matters such as, but not limited to written authorisations, permits, assignments, and licences consistent with its powers under section 70 of the Nigerian Communications Act 2003. Notwithstanding the restriction of TELCOs and the licensing of 21 MMOs, the number of

The exclusion of TELCOs as lead initiators of mobile money has led to bank dominance. Although the CBN has rationalised its decision to exclude TELCOs from MMOs as a bid to ensure TELCOs deliver 'quality service', it seems counterproductive to the Bank's financial inclusion drive. This is because the national distribution and number of TELCO accounts and service access points outweigh the number of bank accounts and thus position them to extend services to unreached places better. According to the Nigeria Inter-Bank Settlement Systems PLC (NIBSS), a total number of 51.7 million bank account holders had been assigned biometric verification numbers by February 2017 compared to 154.1 million phone subscribers in the same period in 2017 and 93.3 million unique subscribers.[172] Also, TELCO access points across the country exceed commercial bank access points. In 2018, the CBN introduced new Guidelines for Licensing and Regulation of Payment Service Banks in Nigeria, which allow TELCOs to undertake some banking activities but expressly prohibited lending.[173] The lack of competition from other service providers and consequent low investment in an algorithm-driven process[174] mean that Nigerian banks continue to rely on traditional screening methods such as requirements that borrowers have a white-collar job with the salary account domiciled in the bank or owned valid collateral before loan applications receive consideration.

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fintech start-ups currently operating in the market is more than double that number, the implication being that some operators are without a license to carry on business.

[172] Nigerian Communications Commission, 'Industry Statistics- Subscriber/Teledensity Data: June 2017- May 2018' (*NCC,* 5 May 2019) <https://www.ncc.gov.ng/stakeholder/statistics-reports/industry-overview#view-graphs-tables> accessed 5 May 2019. It is important to note that Nigeria has a multi-SIMs culture; hence, more active connections than individual subscribers.

[173] Para 4, Guidelines for Licensing and Regulation of Payment Service Banks in Nigeria 2018.

[174] This is important for them because in the absence of investment in algorithm-based data collection and processing, and reliable credit reporting, the salary, and collateral are useful tools to assess creditworthiness and customer loan limit.

2.5.2 Agent Banking Regulations

Commercial banks have relied more recently on agent banking rather than branch expansion as a strategy for expanding towards rural areas. The CBN's Banking and Payments System Department issued Guidelines for the Regulation of Agent Banking and Agent Banking Relationships in Nigeria in February 2013 which amongst other things permits banks to enrol customers, accept deposits, and perform cash-out transactions through agents who may not be exclusive to a single MMO. The Guidelines provide that 'Every agent banking contract shall contain a reference to the Financial Institutions' (FI) full liability concerning customers, and it shall specify the obligation of both the FI and the agent'.[175] The main driver of this strategy was the implementation of the Regulatory Framework for Mobile Money, released in 2009. As of 2014, there were a total of 21 Mobile Money Operators (MMOs) licensed to conduct business in Nigeria.[176]

2.5.3 Credit Reporting Act

The Credit Reporting Act 2017 seeks to address the information problem in the consumer credit market. The main objectives of the Act are to promote access and risk management, increase transparency through information sharing and establish reporting standard, ultimately enhancing responsible lending and borrowing. Sections 1 and 12 (f) of the Act stop short of making 'responsible lending and borrowing' a legal requirement but attempt to responsibilise lenders by requiring lenders to obtain a credit report from at least one of the licensed credit bureaux before granting any form of credit. While the CRA is not explicit on the penalties for non-compliant lenders, sections 23 and 27 make non-compliance with the provisions of the Act punishable by a fine (on lending institutions) and imprisonment upon conviction

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[175] See para 3, Guidelines for the Regulation of Agent Banking and Agent Banking Relationships in Nigeria, February 2013.

[176] CBN, 'Financial Service Providers' (*CBN,* 5 May 2019) <https://www.cbn.gov.ng/FinInc/finservproviders.asp> accessed 5 May 2019.

for authorising officers. It is also not clear if lenders would be penalised for granting credit to a borrower shown to be over indebted by a credit report.[177]

The most important contribution of the Credit Reporting Act 2017 to the development of consumer credit market in Nigeria is contained in section 27 which expands reporting obligation to a broad segment of informal market operators including co-operative societies that offer credit to small, medium and micro enterprises, including individual consumers.[178] This segment of the market is responsible for originating most credit facilities to consumers and the most opaque. The CRA therefore potentially introduces much needed transparency into this market and also encourages mainstream lenders to lend to the category of individuals that seek out loans in this market.

While it is true that credit scoring algorithms have kick-started consumer lending by start-ups like Paylater,[179] the CBN's preference for bank-led mobile money operation and incidental restrictions on TELCOs from mobile money operations has negative consequences for consumers in, ironically, the precise sense that the theory of overregulation anticipates.[180] An overregulated business environment stands in contrast to a 'good investment climate', generally considered as one which 'encourages firms to invest by removing unjustified costs, risks, and barriers to competition'.[181] The theory of overregulation contends that 'effective business regulation affords micro and small firms the opportunity to grow, innovate and, when

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[177] Experience from the Nigerian banking crisis has shown that lenders tend to focus more on the margins on the principal loan sum than they are worried about losing the principal.

[178] G Davel, *Regulatory options to curb debt stress* (CGAP, 2013) 1.

[179] Nigeria's 3-tiered Know-Your-Customer system allows customers without a National ID to open a basic account or mobile wallet with other forms of identification. See Economist Intelligence Unit, 'Global Microscope 2018' (n 163).

[180] World Development Report, *A Better Investment Climate for Everyone* (OUP 2005) <http://siteresources.worldbank.org/INTWDR2005/Resources/complete_report.pdf>accessed 25 September 2019.

[181] ibid 2.

applicable, move from the informal to the formal sector of an economy'.[182] Such regulation is flexible, protective of property rights and simplifies (minimises) the tax bills of businesses.[183]

By making market entry difficult, regulators have inadvertently chosen to protect traditional incumbents (from effective competition) over consumer needs for a diverse set of consumer credit products. TELCOs in Nigeria have far more extensive coverage and distribution of access points compared to banks and thus better positioned to reach rural communities where formal financial services are currently unavailable. Secondly, they have a more extensive customer base, and the marginal costs of extending banking services to them are lower compared to banks. Thirdly, as one of the biggest challenges to fintech product uptake by consumers is lack of awareness of rather obscure fintech products,[184] TELCOs have the advantage in terms of advertising as all it takes is an SMS delivered to customers at no extra costs. With their more extensive agent network, they can also leverage their position to deepen consumer financial education, which ultimately benefits the entire market. Fourthly, commercial banks do not appear to deserve the protection from competition that they currently enjoy considering that their service delivery record has not been stellar. According to the Consumer Protection Council of Nigeria, the banking sector received the most complaints from consumers in 2017. This negates the CBN's rationale for excluding TELCOs in the first place.

The CBN's relaxation of restrictions, allowing TELCOs to carry on MMOs through subsidiaries has, however, not prevented the emergence of unlicensed operators in

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[182] International Bank for Reconstruction and Development / The World Bank, Ease of Doing Business Report (World Bank 2019) 1 <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf>accessed 09 December 2019.

[183] ibid.

[184] According to a Financial Inclusion Insights surveys (FII) conducted in 2015, 88% of non-users of innovative fin-tech products in Nigeria are unaware of the existence of such product or service. See Financial Inclusion Insights, 'African Financial Inclusion Insights in an Instant' (FII 2016) <http://finclusion.org/blog/african-financial-inclusion-insights-in-an-instant.html> accessed 5 May 2019.

the Mobile Money market. Many fintech companies are marketing apps to members of the public without the requisite license to operate. For example, in Lagos Nigeria, many fintech start-ups introduce products that allow customers to link a bank account to external payment tools. However, some of these start-ups fail very quickly exposing consumers to loss, fraud, or other forms of vulnerability, and effectively reducing consumers to Guinea Pigs in tech experiments with attendant high vulnerability.

2.6 INFORMAL SECTOR

'Informality' broadly captures 'the collection of firms, workers, and activities that operate outside the legal and regulatory frameworks or outside the modern economy'.[185] In sub-Saharan Africa, an estimated 70.9 per cent of the labour force participation is informal, compared to a global average of 63.5 per cent in 2014.[186] Nigeria's informal sector forms 65 per cent of Gross Domestic Product,[187] more extensive than those of Brazil, Ghana, Turkey, Malaysia, and South Africa according to World Bank estimation.[188] The vast majority of borrowers in Nigeria unable to access credit from formal institutions turn to informal lenders to meet their needs. Studies suggest that while informal markets thrive because of its informational advantage over the formal sector,[189] from a consumer protection perspective, it presents a more severe difficulty for monitoring the welfare implication of credit

[185]NV Loayza, 'Informality in the Process of Development and Growth' (World Bank Development Research 2019) <http://pubdocs.worldbank.org/en/303301465334000439/Informality-Development-and-Growth.pdf> accessed 5 May 2019.

[186] International Labour Organisation, 'Five Facts about Informal Economy in Africa' (*ILO,* 18 June 2015) <http://www.ilo.org/addisababa/whats-new/WCMS_377286/lang--en/index.htm> accessed 5 May 2019.

[187] International Monetary Fund, 'Regional Economic Outlook: Sub-Saharan Africa Restarting the Growth Engine' (Washington, DC, International Monetary Fund 2017).

[188] SL Sanusi, 'Banking Reform and Its Impact on the Nigerian Economy' (University of Warwick's Economic Summit, Warwick, February 2012) <http://www.bis.org/review/r120320d.pdf> accessed 5 May 2019.

[189] A Kochar, 'An Empirical Investigation of Rationing Constraints in Rural Credit Markets in India' (1997) 53 (2) Journal of Development Economics 339-371.

contracts for borrowers. This is because informal contracts are often unwritten and therefore unclear, and lenders often resort to extra-legal means for debt recovery.[190]

There are at least two schools of thought about the utility of informal markets. The first school of thought considers informal markets as complex systems with enormous social, economic, and cultural welfare benefits for participants. It posits that it is possible to harness the benefits of informal processes, institutions, and practices that work for any given group by using regulation to fix, improve, modernise and consistently monitor its operation, rather than focusing policy on eliminating the market wholesale.[191] This school of thought generally acknowledges some of the drawbacks of the market, such as inefficiencies, exploitation, and lack of productivity but considers these as challenges that can be remediated.

The second school of thought views informal systems through a negative lens and typically defines informality as a problem in and of itself. Informal markets tend to lack appropriate technologies, social protection, and often deprive participants of access to public services. The World Bank is one institution that makes policy often based on this assumption.[192] There are at least two sub-schools within this school of

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[190] Illegal debt recovery practices by lenders and law enforcement agencies involving the intimidation, physical violence, detention, arbitrary seizure of borrowers' assets and other breaches of the fundamental rights of borrowers have been documented in a long line of case law in Nigeria. See *Economic & Financial Crimes Commission v Diamond Bank Plc & Ors* (2018) LPELR-44217(SC). See also *AG Plateau State v AG Nasarawa* (2005) 129 LRCN 1523 at 1531; *UNIBIZ v Commercial Bank* (2005) 125 LRCN 1484 at 1495; *University of Ilorin v Oyelana* (2001) FWLR (Pt 83) 2193 at 2209.

[191] V Diaz-Moriana and C O'Gorman, 'Informal Investors and the Informal Venture Capital Market in Ireland' (2003) 3 (6) Journal of Asian Scientific Research 630-643; AA Babajide, 'The Relationship Between the Informal and Formal Financial Sector in Nigeria: A Case Study of Selected Groups in Lagos Metropolis' (2011) 1 (10) International Journal of Research in Computer Application and Management 24-32.

[192] For example, in a recent policy paper, the World Bank in highlighting the disadvantages of informal markets noted that 'complex and nontransparent trading systems can be discouraging to foreign investors and can otherwise undermine trade policy and the international competitiveness of developing countries.' See N Benjamin and others, 'Informal Economy and the World Bank' (2014) Policy Research Working Paper 6888

thought. According to Loayza, one sub-school believes that informality is a consequence of a lack of development, and a failure to put in place sufficient protections for workers, while another considers informality a product of bad governance 'whether through excessive regulation, poor government services, or a combination of the two'.[193] There is, however, a consensus in this school that informality is a problem that results from all of the causes identified. While the original approach prescribed by the World Bank was formalisation, Loayza's recent study published by the Bank is more nuanced, encouraging formalisation but emphasising that 'policies to address informality should also vary country by country'.[194]

Although the World Bank has favoured the view that formalisation will foster more property rights, business rights, and labour rights according to free-market principles, it has stopped short of embracing and promoting more mandated social responsibilities for financial institutions in the credit market. In Nigeria, property rights are historically significant for understanding the disparity in credit advances to wealthy and lower-end borrowers. For one, the legal process for the determination of valid collateral is unfair to the poor, especially borrowers who hold assets with customary titles. Less than 3 per cent of Nigerian land has registered titles,[195] meaning weaker borrowers are more likely to hold only customary titles, build without government permits and consequently enjoy less access to formal credit.[196] Formality,

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<http://documents.worldbank.org/curated/en/416741468332060156/pdf/WPS6888.pdf>accessed 09 December 2019. See also E Dabla-Norris and others, 'Causes and Consequences of Income Inequality: A Global Perspective' (2015) SDN/15/13 IMF Staff Discussion Note 4 <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf>accessed 12 December 2019. It is, however, not the case that formal markets are always more transparent than informal markets eg if one contrasts markets for securitisation with the customary credit market described at para 2.8 below.

[193]Loayza (n 185).

[194] ibid.

[195] Presidential Technical Committee on Land Reform, *Land reform in Nigeria: Basic Facts (third edition)* (Abuja, The Presidency, Office of the Secretary to the Government of the Federation 2013).

[196] H de Soto, 'Excerpts from the Mystery of Capital' (2017) 6 Brigham-Kanner Property Rights Conference Journal 9-71.

in the context of property rights in Nigeria, however, presents as a drag on the welfare of the weakest consumer borrowers. According to de Soto, legislation such as the Land Use Act 1978 represents a legacy of colonial law in most developing countries that are 'tilt[ed] toward protecting ownership', and 'why most of the assets in developing and former communist countries have slipped out of the formal legal system in search of mobility'.[197] Focus on supplanting customary rights with 'formal rights' building on imported legal orders does generate a separate set of problems. Laws are a body of norms, values, ideology, and manifestation of customs and tradition. Viewed this way, the importation of laws inconsistent with local systems, values, and needs could be as devastating as outright deregulation.[198]

Formalisation is not inherently a bad policy if the goal is to promote access to safe consumer credit products. Formal lending institutions are more efficient, scalable, productive, transparent, and easier to monitor compared to most informal systems.[199] However, formalisation, as a policy response to financial exclusion, requires scrutiny for two reasons. First, it has become a rationale for deregulation and liberalisation of financial markets in developing countries and across the world. The assumption that informal markets exist because of the excessive regulation of formal systems leads many policymakers to conclude that for formalisation to occur, deregulation must inevitably precede. Very few regulatory experts would disagree that excessive regulation could stifle business and economic growth. However, what is 'excessive regulation' remains contentious amongst experts, and has much to do with ideology, cost-benefit analysis, and practical realities of every individual system or market. In any case, it is disturbing when deregulation becomes a code word for weaker consumer rights and protection. In Nigeria, it is unclear how much SAP has helped to reduce informality. On the contrary, the evidence shows that more consumers fell off

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[197] ibid.

[198] M Dasgupta, 'Moving from Informal to Formal Sector and what it means for Policymakers' (*World Bank*, 20 September 2016) <http://blogs.worldbank.org/jobs/moving-informal-formal-sector-and-what-it-means-policymakers> accessed 5 May 2019.

[199] S Yu and F Ohnsorge, 'The Challenges of Informality' (*World Bank,* 18 January 2019) <http://blogs.worldbank.org/developmenttalk/challenges-informality> accessed 5 May 2019.

the formal market 'cliff' and inevitably had to borrow from informal sources to stay alive. Even in developed markets, deregulation and liberalisation in the 1980s gave rise to more informal production structures.[200]

The effectiveness of deregulation as an incentive for formalisation, and as a substantive approach to consumer protection could also be assessed by looking at the benefits it confers on all categories of consumers who already have access to formal credit products and services. There is strong evidence across the globe, especially since the Global Recession, that extreme deregulation almost always delivers the most benefits to the wealthiest in society (the notorious top 1 per centers), while the weakest members of society bear the costs.[201] The Global Recession teaches many lessons but importantly that in the absence of strong regulations, formal and informal markets present similar risks to consumers, and the former can be more devastating due to the typical scale of risk. Consider, for example:[202]

i. Deregulation led to unsupervised innovations which in turn birthed complex products such as collateralised debt obligations and other forms of securitisation which were as opaque and confounding as credit products obtainable in informal markets.
ii. Predatory lending was a hallmark of the mortgage market in the United States before the Global Recession with numerous subprime products sold to the most vulnerable consumers on the market, much like what obtains in many informal systems.

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[200] Dasgupta (n 198).

[201] LA Keister and HY Lee, 'The One Per Cent: Top Incomes and Wealth in Sociological Research' (2014) 1 (1) Social Currents 13-24; M Kumhof, R Rancière, and P Winant, 'Inequality, Leverage, and Crises' (2015) 105(3) American Economic Review 1217-1245; T Piketty, *Capital in the Twenty-First Century* (Cambridge Massachusetts, Harvard University Press 2014).

[202]BS Bernanke, TF Geithner, and HM Paulson, *Firefighting: The Financial Crisis and its Lessons* (New York, Penguin Books 2019) 11-12.

iii. Systematic discrimination against minority ethnic groups by banks for which Wells Fargo and many top US banks were recently indicted is very similar to fears most regulators often harbour about informal markets.[203]

These examples are only a few of the many similarities between formal and informal credit markets and demonstrate the negative impact that deregulation and liberalisation could have on all consumers, but specifically the most vulnerable consumers in developing countries. Informal systems are peculiar and vary from country to country; as such, it is misguided to approach formalisation or elimination of informality as an end. Informal structures are not inherently wrong; instead, such a conclusion could only be reached based on a specific assessment of the informal structure, activity, or process.[204] In Nigeria, the World Bank's focus on formalisation, privatisation, and liberalisation as the ideal path to financial access and consumer protection has achieved three outcomes that this thesis would show in chapter five:

i. These policies have fuelled more borrowing from 'black markets' by making the formal sector less accommodating of lower-end borrowers.
ii. Consumers who survived the reforms and continue to access formal credit products are worse off in terms of the welfare benefits accruing from borrowing.
iii. The approach fails to examine and understand informal markets adequately, and too often ignores well-functioning informal systems and structures that could be improved by regulation to serve the needs of consumer credit users.

As noted in chapter one, this thesis argues that formal and informal markets can present welfare enhancing benefits and risks that require effective regulation to

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[203] M Egan, 'Wells Fargo accused of preying on black and Latino homebuyers in California' (CNN Business, February 2018) <https://money.cnn.com/2018/02/27/investing/wells-fargo-sacramento-lawsuit-discriminatory-lending/index.html>accessed 09 December 2019; R Rothacker and D Ingram, 'Wells Fargo to pay $175 million in race discrimination probe' *Reuters* (7 July 2012) <https://www.reuters.com/article/us-wells-lending-settlement/wells-fargo-to-pay-175-million-in-race-discrimination-probe-idUSBRE86B0V220120712>accessed 09 December 2019.

[204] Dasgupta (n 198).

balance.[205] The following are some of the informal sources of consumer credit in Nigeria. There are two categories of informal markets, namely the markets emerging in direct response to regulation (black markets) and markets that evolved from customs and traditional arrangements predating colonialism and formal regulation.

2.7 MARKETS EMERGING IN RESPONSE TO REGULATION ('BLACK MARKET')

These so-called black markets evolved in Nigeria as in many other countries for various reasons. The black market for consumer credit in Nigeria consists of unlicensed moneylenders, hire-purchase vendors, and pawnbrokers. These moneylenders avoid licensing in order to avoid legal constraints such as caps on the rate of interest chargeable on consumer loans or checks on arbitrary loan recovery methods. Unlicensed moneylenders are known to charge rates above 150 per cent per annum, compound interest,[206] and enjoy a broad customer base across the country. They are also known to take matters into their own hands when borrowers default on loans in ways that the law does not approve. Moneylenders increasingly find it easy to operate without a license due to the erosion of the deterrent value of existing regulation, such that even licensed moneylenders often ignore or violate the provisions of the moneylenders' law.[207] For example, many licensed financiers violate the law out of ignorance of the law, and because many moneylenders lend to people in their social, workplace or communal circles, they often demand a 'waiver' of protective provisions under the law from prospective borrowers which they get because of the desperate circumstances of such borrowers. Many of these borrowers

[205] E Hobson, WK Sameh, and M Angus, 'Uganda - From Regulators to Enablers: Role of City Governments in Economic Development of Greater Kampala' (Washington DC, World Bank 2017) <http://documents.worldbank.org/curated/en/860311505816462189/Uganda-From-regulators-to-enablers-role-of-city-governments-in-economic-development-of-greater-Kampala> accessed 5 May 2019.

[206] Many consumer borrowers do not understand how compound interest is calculated in contrast to simple interest, which casts some doubt as to how well credit contracts are broadly understood by consumer borrowers when they enter into new loan transactions.

[207] Ntiedo (n 128) 305-323.

are themselves ignorant of the law, too poor to pursue their legal rights, or unwilling to jeopardise future lines of credit.[208]

A broad class of black market lenders has also unintentionally emerged as a result of underlying inflation which takes most transactions of certain forms out of the coverage of extant laws. For example, practically all hire-purchase and pawnbroker deals are unregulated by the relevant statutes. The protections under the Common Law, however, are weaker than those under existing ineffectual legislation.[209]

In Nigeria, black market lenders cater to borrowers often rationed out by formal lenders due to information asymmetry occasioned by a weak credit reporting regime, a very slow debt recovery process,[210] an incomplete biometric database, and the fact that many of the lower end borrowers do not own valid or acceptable collateral (Chapter four).[211] The black market can cater to their borrowing needs because lenders and borrowers in this sector are more or less outlaw – in the sense that transactions

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[208] Falola (n 95) 403-423; M Ekpo, E Alobo, and J Enyia, 'Impediments to the Development of a Strong Consumer Credit System in Nigeria' (2018) 5 (1) World Journal of Social Science 36-45.

[209] ibid.

[210]The rules of court, mainly the Civil Procedure Rules of the various States of the Federation make provision for a fast track rule towards disposing off matters of liquidated money demands which are often filed on the undefended list with the aim of reaching quick judgment. However, shrewd lawyers always figure a way to move such matters to the General Cause list where litigation gets protracted. For instance, the Nigerian Supreme Court case of *Khaled Barakat Chami v UBA Plc* (2010) 6 NWLR (Pt. 1191) 474 SC first originated in the High Court in 1999, but the judgment of the Supreme Court was only delivered eleven years after in 2010. Similarly, in the Supreme Court case of *Chief Peter Amadi Nwankwo & Anor v Ecumenical Development Co-operative Society (EDCS) UA (2007) 5 NWLR (Pt.1027) 377,* litigation on loan due to be repaid by the appellants in 1990 lasted up to 2007 when the apex court delivered its judgment on a procedural issue without delving into the substantive issue of the debt. With the hardship of debt recovery in Nigeria, lending posed an apparent moral hazard as the gain derivable from non-repayment outweighs the punishment for default. See J Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (2014) 43(2) The Journal of Legal Studies S209-S237.

[211] Central Bank of Nigeria, 'Exposure Draft of the National Financial Inclusion Strategy Refresh' (CBN 2018)
<https://www.cbn.gov.ng/Out/2018/CCD/Exposure%20Draft%20of%20the%20National%20Financial%20Inclusion%20Strategy%20Refresh_July%206%202018.pdf> accessed 16 October 2018.

neither conform to the law nor are parties protected by the law. For example, lenders could charge any rate of interest to cover the assessed risk and could use extra-legal means to recover loans.

Consumer credit channelled through black markets increases borrower vulnerabilities in diverse ways. In the absence of regulation, lenders set the terms and borrowers are often subjected to their whims and caprices.[212] This risk materialises in different forms in Nigeria where the poor socio-economic backgrounds of consumer borrowers create an inequality of bargaining power resulting in welfare reducing transactions.

2.8 CUSTOMARY MONEYLENDERS

Customary lenders exist in different forms. Since pre-colonial times and before the adoption of the English legal system, consumers had been exposed to lending and borrowing as a concept and had various customary arrangements around which lending and borrowing occurred. In many traditional credit arrangements, the lender and borrower belong to the same family, social circles, labour union, or share a certain sense of community.[213] This relational model presents additional advantages potentially, in terms of fairer interest rates, the flexibility of repayment, or a distinct level of lender compassion that is often not afforded by formal contracts.[214] There are, however, downsides. Lenders in informal markets often cannot provide the sums required by borrowers, whereas consumers' options are finite as they tend to have a limited social network and lack the financial means to invest in the social capital to expand this network.[215] A few of these informal arrangements are discussed below.

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[212] A Rona-Tas and A Guseva, 'Consumer Credit in Comparative Perspective' (2018) 44 Annual Review of Sociology 61.

[213] S Heath and E Calvert, 'Gifts, Loans and Intergenerational Support for Young Adults' (2013) 47(6) Sociology 1120–35.

[214] ibid.

[215] Y Yuan and L Xu, 'Are Poor Able to Access the Informal Credit Market? Evidence from Rural Households in China' (2015) 33 China Economic Review 232-246.

2.8.1 Family and Friends

Family and friends constitute an essential source of informal credit either for consumption or production purposes. Lending between family and friends is typically interest-free and often lacks a crucial element of a valid contract, ie, an intention to enter a legal relationship. This form of lending blurs the line between a credit contract and a gift and as such may not fall within the definition of a moneylender under the law. The lending of this nature mostly defies the assumption that informal credit is exploitative and harmful to borrowers.[216] Nigerian societies, like many African societies, are organised around an intricate web of extended family and communal relationships. This is particularly true of rural communities but also of urban centres through religious institutions like churches, mosques and trade associations. Individualism is only just emerging as a trend amongst the educated urban working class and giving financial assistance to distant family relations is still widely considered a duty and obligation, responsibility rather than an act of kindness or charity.

Family and friends remain the most important alternatives to microfinance but cannot often make substantial advances to borrowers.[217] Besides the insufficiency of funds, lending under this arrangement has the potential to fray familial bonds hence unattractive to many individuals.

2.8.2 Rotating Savings and Credit Associations (ROSCAs)

ROSCAs are a form of '… informal, indigenous savings and credit institution, and a widespread phenomenon in rural and urban economies around the world'.[218]Across Africa, a prominent motivation for participation in ROSCAs is to finance consumer

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[216] S Rutherford, 'The Savings of the Poor: Improving Financial Services in Bangladesh' (1998) 10 (1) Journal of International Development 1–15.

[217] D Collins, S Rutherford, and O Ruthven, *Portfolios of the Poor: How the World's Poor Live on $2 a Day* (Princeton University Press 2009).

[218] R van den Brink and JP Chavas, 'The Microeconomics of an Indigenous African Institution: The Rotating Saving and Credit Associations' (1997) 45 (4) Economic Development and Cultural Change 746–772; S Ambec and N Treich 'Roscas as Financial Agreements to Cope with Self-Control Problems' (2007) 82 Journal of Development Economics 120–137.

needs such as food, education, acquisition of durable household goods, and other capital-intensive undertakings.[219] By default, ROSCAs constitute a form of unregistered cooperative society engaging in lending to members and outsiders.

ROSCAs typically pool money by way of individual contributions that are collected and advanced to one individual member selected by some random or blind method and is operated until the last member of the group receives the contributions. Contributions are usually fixed and regular amounts over a stated period. This arrangement constitutes both savings and borrowing at the same time, depending on where a member places in the collection order. Regardless of the order of collection, ROSCAs have been praised for the economies of scale[220] and capability that it affords members[221] who otherwise have no access to formal financial markets. ROSCA has also been shown to provide more than just money but a sense of belonging and meaning,[222] a model of democracy and self-governance, and a platform for sharing profitable ideas amongst members.[223] They are usually very flexible, often willing to bend the rules in favour of member solidarity in a way that formal institutions could

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[219] PK Kimuyu, 'Rotating Saving and Credit Associations in Rural East Africa' (1999) 27 (7) World Development 1299–1308; S Guha and G Gupta, 'Microcredit for Income Generation: The Role of RoSCA' (2005) 40 (14) Economic & Political Weekly 1470–73; A Manji, 'Eliminating Poverty? "Financial Inclusion", Access to Land, and Gender Equality in International Development' (2010) 73 The Modern Law Review 985–1025.

[220]P Collier, 'Social Capital and Poverty: A Micro-Economic Perspective' in C Grootaert and T van Bastelaer (eds), *The Role of Social Capital in Development: An Empirical Assessment* (Cambridge, Cambridge University Press 2002) 19–41.

[221] A Sen, *Development as Freedom* (Oxford, Oxford University Press 1999).

[222] I Gough, JA Mcgregor, and L Camfield, 'Theorising wellbeing in international development' in I Gough and A Mcgregor (eds), *Well-being in Developing Countries: From Theory to Research* (Cambridge, Cambridge University Press 2007) 3–43; SC White, 'Analysing Wellbeing: A Framework for Development Practice' (2010) 20 (2) Development in Practice 158-172.

[223] C Grootaert and T van Bastelaer, 'Introduction and Overview' in C Grootaert and T van Bastelaer (eds), *The Role of Social Capital in Development: An Empirical Assessment* (Cambridge, Cambridge University Press 2002) 1–15.

not support. This is, however, a double-edged sword in that it is also capable of ruining relationships as well when discord arises between members.

ROSCAs exist across Nigeria and are open to participants mostly in rural areas[224] but also individuals active in the formal sector,[225] and are known by different ethnic names such as *Esu* or *Ajo* in south-west Nigeria, *Esusu* in eastern Nigeria, and *Adashi* or *Oja* in parts of northern Nigeria. Sometimes contributors are brought together by a professional organiser or convenor who earns a commission, for example, thrift collectors. In some cases, however, it is a collegial arrangement of members with communal or trade ties. Enforcement of obligations depends on a 'shared commitment to contribution and social repercussions' by members such as ridicule, embarrassment, and in extreme cases, ostracism.[226] According to Sofola, 'the success of these clubs is based on the fact that recourse to the courts or enforcement machinery is not contemplated'.[227] However, problems potentially could arise from lack of accurate record-keeping, theft of pooled funds, and moral hazard where members discontinue contributions after receiving payments.

2.8.3 Vendor Credit

Vendor credit is a crucial source of consumer credit for most individuals in the informal economy. Vendors in this context are typically provision store owners, dealers of textile materials, and small business owners generally who enjoy the patronage of individual consumers on the strength of credit sales. In the case of vendor credit between a wholesale dealer and retailers or petty traders, the seller permits the purchaser to take goods away and to remit the purchase price in most cases after the

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[224]Collins, Rutherford, and Ruthven (n 217).

[225] S Jain, 'Symbiosis Vs. Crowding-Out' (1999) 59 (2) Journal of Development Economics 419-444; Y Yuan and L Xu, 'Are Poor Able to Access the Informal Credit Market? Evidence from Rural Households in China' (2015) 33 China Economic Review 232-246; A Kochar, 'An Empirical Investigation of Rationing Constraints in Rural Credit Markets in India' (1997) 53 (2) Journal of Development Economics 339-371; C Bell, T Srinivasan, and C Udry, 'Rationing, Spillover, and Interlinking in Credit Markets: The Case of Rural Punjab' (1997) 49 (4) Oxford Economic Papers 557-585.

[226] Sofola (n 4).

[227]ibid.

purchaser has resold the goods. Whereas, with non-trading consumers, the vendor releases the goods to the consumer who pays for them later. Vendor credit contracts are usually oral, the existence of which is proven by witnesses.[228]

2.9 JURISDICTION OVER INFORMAL CREDIT CONTRACTS

One of the leading criticisms of informal systems is the lack of clear rules, oversight, and enforcement mechanisms. From the preceding, however, informal institutions are not homogenous. While some informal channels such as black markets consist of deliberate infringers of the formal regulatory framework or shrewd operators exploiting gaps in those frameworks, some informal operators have evolved from customs and traditions of specific localities. Parties to black market transactions are notorious for their recourse to self-help in dispute resolution. Disputes arising from customary transactions are usually enforced by traditional institutions such as local chiefs and monarchs, religious leaders, and in some cases by inferior courts like Customary Courts and Magistrate's Courts in the south; or Area Courts and District Courts in the north of Nigeria respectively.[229] Judges on these courts weave a knowledge of English and customary laws of the place of dispute in order to arrive at the justice of each case. Where the dispute borders on criminality, however, customary law becomes inapplicable.

Customary debt recovery procedures typically begin with complaints made first to the debtor himself, to his family, to village elders, chiefs and traditional rulers in that order. Once the claim is verified, the traditional ruler intervenes through customary bailiffs, sometimes by condoning measures that expressly contravene modern concepts of human rights.[230] Some cultures had very little tolerance for debt defaulters, thus giving latitude to creditors, with the permission of monarchs, to adopt extreme means in order to recover an accrued debt. In western Nigeria, the principal tool was nuisance. A creditor could pester the debtor by following him about,

[228]ibid.

[229] See Chapter VII CFRN (as amended) 1999.

[230] Sofola (n 4); Falola (n 95) 403-423.

disrupting his business, using abusive language and generally making the debtor's life difficult. Such methods also applied to the loan guarantor, who was the primary collateral for loans under most traditional arrangements.[231]

In many of these societies, going to the police or the courts was considered more trouble than it is worth, and violence to the person or property of the debtor was a last resort. Some of the penalties for loan defaulters were enforced against family members, such as the denial of proper funeral rites to a deceased borrower until their kin offset their debt. The rising popularity of Christianity and Islam has, however, mitigated some of these obnoxious practices. On a more positive note, some customary rules are more lenient towards the borrower compared to English law. For example, the customary equivalent of the English mortgage system is a pledge. Under many customs, a pledge could be constructive without giving actual possession like when a farmer pledges future harvests to their creditor if they default on a consumer loan. While a mortgage allows for forfeiture, a pledge is always a pledge, and a debtor could recover their pledged asset whenever they can raise and repay their debt.[232]

2.10 SUMMARY

The Nigerian legal system is built on English law, statutory law and customary law. As such, financial regulation is conducted by a plurality of laws, norms and convention depending on whether parties to transaction are engaging in formal, semi-formal or informal lending and borrowing. While the formal sector accounts for the largest loan payouts in monetary value, the semi-formal and informal sectors provide the most loans in terms of volume. The informal sector for analytical clarity is further broken down into two sub-sectors namely customary lenders and 'black' market lenders, with the latter presenting the bigger risk for consumer welfare. Finally, the chapter noted that while fintech is gaining traction as a viable source of consumer finance, there are still challenges about scale, imprecise regulatory framework, and

[231] Sofola, (n 4) 72.

[232] *Adjei v Dabanka* (1930) WACA 63 at 66-67.

tendencies for digital credit to mirror the current trends of exclusion in the traditional credit market.

CHAPTER THREE

RATIONALE FOR CONSUMER CREDIT REGULATION

3.1 THE UTILITY OF CONSUMER CREDIT

Traditional justifications for the regulation of consumer credit derive mostly from the field of economics. However, the economic literature is not unanimous on the welfare implications of consumer borrowing. This chapter considers two schools of thought on the welfare impact of consumer credit and the rationale for its regulation. The first school of thought theorises that credit is welfare-enhancing and enables individuals to balance consumption over a lifetime (life-cycle theory). The second school of thought rejects the idea of consumer credit entirely as a welfare tool, or at least for specific categories of consumers and markets. These theoretical disagreements inevitably present in relation to prevailing understandings of the role of regulation within consumer credit markets. Neo-classical economic theory historically assumed individual rationality and agency as the *grundnorm* of markets. Over time, influences from other disciplines, particularly philosophy, sociology and psychology have led to a better understanding of consumer behaviour. Neoliberal economics, thus, admits of some role for regulation in credit markets. As noted earlier in chapter one,[233] regulation is integral to the functioning of markets. This chapter will explore why this claim applies to consumer credit markets.

This chapter consists of three parts. The first part considers the two schools of thought on the welfare impact of consumer credit on individuals and households. The view is commonly held that 'debt is bad' while assuming that 'credit is good', missing the fundamental connection between the two.[234] It examines the arguments for and against providing access to consumer credit and using regulation to facilitate either outcome. The second part discusses some of the neoliberal regulatory approaches to

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[233] M Fisher, *Capitalist Realism: Is There No Alternative?* (Winchester, Zero Books 2009). See general discussion of neoliberalism in para 1.2.1.

[234] ibid.

financial access and consumer protection as a prelude to the theoretical framework for this thesis. This section will highlight the dynamics of consumer risk in different markets and note how the rationale for regulatory intervention diverge in critical aspects in developed and developing markets. Part three highlights the growth of the influence of human rights principles in articulating the role of regulation in consumer protection. This section lays the foundation for the broad argument of this thesis that the social wellbeing of consumer borrowers is as salient a consideration for regulation as is market efficiency and underscores why market (economic) efficiency cannot and should not be divorced from social protection.

3.2 THE SCHOOLS OF THOUGHT

3.2.1 Credit as Lubricant:[235] The Permanent Income Hypothesis Theory (PIH)

Individuals have insatiable wants that their immediate means cannot always afford. While it is not reasonable to pursue all wants using credit, there are several justifications for providing opportunities for individuals to access credit. Although the modern system of consumer credit evolved between 1915 and 1935 in the United States as well as the UK, credit for consumption is the oldest of all forms of credit, with a history reaching back to antiquity.[236]

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[235] I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Oxford, Hart 2012) 362-63.

[236] L Calder, 'The Evolution of Consumer Credit in the United States' in TA Durkin and others (eds), *The Impact of Public Policy on Consumer Credit* (Kluwer Academic Publishers 2002) 23; D Graeber, *Debt: The First 5,000 Years* (New York, Melville House 2013). Credit offers opportunities for households to accumulate wealth and expand job opportunities. Credit cards, for example, render payments for the purchase of goods and services convenient by reducing the amount of cash at hand with the attendant exposure to the risk of theft or loss, and the risk of botched transactions as a result of insufficient cash. See O Bar-Gill and E Warren, 'Making Credit Safer' (2008) 157 (1) University of Pennsylvania Law Review 1-101; Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971) 13. People borrow to smooth temporarily unstable income, and particularly in times of broader economic downturn, credit is beneficial even when it is expensive. See V Guerrieri and G Lorenzoni, 'Credit Crises, Precautionary Savings, and The Liquidity Trap' (2017) 132 (3) The Quarterly Journal of Economics 1427–67; S Mullainathan and others, 'What's Psychology Worth? Evidence from

A favourable view of credit is supported by the life-cycle theory ('Permanent Income Hypothesis', PIH), suggesting that credit holds the potential to enhance economic welfare by allowing smoother consumption paths over time for individuals and households.[237] The PIH model rests on the underlying assumptions that individuals are minded to distribute their resources in equal proportion over a lifetime.[238] Lending

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a Consumer Credit Marketing Field' (2010) 125 (1) Quarterly Journal of Economics 1-45; DP Morgan, MR Strain, and I Seblani, 'How Payday Credit Access Affects Overdrafts and Other Outcomes' (2012) 44 (2-3) Journal of Money, Credit and Banking 519–531; R Mazer, K McKee, and A Fiorillo, *Applying Behavioural Insights in Consumer Protection Policy* (CGAP 2014); A Morse, 'Payday Lenders: Heroes or Villains?' (2011) 102(1) Journal of Financial Economics 28–44. The extent of these welfare benefits remains unclear. See J Lerner and P Tufano, 'The Consequences of Financial Innovation: A Counterfactual Research Agenda' in J Lerner and S Stern (eds), *The Rate and Direction of Inventive Activity Revisited* (University of Chicago Press 2012). Findings suggest that even with a behavioural misperception of risks among consumers, access to formal credit impact the poor positively, albeit modestly. A broad discussion of behavioural economics will follow below at para 3.4.4. See also A Banerjee, D Karlan, and J Zinman, 'Six Randomized Evaluations of Microcredit: Introduction and Further Steps' (2015) 7(1) American Economic Journal: Applied Economics 1–21.

[237] CJ Bouveng, 'Consumer Credit: Some Long-Term Economic Aspects' (1966) 68 (4) The Swedish Journal of Economics 234-260. See also BS Bernanke and M Gertler, 'Inside the Black Box: The Credit Channel of Monetary Policy Transmission' (1995) 9(4) Journal of Economic Perspectives 27-48. Families in distress can count on credit as a critical safety net when they face economic shocks such as a job loss, failed marriages, or ill health, with the promise to pay back in the future when things get better. Public policy across different countries seems to accept this welfare-enhancing quality of consumer credit gradually. The EU's commitment to a market-driven approach to financial inclusion rests on the vision of cheap credit as a means of achieving financial and social inclusion. See G Comparato, 'The Design of Consumer and Mortgage Credit Law in the European System' in IN Domurath and HWH Geraint (eds), '*Consumer Debt and Social Exclusion in Europe* (Taylor and Francis 2016). The vision of credit as a social safety net was also pursued in post-apartheid South Africa, while the Community Reinvestment Act 1977 in the United States also reflects this approach in some ways. See D James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (California, Stanford University Press 2015) 4, 27. This is not to endorse credit as a replacement for the entirety of state welfare as that debate is considered elsewhere in this chapter.

[238] The PIH model rests on five set of basic assumptions: a. The utility function is homogeneous with respect to consumption at different points in time; or, equivalently, if the individual receives an additional dollar's worth of resources, he will allocate it to consumption at different times in the same

and borrowing thus make it possible to redistribute spending from periods in the life cycle in which income is high to periods in which it is low,[239] and where appropriately priced, can be a boon to consumers' quality of life.

The PIH forms the foundation for efforts to promote financial inclusion and greater access to credit.[240] Such efforts have aimed to curb inequality and sustain the progressive effects of social distributions through social support systems.[241] The Financial Ombudsman Service notes, for example, that the credit card market can deliver significant benefits to customers, such as bringing consumption forward and spreading the costs over several months, if the market functions well.[242] As Deborah James points out, access to credit played a crucial role in the creation of a new middle class in post-apartheid South Africa by expanding to accommodate black South Africans. Access to credit helped to unleash a creative new generation of consumers,

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proportion in which he had allocated his total resources prior to the addition; b. The individual neither expects to receive nor desires to leave any inheritance; c. The consumer at any age plans to consume his total resources evenly over the remainder of his life span; d. The fourth assumption has three legs: (i) Every age group within the earning span has the same average income in any given year t; (ii) In a given year t, the average income expected by any age group T for any later period r, within their earning span, is the same; (iii) Every household has the same (expected and actual) total life and earning spans, assumed to be 50 and 40 respectively for the purpose of numerical computation. The rate of return on assets is constant and is expected to remain constant. See A Ando and F Modigliani, 'The "Life Cycle" Hypothesis of Saving: Aggregate Implications and Tests' (1963) 53 (1) The American Economic Review 55-84. See also A Deaton, *Understanding Consumption* (Oxford, Oxford University Press 1992); OP Attanasio, 'Consumption' in JB Taylor and M Woodford (eds), *Handbook of Macroeconomics*, (Amsterdam, Vol. 1, Elsevier Science BV 1999) 741-812.

[239] Ando and Modigliani (n 238) 55.

[240]ibid. See also the US Consumer Credit Protection Act, PL 90–321; JP Watkins, 'Corporate Power and the Evolution of Consumer Credit' (2000) 34 (4) Journal of Economic Issues 909-32; Calder (n 219) 23.

[241] I Ramsay, 'The Regulation of Consumer Credit' in G Howells, I Ramsay, T Wilhelmsson, and D Kraft (eds), *Handbook of Research on International Consumer Law* (Cheltenham, Edward Elgar Publishing Limited 2010) 383.

[242] Financial Ombudsman Service, *Payday Lending: Pieces of the Picture* (Insight Report, Financial Ombudsman Service Limited 2014).

able to explore their 'social potentials'.[243] To the extent that people borrowed to spend on necessaries, debt was legitimate regardless of monetary cost. The value of credit was measured not by money but utility.[244] Middle-class borrowing in South Africa, for instance often reflected genuine expenditure, mostly for educational, matrimonial causes, or funeral rites for loved ones.[245] However, for poor people without incomes or a stable source of income who borrow to buy consumables at high-interest rates rather than solid assets at affordable rates, the loans increased their vulnerability.[246]

3.2.2 The PIH and Consumer Borrowing in Nigeria

The PIH accepts that individuals can beneficially organise their economic lives through careful maximisation of borrowing opportunities in the present on the promise of future incomes. This theory is popular within the neoliberal economics tradition.[247] For the typical individual, consumption needs outweigh income at the early career stage but decline in proportion to income in later life. Thus, credit enables the consumer to maintain a smooth consumption pattern throughout a lifetime. Some of the core assumptions of PIH have a broad application across jurisdictions. The average consumer, regardless of the market within which they operate, has unlimited wants and limited means. Consumers in developing countries, like their counterparts in developed markets, are also likely to earn less in early life than in later life. However, the life cycle theory's relevance for theorising about the utility of consumer credit to borrowers in Nigeria, and consequently for regulating credit, is minimal. As a basis for policymaking, the PIH theory makes several assumptions worth examining closely for how they might affect regulation in a developing country:

[243]James, Money from Nothing (n 237) 1.

[244] ibid. The author goes on to highlight the dangers of debt stress in South Africa later in the book.

[245]James, Money from Nothing, (n 237) 45.

[246]C Ardington and others, 'Savings, Insurance and Debt over the Post-Apartheid Period: A Review of Recent Research' (2004) 72 (3) South African Journal of Economics 604– 40.

[247] See, for instance, Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971) 13.

(i) Future Incomes Will Continue to Grow

First, it assumes the steady growth of future incomes.[248] This assumption is more representative of a post-industrial economy than the current economic development of the Nigerian market can support. In developing countries, it is more difficult to plot income growth across an individual's lifespan because high youth unemployment negatively impacts the acquisition of the requisite skills and experience for wage increase in middle-age. On the other hand, life expectancy is low, and this potentially impacts loan repayment. The life-cycle theory also misses 'taste-shifting' elements of consumer behaviour. The size of a household and the demography of its members can be a crucial influence on the borrowing behaviour of individuals. While middle-class families are having fewer children, the average Nigerian family particularly in the northern part of the country has more than four children and continue to have children throughout their lifetimes due to polygamy and religious opposition to contraception.[249]

Strong but not conclusive evidence that this assumption does not hold firm for the average consumer borrower in Nigeria is the bias of formal lenders for business lending over consumer lending. This bias towards entrepreneurial lending is because it is the only scenario where the presumption of future profits is consistent, in concrete terms, with the assumption of future growth in income that undergirds the high cost of microcredit and commercial bank loans in Nigeria.[250] Consumers in Nigeria have few guarantees of future growth in income or any income at all; hence, borrowing against an uncertain future inherently presents a much higher risk that policy must

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[248] DM Suresh, D McKenzie and C Woodruff, 'Returns to Capital in Microenterprises: Evidence from a Field Experiment' (2007) World Bank Policy Research Working Paper 4230, <https://openknowledge.worldbank.org/handle/10986/7124> accessed 28 August 2019; DJ McKenzie and C Woodruff, 'Experimental Evidence on Returns to Capital and Access to Finance in Mexico' (2008) 22 (3) World Bank Economic Review 457 – 482.

[249] See G Bertola, R Disney, and C Grant, *The Economics of Consumer Credit* (Cambridge, The MIT Press 2006) 8.

[250] The full finding from the qualitative study is presented in chapter five. See also para 2.3, Ch 2.

consider.[251] In the absence of interest rate controls in Nigeria, consumer borrowing from commercial banks and MFIs is inevitably precarious for low-income groups.

(ii) Demand for Credit is a *Choice*

The PIH assumes that the individual *chooses* to borrow against future incomes. It views credit through the parameters of private wealth, the management of the self, and rationale choice. Consumer borrowing in Nigeria is less about wealth management and choice, but more about survival and the lack of choice and it is not a subtle distinction. Because consumer borrowers in Nigeria claim to borrow as a last resort, it challenges the theoretical premise of rational choice for policy purposes. The average borrower in Nigeria is constrained to borrow regardless of the terms for basic subsistence, ie to *survive*. Under such circumstances, taking up expensive loans is a *rational* decision, but hardly a *choice*. From a consumer protection perspective, regulators must choose whether to allow the markets to exclusively determine the price of loans or what product is *affordable* and welfare-enhancing and what is not.

(iii) There is an Endless Pool of Lenders to Borrow From

The question of choice also presents in a different, but not unrelated context. The PIH assumes that individual borrowers have access to credit and only have to *choose* whether to borrow or not. This assumption is only true to the extent that across all markets, most borrowers have access to some form of credit at a given price. In theory, consumer borrowers in Nigeria have access to credit, but many have no *choice* of formal credit, while most must borrow from informal sources. Since credit serves a more crucial role (as a safety net) in Nigeria than only a wealth management tool, it raises the stakes for regulators regarding whether the state should intervene in the supply of credit or to leave that to the market.

On balance, consumer credit confers a benefit on the user where 'the amount of satisfaction derived from the current use of the loan proceeds is greater than the loss

[251] The findings from the interviews revealed structural economic issues, including high unemployment, high informality, low and unstable wages, and weak infrastructure.

of satisfaction involved in using future income to repay the loan'.[252] This is the crux of the matter. In a high inflation climate for example (typical in developing markets), the consumer can buy the goods now at a lower cost than in the future and repay the loan in money instalments of diminishing real value from future money income higher than current earnings.[253] However, the cost of exclusion from formal credit in Nigeria is best measured by the cost of a subscription to unregulated credit products in black markets. From the consumers' perspective, it makes economic sense to borrow from black market lenders (including loan sharks) in the absence of alternative incomes,[254] but it is not unreasonable from a policy perspective to question the sensibility of permitting such welfare costs.

3.3 CONSUMER CREDIT AS A PERILOUS PRODUCT

There are three critiques of consumer credit as a perilous product: (a) Consumer credit primarily hurts more than it helps low-income consumers; (b) Consumer credit is a smokescreen for rolling back the welfare state; and (c) Consumer credit distorts resource allocation within the economy.

3.3.1 Consumer Credit Hurts More Than It Helps Low-Income Consumers

Indebtedness is often described as the modern equivalent of slavery or peonage.[255] Safe credit, in contrast, could mean 'free from risk, a cost-benefit assessment of risk or a socially acceptable risk… [This] requires both technical expertise and political judgments'[256] to strike a balance. Credit is a product, and like all products, it can pose several risks when people employ its use. People fall into debt for good and bad

[252] Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971).

[253] ibid.

[254] As pointed out in para 2.8, although customary lenders provide relatively safer products than black market lenders, they generally have limited available funds to lend.

[255]James (n 237) 2.

[256] A Duggan and I Ramsay, 'Front-End Strategies for Improving Consumer Access to Justice' in M Trebilcock, A Duggan, and L Sossin (eds), *Middle Income Access To Justice* (University of Toronto Press 2012) 121.

reasons.[257] Borrowing to fund one's education can be as stressful as imprudent borrowing to lead unsustainable lifestyles, eg to keep up with the Joneses.[258] Consumer credit products like credit cards and payday loans can create financial distress for borrowers, economic losses for innocent third parties, and a state of economic instability for a country's economy.[259]

Lenders deploy several strategies to lure consumers into borrowing. These include negative-option marketing, long-maturity,[260] lower down payments,[261] unsolicited credit, automatic increases in credit limits, and automatic and incremental re-advances or refinancing.[262] Consumer credit can reduce consumer welfare in various ways. In a study of credit card debt among four hundred and forty-eight students on five college campuses, students reporting higher debt reported higher stress and

[257]It is a controversial endeavour to begin to weigh use-specific values of credit because of relative individual needs, but we are not going to delve into that debate at this point.

[258]James (n 237) 45-6, 50.

[259] ibid.

[260] OP Attanasio, PK Goldberg, and E Kyriazidou, 'Credit Constraints in the Market for Consumer Durables: Evidence from Micro Data on Car Loans' (2008) 49 (2) International Economic Review 401–436.

[261] W Adams, L Einav, and J Levin, 'Liquidity Constraints and Imperfect Information in Subprime Lending' (2009) 99 (1) American Economic Review 49–84.

[262] G Davel, *Regulatory Options to Curb Debt Stress* (CGAP 2013).

decreased financial well-being.[263] Expensive credit, for instance, translates to more financial distress,[264] bankruptcy,[265] and a decrease in job performance.[266]

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[263] J Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (2014) 43 (2) The Journal of Legal Studies S209-S237.

[264] B Melzer, 'The Real Costs of Credit Access: Evidence from the Payday Lending Market' (2011) 126 (1) The Quarterly Journal of Economics 517–555; D Campbell, P Tufano, and A Martinez-Jerez, 'Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures' (2012) 36 (4) Journal of Banking & Finance 1224–1235.

[265]PM Skiba and J Tobacman, 'Payday Loans, Uncertainty and Discounting: Explaining Patterns of Borrowing, Repayment, and Default' (2008) Vanderbilt Law and Economics Research Paper No. 08-33; DP Morgan, MR Strain, and I Seblani, 'How Payday Credit Access Affects Overdrafts and Other Outcomes' (2012) 44 (2-3) Journal of Money, Credit and Banking 519–531.

[266]Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (n 263) S209-S237. Studies seeking to understand why consumer credit users are prone to exploitation found that it is mainly because most users are desperate and insensitive to the rate of interest as is commonly the case with payday loans, while others borrow too much because they underestimate the cost of credit. See A DeFusco and A Paciorek, 'The Interest Rate Elasticity of Mortgage Demand: Evidence from Bunching at the Conforming Loan Limit' (2014) Finance and Economics Discussion Series Divisions of Research & Statistics and Monetary Affairs Federal Reserve Board, Washington, DC; Bar-Gill and Warren (n 236) 1-101. Many borrowers pay a high price for a loan that is of limited net benefit or makes their already difficult financial situation worse.[266] Creditors, on the other hand, have found various means to entrap their customers into spiralling debt cycles or rollover loans. See V Stango and J Zinman, 'Limited and Varying Consumer Attention: Evidence from Shocks to the Salience of Bank Overdraft Fees' (2014) 27 (4) Review of Financial Studies 990-1030; S Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population.* (London, Routledge 2014) 69-71. In its report on payday lending in the UK, the Financial Ombudsman Service found that most consumers bringing complaints about payday lending frequently have multiple payday loans at any one time, or have taken out several sequential payday loans with the credit record of 24 per cent of complainants damaged. See Financial Ombudsman Service, *Payday Lending* (n 235). Sometimes the same creditor is issuing judgment summonses against a debtor, while through its agents, it is persuading that debtor to accept extra credit. See Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971). Similarly, the Financial Conduct Authority in its study of the UK credit card market found that during the period covered by its dataset, there were around 4 million accounts in persistent debt at any given time. See Financial Conduct Authority, *Credit Card Market Study: Consultation On Persistent Debt And Earlier Intervention Remedies* (2017) Consultation paper CP17/10,

Consumer credit also can be addictive, such that sometimes, when availed access to more cash, borrowers spend more on uneconomical activities such as weddings and funerals.[267] In Nigeria, much of the exploitation occurs in the 'black markets' not because formal lenders are particularly ethical in their lending practices, but because the most vulnerable borrowers do not have access to formal products.

The theory that consumer credit primarily does more harm to poor consumers than good is understandable in the light of the negative social impact it has had and continues to have on consumers especially after the Global Recession a decade ago. However, the theory in its basic form is unhelpful in thinking about the utility of consumer credit in Nigeria, and thus its regulation. The positive value of consumer loans in Nigeria, mainly the social insurance function performed by customary credit are too significant to be discarded in absolute terms.[268]

3.3.2 Consumer Credit as a Smokescreen for Rolling Back the Welfare State

According to this theory, governments across the western world craft austerity policies on the notion that access to consumer credit will mitigate the negative impact on consumers.[269] Thus, this school opposes consumer credit for two reasons. First borrowing is an inferior means of financing consumption compared to a stable government-guaranteed income that is not a debt. Underlying this critique of credit are premises worth unpicking.

<https://www.fca.org.uk/publications/consultation-papers/persistent-debt-earlier-intervention-cp17-10> accessed 29 August 2019.

[267] R Mazer, K McKee, and A Fiorillo, *Applying Behavioural Insights in Consumer Protection Policy* (CGAP 2014).

[268] This point is fully addressed in part three.

[269] S Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population* (London, Routledge 2014) 71; M Lazzarato, *Governing by Debt* (Boston, semiotext (e)/ Intervention series 17, MIT Press 2015) 66.

One of the key economic trends since the Global Recession in Western economies as well as developing countries is rising inequality.[270] Rising inequality has been identified as a plausible explanation for why households get overleveraged. There is a genuine belief amongst some that a hardworking individual with a decent job should not need to borrow to finance basic consumer needs.[271] Most recently, in the UK and several other advanced capitalist societies, there is a recognition that the 'working poor' is becoming a statistically significant demography and fuel for populist politics.[272] A low wage regime forces the working poor to borrow in order 'to subsidize (sic) basic subsistence needs in the absence of social welfare …thereby forging a new normal—the privatization (sic) and commodification of social subsistence'.[273]A major concern shared by scholars and consumer rights advocates is that consumer credit products and loan terms are unfixable without addressing consumer weaknesses like education, bargaining power, and robust recourse options.[274]

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[270] M Kumhof, R Rancière, and P Winant, 'Inequality, Leverage, and Crises' (2015) 105 (3) American Economic Review 1217-45; T Piketty, *Capital in the Twenty-First Century* (Cambridge Massachusetts, The Belknap Press of Harvard University Press 2014).

[271] J Lanchester, 'The Case for Universal Basic Income' (2019) 41 (14) London Review of Books 5-8.

[272] P Johnson, 'The Rise of In-Work Poverty is a Complex Issue with no Easy Answer' (*Institute for Fiscal Studies*, 24 June 2019) <https://www.ifs.org.uk/publications/14210> accessed 29 August 2019. See also R Joyce and X Xu, 'Inequalities in the 21st Century: Introducing the IFS Deaton Review' (Institute for Fiscal Studies, 14 May 2019) <https://www.ifs.org.uk/inequality/chapter/briefing-note/> accessed 29 August 2019; P Johnson, 'Child Poverty, Where Parents are Doing What the Social Security System Expects of Them' (Joseph Rowntree Foundation, 10th Sep 2018). <https://www.jrf.org.uk/report/child-poverty-where-parents-are-doing-what-social-security-system-expects-them> accessed 29 August 2019.

[273] ibid.

[274] Bar-Gill and Warren, *Making Credit Safer* (n 236) 1-101. A recent study of the payday lending market in Ohio, United States, blames unemployment, absence of living wages and state welfare together with loopholes in regulation for more people turning to payday loans. See J Hembruff and S Soederberg, 'Debtfarism and the Violence of Financial Inclusion: The Case of the Payday Lending Industry' (2019) 48 (1) Forum for Social Economics 49-68. See also J Parker, 'Payday Lending in Ohio' (2013) 130 (1) Members Only Brief 1–16

Secondly, critics of the capitalist economic model argue that western governments have also used low-interest rate guarantees as a ploy to weaken consumer action against government austerity. The objection of this group, therefore, is ideological, not towards high-cost credit as much as it is to consumer borrowing. Aggressive promotion of access to credit is integral to the financial inclusion strategy of Western capitalist governments to meet public demands for higher living standards. The engineered transition from state welfare begins with governments dismantling barriers to market access by all citizens and ends with individual citizens taking full personal financial responsibility by various lawful means, including consumer borrowing. Governments increasingly embrace borrowing to shore up their revenue shortfalls and encourage citizens to do the same. By floating policies that make access to credit easier, they not only shed the associated financial burden of state welfare but ensure that social tensions are kept at bay. In South Africa, easy access to credit was seen as a negotiated settlement to 'postpone' a possible citizen revolt against the political and economic system.[275] This process systematically replaces one set of human rights with a new kind of right. The things that were hitherto considered 'human rights'– access to decent education, universal healthcare, and affordable housing – are now understood as privileges that individuals must pay for to enjoy, on credit if necessary.[276]

It is tempting to also place some of the blame for credit democratisation and excessive consumer leverage in the West on changes in social attitudes and culture. According

<https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/130paydaylending.pdf> accessed 29 August 2019. Critics of the credit-driven model of financial inclusion have advocated increased state welfare or at least a halt in cuts. Others have proposed the Universal Basic Income (UBI) as the way forward. UBI is a welfare model that proposes governments pay all its citizens not based on work done but based on citizenship. UBI is as exciting as it is controversial. Surface analysis of UBI will flag issues of feasibility and likely disincentive to work. See para 6.9.1 for a discussion of these critiques.

[275] James (n 237) 4, 27.

[276] C Bickerton, 'Capitalism after the Crisis' (2015) 20 (5) New Political Economy 783-791.

to Hall,[277] 'the process whereby one policy paradigm comes to replace another is likely to be more sociological than scientific'. According to this narrative, intra-class comparisons and inter-class aspirations produced upward movements in consumer tastes, often rising above real incomes but achievable with access to credit.[278] While the intra-class comparison is now captured in the expression 'keeping up with the Joneses', inter-class competition is more or less like 'Keeping Up with the Kardashians', a result of the celebrity culture facilitated by cable news, celebrity magazines and reality TV shows, and societal aspirations to live like celebrities.[279] However, despite these sociological trends, extensive studies by polling agencies in the US and UK attribute excessive consumer leverage to stagnant wage growth, rising cost of living, and government austerity rather than the pursuit of luxury.[280]

The credit democratisation narrative is, however, most relevant to advanced economies with hitherto comprehensive and generous welfare states and has a minimal application to Nigeria. While the austere conditions speak to the situation of Nigeria described in chapter one, brought about by SAP in the 1980s and its subsisting legacies, the debate on the declining welfare state and the appropriateness of consumer credit are inapplicable to Nigeria to the extent that in these advanced countries, it is government policy to keep consumer credit *affordable, whereas in Nigeria the outcome of regulation is purposeful exclusion of broad consumer groups from formal*

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[277]PA Hall, 'Policy Paradigms, Social Learning, and the State: The Ease of Economic Policy-Making in Britain' (1993) 25 (3) Comparative Politics 280.

[278] ibid.

[279] J Schor, 'In Defense of Consumer Critique: Revisiting the Consumption Debates of the Twentieth Century' (2007) 611 The Annals of the American Academy of Political and Social Science 16-30.

[280] The Pew Charitable Trusts, 'The Precarious State of Family Balance Sheets' (*PEW,* January 2015) <https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2015/01/29/pew-state-of-us-family-balance-sheets-is-precarious>accessed 9 September 2019; A Lusardi, D Schneider, and P Tufano, *Financially Fragile Households: Evidence and Implications* (The Brookings Institution 2011). See also the University of Warwick School of Law's comprehensive list of reports on the impact of public spending cuts in the UK across several metrics <https://warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/resources/reports-uk/>accessed 9 September 2019.

markets and indifference to consumer plight in informal markets. In much of Europe and the United States, the average consumer (excluding subprime borrowers) has access to affordable credit, but in Nigeria, credit is unaffordable for the middle and lower-income classes. Another significant divergence is that Nigeria has no robust welfare system and as such, cannot afford to ignore the welfare gains of cheap credit at least as a first step towards evolving into a welfare state.

3.3.3 Consumer Credit Distorts Resource Allocation Within the Economy

This critique is unique in that it predominantly derives from neoclassical economists who argue for producer credit and by extension against consumer credit. At the macro level, consumer credit is blamed for rising inflation, promotion of consumption at the expense of production, and as an instigator of bubbles and busts, most recently evidenced by the Global Recession.[281] Neoclassical economists hold the view that the provision of credit while essential for the growth of industry and enterprise within an economy can have devastating effects such as inflation.[282] In Nigeria, the Central Bank has had to impose an interest rate floor of 14 per cent ostensibly to keep inflation at bay. Beyond inflation, some economists see consumer credit as a source of instability and have advocated high-interest rates as a check on consumer demand. Hayek, for example, viewed credit through the lens of the business cycle. Access to cheap credit grows consumers' collective appetite for borrowing, plunging families and businesses into excessive leverage for mostly uneconomic reasons. According to Hayek, the outcome of this is a dislocation of market order: resources are in the wrong place, and are of the wrong kind, and unable to serve the changed realities of customers' demand.[283] Criticisms of consumer credit extended to even the more legitimate and efficient application of it. Some critics point out that although consumer credit could be a catalyst for the consumption of durable goods, it also has the potential to divert

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[281] Ramsay, 'The Regulation of Consumer Credit' (n 241) 383. See also Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971).

[282] G Cassel, 'Keynes' "General Theory"' (1937) 36 International Labour Review 437.

[283] E Butler, *Friedrich Hayek: The Ideas and Influence of the Libertarian Economist* (Hampshire, Harriman House Ltd 2012) 65-73.

the expenditure of consumers away from stable industries for non- durable goods (such as food) and services, and towards less stable industries for durable goods, thus potentially harmful to the economy.[284]

In recognition of the destabilising character of consumer credit to financial markets and potential harm to individual borrowers, consumer protection has become central to the current international paradigm on consumer credit. Transnational bodies like the G-20, the Financial Stability Board, the Organization for Economic Co-operation and Development, the World Bank and IMF have to different degrees embraced a tighter regulation since 2009.[285] However, for the same reasons that regulatory policy on consumer credit in Nigeria cannot base on the PIH assumptions above,[286] it is unhelpful to leave the determination of access and pricing of consumer credit in Nigeria to the markets.

3.4 RATIONALE FOR REGULATING CONSUMER CREDIT

3.4.1 Market Construction

Consumer credit regulation serves two crucial functions across all markets. Regulation is critical both in constructing credit markets and in correcting market failure.[287]*A priori* markets are constructed by regulation. Neoclassical laissez-faire free-market theory tends to understate the efficiency of regulation and emphasise the ability of markets to self-correct or self-regulate.[288] However, markets emerge based on generative rules that operate to guarantee the freedom to contract and give force

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[284] Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971).

[285] See World Bank, *Good Practices for Financial Consumer Protection* (Washington, World Bank 2012) 66; United Nations Guidance on Consumer Protection (New York, UN 2016) art 67.

[286] See para 3.2.2.

[287] IDC Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 Oxford Journal of Legal Studies 177.

[288] FA von Hayek, *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice* (London, Routledge and Kegan Paul 1976) 133.

to contractual obligations. In other words, there is no 'natural pre-political market'.[289] Markets depend for their existence on law, and regulatory intervention, for example, is necessary to enable the establishment of property rights.[290] Thus, the market has never been free from, but always constructed by regulation.[291]

Markets are not ends in themselves, but powerful means for prosperity and security for all and thus require societal consent which could take the form of regulation as they are prone to instability, excess and abuse.[292] This analysis is also applicable to, and against, informal credit markets. Historically, market regulation relied heavily on informal codes and understandings. The sustainability of informal models has now been undercut by rampant incidents of misconduct, low public trust, and systemic risk.[293]

There are a good number of uses for regulation in constructing consumer credit markets. Regulation defines who should be accountable, sets market standards, and stipulate consequences for misconduct. For instance, it is within the remits of regulation to define product benchmarks; tackle collusion in order to increase choice and competition; simplify market rules to foster transparency and personal accountability, and to curtail negative incentives.[294] Mark Carney succinctly captures the importance of market regulation as follows:

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[289] Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (n 288) 177; I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Oxford, Hart 2012). See also A Rona-Tas and A Guseva, *Plastic Money: Constructing Markets for Credit Cards in Eight Post-Communist Countries* (Stanford, Stanford University Press 2014).

[290] CR Sunstein, *Free Markets and Social Justice* (1st edn, Oxford University Press 1997) 3.

[291]K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2002) 131-132.

[292]M Carney, 'Building Real Markets for the Good of the People' (*Bank of England*, 10 June 2015) <https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/building-real-markets-for-the-good-of-the-people> accessed 29 August 2019.

[293] ibid.

[294] HM Treasury, Bank of England, and Financial Conduct Authority, *Fair and Effective Markets Review Final Report* (June 2015) <https://www.bankofengland.co.uk/-/media/boe/files/report/2015/fair-

> Real markets are professional and open, not informal and clubby. Participants in real markets compete on merit rather than collude online. Real markets are resilient, fair and effective. They maintain their social licence. Real markets [don't] happen; they depend on the quality of market infrastructure… Robust market infrastructure is a public good, one in constant danger of under-provision because the best markets innovate continually.[295]

Acknowledging that 'market infrastructure' is a public good underscores the salience of regulation and the inadequacies of building market institutions entirely on private ordering. Emerging markets lacking institutional frameworks to help unleash consumer credit markets depend on regulation to put such institutions in place. Markets also require a contractual culture that defines norms and assumptions about creditors, debtors and the role of credit. These assumptions are shaped by the nature of the regulatory approach favoured by a state.[296] In developed markets, unhealthy market practices and perverse incentives that may lead to market failure are targeted by regulation to restore both market efficiency and fairness in the market.

3.4.2 Correcting Market Failures

Regulation is instrumental to correcting market failures. Four common types of failures in the consumer credit market justify regulatory intervention:

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and-effective-markets-review-final-report> accessed 29 August 2019. Market competition can, however, have a perverse effect on consumers where a narrow obsession with short term profit making overshadows sellers' interest in building goodwill. Consumers are unable to rely on lenders in such circumstances for credible information, mainly where parties engage in one-off transactions that do not envisage a future relationship.

[295]M Carney, 'Building Real Markets for the Good of the People' (*Bank of England*, 10 June 2015) <https://www.bankofengland.co.uk/-/media/boe/files/speech/2015/building-real-markets-for-the-good-of-the-people> accessed 29 August 2019.

[296] IDC Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (n 288) 177.

(i) **Monopoly and Coordination**

The promotion of competition among lenders and the provision of product information have been central to the neoliberal approach to consumer credit regulation. Competition increases the incentives for firms to reduce costs, cut prices and improve the quality of their products.[297] Effective market competition is thus too important for credit supply and consumer well-being that it is unwise to entrust to 'major law firms and competition law experts'.[298] The absence of competition creates monopoly which exposes consumers to the exploitative tendencies of profit-maximising lenders as consumers are less able to shop around for options, thereby reducing welfare. Where a market is dominated by a few lenders with a high barrier to entry, this could result in credit undersupply, and co-ordination to keep interest rates high.[299]

While low competition is a common problem in developing markets, balancing competition goals with the need to provide incentives to first-movers in the rapidly emerging market for digital credit is also a regulatory challenge.[300] Digital finance channels can provide easy, secure, low-cost access to low-income consumers. The digital race for consumer patronage, however, potentially creates new consumer risks,

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[297]A Murray, 'Consumers and EU Competition Policy' (Centre for European Reform, September 2005) <https://www.cer.eu/sites/default/files/publications/attachments/pdf/2011/policybrief_consumers-839.pdf> accessed 29 August 2019.

[298] D Byrne, 'EU Consumer Policy – Making It Work' (Dutch Presidency Conference on EU Consumer PolicyAmsterdam, 21 October 2004) <https://europa.eu/rapid/press-release_SPEECH-04-468_en.htm> accessed 29 August 2019; United Nations Conference on Trade and Development, 'The Benefit of Competition Policy for Consumers' (Intergovernmental Group of Experts on Competition Law and Policy Fourteenth session, Geneva, 8–10 July 2014) TD/B/C.I/CLP/27 <https://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf> accessed 29 August 2019.

[299] Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (n 263) S209-S237.

[300] R Mazer and P Rowan, *Competition in Mobile Financial Services: Lessons from Kenya &Tanzania* (CGAP 2016).

including money laundering, credit scoring, electronic fraud and information problems.[301]

(ii) **Information Failures**

Healthy market competition requires information. Pricing transparency, for example, makes for a more competitive market.[302] However, firms detest competition and are naturally inclined to withhold certain information from their competitors and consumers. Taking the credit card market as a case study, lenders do not have appropriate incentives to stop consumers from over-borrowing and under-repaying until they default, even though consumers may be experiencing harm before that stage.[303] With an understanding of the 'economics of information'[304] comes the realisation that information is a public good with a free-riding effect such that market participants seek to use without sharing in the cost of production.[305] There is, therefore, a rationale for regulatory intervention in order to subsidise the provision of information.

Although the Nigerian banking sector has had a high turnover of financial institutions, actual competition has been undermined by informal coordination amongst the lenders at the expense of borrowers.[306] Similarly, credit products in the formal sector are highly homogenous such that consumers lack sufficient information to choose appropriate products. Indeed, the very existence of the large informal credit

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[301] CGAP, 'Update on Regulation of Branchless Banking in Kenya' (CGAP, 2010) <https://www.cgap.org/sites/default/files/CGAP-Regulation-of-Branchless-Banking-in-Kenya-Jan-2010.pdf> accessed 29 August 2019.

[302] L Brix and K McKee, Consumer Protection Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance (2010) CGAP, Focus Note No. 60 <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Consumer-Protection-Regulation-in-Low-Access-Environments-Opportunities-to-Promote-Responsible-Finance-Feb-2010.pdf> accessed 29 August 2019.

[303] Financial Conduct Authority, *Credit Card Market Study* (n 267).

[304] Ramsay, *Consumer Law and Policy* (n 285).

[305] ibid.

[306] S Apati (n 48) 27-28.

sector has been attributed to information asymmetry.[307] The information asymmetry problem raises two sets of concerns. On the one hand, there is insufficient information in the market to support economic decision making by sellers and buyers of consumer credit products, and on the other hand, comprehension and processing of information are challenging tasks for consumers in the marketplace.[308]

(iii) **Credit Rationing and Adverse Selection**

Information asymmetry in the Nigerian consumer credit market has significant ramifications for lenders and borrowers. On the lenders' side, it has led to adverse selection,[309] such that because of the high cost of credit, formal sector borrowers are overwhelmingly wealthy individuals insensitive to the rate of interest. Regulation can help address the behaviour of lenders and borrowers especially in correcting adverse selection and moral hazard. Normally, lenders' aim to provide credit at a reasonably competitive rate to minimise adverse selection which 'arises when exploitative and careless buyers and sellers enter into the market and conscientious ones exit'.[310] The model developed by Stiglitz and Weiss for credit markets, predicts that lenders respond to adverse selection by setting the interest rate so low as to be attractive to 'good' borrowers and control the risk of default by 'bad' borrowers by rationing credit to both high and low-risk borrowers.[311] However, in Nigeria, the evidence indicates that in the formal market, wealthy business borrowers account for the highest defaulters precisely because they have exclusive access to formal credit while consumer borrowers regardless of their creditworthiness are excluded by the banks.

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[307] Chapter five investigates the Nigerian credit market in relation to these issues.

[308] Ramsay, *Consumer Law and Policy* (n 285).

[309] Adverse selection occurs when a differing probability of default across borrowers is known by borrowers more accurately than by lenders, which prompts them to become insensitive to the interest rate. See G Bertola, R Disney, and C Grant, *The Economics of Consumer Credit* (Cambridge, The MIT Press 2006).

[310] TJ Klein, C Lambertz and KO Stahl, 'Market Transparency, Adverse Selection, and Moral Hazard' (2016) 124 (6) Journal of Political Economy 1678.

[311] JE Stiglitz and A Weiss, 'Credit Rationing in Markets with Imperfect Information' (1981) 71 (3) The American Economic Review 393-410.

(iv) **Moral Hazard**

The exclusive supply of credit to the rich occurs in part due to moral hazards, again occasioned by information asymmetry. The concept of moral hazard cuts through rational choice theory and law and economics analysis,[312] and its meaning is 'multiple' and 'mutable'.[313] It captures the 'effect of external opportunities on the subjective decision-making of economic actors'.[314] Stiglitz defines moral hazard, precisely as a problem that arises 'when there is imperfect information concerning the actions of [counterparties]…because those actions cannot be directly monitored'.[315]

As wealthier borrowers, in theory, stand to lose more for defaulting on loans, and to get bailed out in the event of default, lenders tend to prefer lending to them over weaker borrowers.[316] Although studies have found no link between intention to default and over-indebtedness,[317] the high default rates among wealthy borrowers (for business rather than consumer loans) have become the arbitrary template for assessing the creditworthiness of low-income consumer borrowers in Nigeria regardless of the actual credit risk of the latter.[318] Such low levels of trust are further deepened by the existence of parallel credit markets (ie formal and informal) which make it tougher to monitor the activities of borrowers in both markets. Multiple

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[312] T Baker, 'On the Genealogy of Moral Hazard' (1996) 75 (2) Texas Law Review 237.

[313] A Leaver, 'Fuzzy knowledge: An Historical Exploration of Moral Hazard and Its Variability' (2015) 44 (1) Economy and Society 93.

[314] ibid 106.

[315] JE Stiglitz, 'Risk, Incentives and Insurance: The Pure Theory of Moral Hazard' (1983) 8 (26) Geneva Papers on Risk and Insurance 5. Moral hazard can manifest in borrower choice of non-viable project, where repayment reflects the willingness (rather than the ability) to honour one's debts, or opting for strategic default perhaps due to the ease of filing for bankruptcy, and the cost of enforcing collateral. See G Bertola, R Disney and C Grant (eds), *The Economics of Consumer Credit* (Boston, MIT Press 2006); Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (n 263) S209-S237.

[316] See chapter four for full analysis of findings.

[317]Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (n 263) S209-S237; R Disney, S Bridges, and J Gathergood, *Drivers of Over-Indebtedness: Report to the Department for Business, Enterprise and Regulatory Reform* (Centre for Policy Evaluation, University of Nottingham 2008).

[318] See para 5.3, Ch 5.

borrowing in this scenario can lead to over-indebtedness[319] especially where harsh contract terms in one market make it impossible or extremely difficult to repay loans from the other market.[320]

3.4.3 Prevention of Systemic Risk and Externalities

Preventing systemic risk and externalities are as central to consumer credit regulation as is consumer welfare.[321] In other words, consumer protection could mean reducing consumer borrowing, thereby minimising systemic risk. Defining 'systemic risk' is somewhat problematic.[322] It is the 'risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy'.[323] A systemic risk threatens the entire financial system, causing a general economic collapse when the system fails, as opposed to risk associated with an individual part of the system.[324] A high level of consumer debt is a source of systemic risk, especially where household indebtedness is at historical highs relative to incomes be it in developed or developing markets. For example, the Bank of England noted in November 2016 that in the UK, consumer credit grew at an annual rate of 10.9 per

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319H Degryse, V Ioannidou, and E Schedvin, 'On the Non-Exclusivity of Loan Contracts: An Empirical Investigation' (Financial Intermediation Research Society Meetings, Minneapolis, June 2012) <https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf> accessed 29 August 2019.

320A Bisin and D Guaitoli, 'Moral Hazard and Nonexclusive Contracts' (2004) 35 (2) Rand Journal of Economics 306–28.

321Systemic risk may result from collateralised borrowing in concert with other factors, deleveraging during an economic downturn, and the predisposition of imperfectly rational consumers.

322E Cerutti, S Claessens and P McGuire, 'Systemic Risks in Global Banking: What Can Available Data Tell Us and What More Data Are Needed?' (*Bank for International Settlements*, April 2012) <http://www.bis.org/publ/work376.pdf> accessed 6 August 2015; IMF, 'Global Financial Stability: Report Responding to the Financial Crisis and Measuring Systemic Risks' (*International Monetary Fund*, April 2009) <https://www.imf.org/external/pubs/ft/gfsr/2009/01/pdf/text.pdf> accessed 6 August 2015.

323Council Regulation (EC) 1092/2010 of 24 November 2010 on European Union Macro-Prudential Oversight of the Financial System and Establishing a European Systemic Risk Board [2010] OJ L331/1.

324J Danielsson, *Global Financial Systems: Stability and Risk* (Harlow, Pearson Education Limited 2013).

cent, being the fastest rate of expansion since 2005.[325] Although the Bank observed that this growth was fuelled by extended interest-free periods on credit card balance transfer offers, and an increase in credit card limits in some parts of the unsecured personal loan market amongst others, its analysis of the channels of risk are quite revealing and justifies regulatory intervention.[326]

According to the Bank of England analysis of the specific risk of consumer (as opposed to business) debt, lenders face a high risk of potential losses on credit portfolios because, in response to adverse shocks, consumer borrowers were more likely to default on their debts, and bank stress tests had shown that the scale of losses on consumer credit books in an economic downturn was likely to be higher than that on mortgage lending.[327] Secondly, the quality of the stock of consumer credit has the potential to deteriorate quickly due to product complexity and given their shorter maturity especially where growth is rapid. For borrowers, asymmetric information could present in the form of lack of full comprehension of loan terms and inadequate appreciation of risks associated with a particular product.

Bar-Gill and Warren identify three sources of consumer risk: the complexity of credit products, the variability of contract terms *ex post* at the instance of lenders, and lenders ability to apply revised terms retroactively to existing customers without the latter's consent.[328] Product complexity is a puzzle for all categories of consumers lenders, and a source of systemic risk.[329] Information failure can result directly from product

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[325]Bank of England, 'Record of the Financial Policy Committee Meeting 22 March 2017' (*Bank of England*, 4 April 2017) <https://www.bankofengland.co.uk/-/media/boe/files/record/2017/financial-policy-committee-meeting-march-2017.pdf> accessed 29 August 2019.

[326]In developing markets, and specifically Nigeria, consumer borrowing remains low in the formal market, but most consumer borrowing occurs in informal markets. Hence, it is difficult to have a clear grasp of the risks in the same way as presented by the Bank of England above. This in itself is the more justification for regulation to promote safe lending practices and prevent harmful products from entering all the markets.

[327]Bank of England, 'Record of the Financial Policy Committee Meeting 22 March 2017' (n 325).

[328]Bar-Gill and Warren (n 236) 1-101.

[329] BS Bernanke, TF Geithner, and HM Paulson, *Firefighting: The Financial Crisis and its Lessons* (New York, Penguin Books 2019) 17-18.

complexity where parties fail to fully appreciate the links between a product and other financial instruments in the wider financial markets or lack the requisite tools to identify the ideal market price of a product as well as the associated risks.[330]

Several factors account for product complexity, including rapid financial innovation and the introduction of a multiplicity of fees,[331] complicated interest computation methods, and pre-trial tools like arbitration clauses that confound quite well-educated consumers. The net outcome of these is an overall welfare loss with a reduction in the amount of satisfaction derived from the current use of consumer credit as a product. The role of regulation in addressing this type of information asymmetry has been controversial due to neoliberal opposition to paternalism, and faith in the rationality of 'informed' consumers to manage own affairs.[332] For example, consumers must identify what they need within the range of products in the market in terms of quality, quantity and price they are willing to pay. The cost to consumers in terms of time and money to obtain these pieces of information present difficulties in predicting patterns of use, and sometimes lead them into welfare reducing transactions.

Since the Global Recession, however, policymakers have recognised that when lenders make consumer and mortgage credit offers at extremely low-interest rates that would rise steeply in the near future (commonly referred to as teaser rates), and especially where these offers are extended to a significant number of sub-prime (mostly uneducated) borrowers, the outcome might be a systemic crisis, hence a justification for more regulatory intervention.[333] The dangers of product complexity

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[330] ibid.

[331] Examples of risk related fees include late fees, over-limit fees, and bounced-check fees. Convenience and service fees include annual fees, cash-advance fees, stop-payment-request fees, fees for statement copies and replacement cards, foreign-currency-conversion fees, phone-payment-convenience fees, wire transfer fees, and balance-transfer fees. See Bar-Gill and Warren, *Making Credit Safer* (n 236) 1-101.

[332] C Sunstein and R Thaler, 'Libertarian Paternalism' (2003) 93 American Economic Review 175 for implications of BE for consumer law.

[333] L Brix and K McKee, Consumer Protection Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance (2010) CGAP, Focus Note No. 60 <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Consumer-Protection-Regulation-in-Low-Access-Environments-Opportunities-to-Promote-Responsible-Finance-Feb-2010.pdf> accessed 29

are far-reaching.[334] Much like in the case of coordination between competitors, the mere presence of many active lenders in a market may not necessarily spur competition where consumers are ill-equipped to appreciate material differences in the products on offer or when consumer inertia subsists.[335]

In the same way that consumer lending can lead to systemic failures, systemic failures caused by other factors can also impact consumer borrowing. Systemic failures create an abrupt tightening in the supply of consumer credit which could hurt aggregate consumer spending, thereby weakening growth. Thus, there is a sound macroeconomic rationale to regulate for the safety and soundness of financial institutions and the market.[336]

Finally, by their nature, commercial transactions occur because parties tend to benefit from the contract. It is possible, however, for harms to occur to third parties who neither benefit from the proceeds of the contracts nor receive legal protection from the unintended or negative fallouts of the contract. The dangers of credit to third parties

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August 2019. See also the following official reports: US Department of the Treasury, 'Financial Regulatory Reform: A New Foundation' (*US Department of the Treasury*, 17 June 2009) <http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf> accessed 5 August 2015; FSA, 'The Turner Review: A Regulatory Response to the Global Banking Crisis March 2009' <http://www.fsa.gov.uk/pubs/other/turner_review.pdf> accessed 5 August 2015; HM Treasury, 'The Nationalisation of Northern Rock - National Audit Office (NAO)' (*National Audit Office*, 20 March 2009) <http://www.nao.org.uk/press-releases/hm-treasury-the-nationalisation-of-northern-rock-2/> accessed 5 August 2015; EC, 'High-Level Expert Group on Reforming the Structure of the EU Banking Sector' (*European Commission*, 2 October 2012) <http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/liikanen-report/final_report_en.pdf> accessed 5 August 2015.

[334] Lenders are also affected by product complexity intensified by securitisation of consumer loans which compound risk assessment and increases the dangers of high default correlations where underlying loans default. Securitisation represents a process by which loans, mortgages, and other credit products that generate predictable future cash streams from borrowers are pooled together and sold to an investment vehicle that then issues securities to investors.

[335]Bar-Gill and Warren, *Making Credit Safer* (n 236) 1-101.

[336] EF Gerding, 'The Subprime Crisis and the Link between Consumer Financial Protection and Systemic Risk' (2009) 4 FIU Law Review 435-462.

are too real to ignore. The consequences of financial distress including the effects of bankruptcies on children and elderly members of affected families have been compared to the sufferings of children of divorced parents.[337] A proliferation of apparently cheap credit entraps borrowers and those already in precarious economic positions often become over-indebted. The likely consequences are reduced essential consumption, disposal of productive assets, withdrawal of children from school, or neglecting health care. They also put at risk future access to formal credit.[338] This leaves a gap in legal protection for members of the public and offers an overwhelming rationale for regulatory intervention.

3.4.4 Behavioural Economics (BE)

The neoclassical economic assumption that 'informed' individuals are the best judge of their taste and in control of the market is negated by information asymmetry in the sense that relevant information is often unavailable to guide market participants, and in the heuristic sense, many consumers are unable to process available market information in an efficient manner. BE, aptly described as a 'potential marriage of psychology and economics',[339] is an emerging alternative theory to neoclassical rational choice model. BE insights are quite revealing in terms of understanding how small 'irrelevant' factors drive people's decisions on whether or not to borrow, as

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[337]TA Sullivan, E Warren and JL Westbrook, *'The Fragile Middle Class: Americans in Debt Ch. 4* (Yale University Press 2001); Department of Defence, 'Report on Predatory Lending Practices Directed at Members of the Armed Forces and their Dependents' (*US Department of Defense*, 9 August 2006) 39-42 <https://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf> accessed 29 August 2019; E Eckholm, 'Seductively Easy, 'Payday Loans' Often Snowball' (*New York Times*, 23 December 2006) A1; GLA Harris, 'Charlatans on the Move' (2011) 13 (4) Public Integrity 353-370; Financial Conduct Authority, *Credit Card Market Study* (n 267).

[338] R Mazer, K McKee, and A Fiorillo, *Applying Behavioural Insights in Consumer Protection Policy* (CGAP 2014).

[339]R Bubb and RH Pildes, 'How Behavioral Economics Trims Its Sails and Why' (2014) 127 Harvard Law Review 1594.

opposed to any time analysis of costs and benefits associated with economic choice.[340] In terms of articulating the impact of behavioural manipulation on contracts, Bar-Gill's approach is helpful in that it reduces BE theory into two canons: (1) That consumers' purchasing and use decisions are affected by systematic misperceptions; and (2) That sellers design their products, contracts, and prices in response to these misperceptions.[341] Below are some specific behavioural biases that lenders often seek to exploit:

(i) Hyperbolic Discounting

Insights offered by experimental psychology indicate that individuals regularly engage in a reversal of preferences where other rewards are presented at different times, ie over a reward-time pair. It occurs, for example, when a subject prefers USD10 now rather than USD12 in a day, but he/she prefers USD12 in a year plus a day rather than USD10 in a year. This pattern of discounting occurs in different magnitudes (the magnitude effect) as a present bias discounting declines with the amount to be discounted.[342] Risk-averse people tend to discount the future more heavily, and that risk tolerance increases with delay, contrary to neo-classical economic theory.[343] The risks of actually receiving a reward increases when the reward is delayed by an additional unit of time, whereas findings suggest that a beneficiary of such reward becomes progressively insensitive to that growing risk. As a result, total discount weights decline at a decreasing rate, ie hyperbolically, even if the pure rate of time

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[340]S Mullainathan and others, 'What's Psychology Worth? Evidence from a Consumer Credit Marketing Field' (n 236) 1-45.

[341] O Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford, OUP 2012).

[342] J Benhabib, A Bisin, A Schotter, 'Present-Bias, Quasi-Hyperbolic Discounting, and Fixed Costs' (2010) 69 (2) Games and Economic Behavior 205-23. See previous studies in RH Thaler, 'Some Empirical Evidence on Dynamic Inconsistency' (1981) 8 Economic Letters 201–07; U Benzion, A Rapoport, and J Yagil, 'Discount Rates Inferred from Decisions: An Experimental Study' (1989) 35 Management Science 270–284; L Green, J Myerson, E McFadden, 'Rate of Temporal Discounting Decreases with Amount of Reward' (1997) 25 Memory and Cognition 715–23.

[343] T Epper, H Fehr-Duda, and A Bruhin, 'Viewing the Future through a Warped Lens: Why Uncertainty Generates Hyperbolic Discounting' (2011) 43 (3) Journal of Risk and Uncertainty 169-203.

preference is constant.[344] Figuratively speaking, hyperbolic discounting is driven by viewing the uncertain future through a warped lens, produced by systematic distortions of probabilities. Even without factoring risk into the equation, real-time preferences may be hyperbolic *per se.* As could be argued for addictive behaviour, instinctual motives, such as hunger or lust, can lead individuals to downplay risk or embrace an excessive preference for the present. Hyperbolic discounting can result from an underlying present bias in consumer decision making. Consumers' may have excessive urges for immediate gratification, prioritising present consumption over future consumption. They may turn around to regret such decisions at a later time thus supporting the finding that consumer preferences are 'time inconsistent'.[345] Consumers 'may be myopic in the short term but rational in the long term'.[346]

(ii) Overconfidence

Consumers are typically upbeat about their prospects and often overconfident about their abilities, including the accuracy of their judgments. They overestimate their ability to repay their credit card debt while underestimating their future spending.[347] Grubb describes two sorts of consumer overconfidence: over-optimism and over-precision.[348] Overoptimistic consumers overvalue their abilities or prospects, either in absolute terms or in comparison to others while over-precise consumers allow for little margins of error around forecasts, thereby systematically miscalculating uncertainty. There is overwhelming evidence from the literature to support consumer overconfidence.[349] Individuals are overoptimistic about their prospective memory, or

[344]ibid.

[345] Financial Conduct Authority, *Credit Card Market Study* (n 267).

[346] Ramsay, *Consumer Law and Policy* (n 290) 57.

[347]JA Shepperd and others, 'A Primer on Unrealistic Optimism' (2015) 24 Current Directions in Psychological Science 232. See also Financial Conduct Authority, *Credit Card Market Study* (n 267).

[348]MD Grubb, 'Overconfident Consumers in the Marketplace' (2015) 29 (4) The Journal of Economic Perspectives 9-35.

[349]S Lichtenstein, B Fischhoff, and LD Phillips, 'Calibration of Probabilities: The State of the Art to 1980' in D Kahneman, P Slovic, and A Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* (New York, Cambridge University Press 1982) 306–34; TG Silk, 'Examining Purchase and Non-Redemption of Mail-in Rebates: The Impact of Offer Variables on Consumers' Subjective and Objective Probability

their ability to remember to take planned actions.[350] They expect to use the gym a lot thereby signing up to monthly and yearly plans and end up attending less such that they could have saved an average of more than 40 per cent by foregoing a membership and paying per-visit.[351] Similarly, consumers tend to overestimate their self-control,[352] believing that they will pay off or refinance debt in time to avoid paying post-introductory rates.[353] Studies in the telecommunications sector show that consumers underestimate the noise in their forecasts of their future demand for (phone) calls by 62 per cent[354] while overconfident drivers tend to undervalue car insurance by underestimating the likelihood of filing a claim.[355]

(iii) Framing Effects and Status Quo Bias

Individuals are averse to a choice framed as a loss as opposed to one framed as forgoing a gain. People tend to privilege the status quo over change, very often dissuaded by the cost of gathering information, comparing it and finding the best offer on the market. This is not entirely unreasonable as they may be unable to quantify the potential gains vis-à-vis the present cost of switching. Thus, switching inertia in long-

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of Redeeming' (PhD Dissertation, University of Florida 2004) <http://etd.fcla.edu/UF/UFE0004380/silk_t.pdf> accessed 29 August 2019.

[350] KMM Ericson, 'Forgetting We Forget: Overconfidence and Memory' (2011) 9 (1) Journal of the European Economic Association 43–60.

[351] S DellaVigna and U Malmendier, 'Paying Not To Go To The Gym' (2006) 96 (3) American Economic Review 694–719.

[352] YM Atamer, 'Why Judicial Control of Price Terms in Consumer Contracts Might Not Always be the Right Answer – Insights from Behavioural Law and Economics' (2017) 80 (4) Modern Law Review 624–60; Bubb and Pildes (n 340) 1642.

[353] H Shui, and LM Ausubel, 'Time Inconsistency in the Credit Card Market' (PhD Dissertation, University of Maryland 2004) <http://drum.lib.umd.edu/bitstream/handle/1903/2082/umi-umd-2049.pdf?sequence=1&isAllowed=y> accessed 29 August 2019; P Heidhues and B Kőszegi, 'Exploiting Naïvete about Self-Control in the Credit Market' (2010) 100 (5) American Economic Review 2279–303.

[354] MD Grubb and M Osborne, 'Cellular Service Demand: Biased Beliefs, Learning, and Bill Shock' (2015) 105 (1) American Economic Review 234–71.

[355] A Sandroni and F Squintani, 'Overconfidence, Insurance and Paternalism' (2007) 97 (5) American Economic Review 1994–2004; A Sandroni and F Squintani, 'Overconfidence and Asymmetric Information: The Case of Insurance' (2013) 93 Journal of Economic Behavior & Organization 149–165.

term contracts can be attributed to status quo bias.[356] Consumers can suffer from inertia, preventing them from taking action and also from inattention to details thereby limiting their capacity to make the right decision or to be aware or conscious of the decision-making process.[357] Even when the economic benefits of particular choices are identical in two situations, consumers may reach different decisions depending on how the problem is framed. In the Credit card market, for example, consumers are often mistaken in choosing to make minimum repayments either simply because lending firms *provide* the options or because they assume that the card provider is recommending it.[358] The implication is that how a programme is framed, for example, requiring an 'opt-in' or 'opt-out' may affect the outcome for consumers.[359]

Other known biases include cumulative cost neglect[360] where imperfectly rational consumers underestimate the cumulative cost of borrowing small amounts several times as opposed to the borrowing of lump sums; anchoring leading individuals to neglect potent but less visible risks such as tuning into media adverts celebrating credit while ignoring reporting on the dangers of over-indebtednesss.[361] Consumer decision making can be affected by anchoring, whereby the presentation of particular

[356]Atamer (n 353) 624–660; K Mathis and AD Steffen, 'From Rational Choice to Behavioural Economics: Theoretical Foundations, Empirical Findings and Legal Implications' in K Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Cham, Springer 2015) 45-47; MG Faure and HA Luth, 'Behavioural Economics in Unfair Contract Terms - Cautions and Considerations' (2011) 34 Journal of Consumer Policy 337, 344.

[357]Financial Conduct Authority, *Credit Card Market Study* (n 267).

[358]ibid. See also K Erta and others, 'Applying Behavioural Economics at the Financial Conduct Authority' (2013) Financial Conduct Authority Occasional Paper No. 1 <https://www.fca.org.uk/publication/occasional-papers/occasional-paper-1.pdf> accessed on 29 August 2019.

[359] Ramsay, *Consumer Law and Policy* (n 290) 56-57.

[360]Atamer (n 353) 624–660; CR Sunstein, 'Boundedly Rational Borrowing' (2006) 73 University of Chicago Law Review 249, 267; O Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford, OUP 2012) 66.

[361] Ramsay, *Consumer Law and Policy* (n 290) 56-57.

pieces of information, which could be intended to help consumers' choices or may be random, heavily bias the decisions taken.[362]

Imperfectly rational consumers also tend to ignore complexity.[363] There is evidence to suggest that complexity and information overload have adverse effects on consumers including poor consumer decision-making, more likelihood to respond to price promotions that provide a simple method of justifying their choice; and failing to make a decision altogether.[364]

BE does not claim to offer a full rebuttal of neoclassical rational choice theory. A significant amount of context-specific findings, however, contradict the mainstream neo-liberal rational choice theory.[365] Mullainathan and others found in their study that potential borrowers may take up a loan because of such mundane considerations like a smiling face on the offer letter, or because of shared racial or cultural traits with the loan offeror or agent.[366] They also found that product complexity, such as the inclusion of too many repayment and interest rate options creates conflict and reduces take up.[367] For example, the inclusion of bogus or unattractive promotional add-ons negatively influences take up decision regardless of the economic efficiency of the loan

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[362] Financial Conduct Authority, *Credit Card Market Study* (n 267).

[363] O Bar-Gill, *Seduction by Contract: Law, Economics, and Psychology in Consumer Markets* (Oxford, OUP 2012).

[364] R Matthews, 'The Agonies of Too Much Choice' *Financial Times* (London, 6 January 2006) <https://www.ft.com/content/bc564736-7e15-11da-8ef9-0000779e2340> accessed 29 August 2019.

[365] ibid.

[366] S Mullainathan and others, 'What's Psychology Worth? Evidence from a Consumer Credit Marketing Field' (n 236) 1-45.

[367] See also C Daryl, N Jentzsch, and R Mazer, 'Incorporating Consumer Research Into Consumer Protection Policymaking' (2011) CGAP Focus Note 74 <https://www.cgap.org/sites/default/files/Focus-Note-Incorporating-Consumer-Research-into-Consumer-Protection-Policy-Making-Nov-2011.pdf> accessed 29 August 2019.

offer.[368]The cost of such promotional offers is likened to a 4 per cent increase in interest rate.[369]

Imperfect rationality manifests itself in much of consumer decision-making. Sometimes, the mere knowledge of an opportunity to borrow lures people into actual borrowing.[370] Some consumers use high-cost payday loans even when cheaper sources of liquidity are available, such as remaining credit card balances or savings.[371] Thus, while financial information can be a useful tool to enlighten consumers about their bias, mounting empirical evidence reveal the need for regulators to be attuned to timing effects on information processing. For instance, information is most effective when provided at the time consumers need it the most.[372] The channel of education is equally important, eg TV and radio may work better than prints.[373] Simplifying a process can also operate to make an *ex ante* regulation more effective.[374]

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[368] ibid.

[369] ibid. In a study undertaken in Mexico, it was found that merely presenting fees for consumers' public pension accounts in Pesos instead of annual percentage rates allowed financially illiterate participants to better financial decisions. See J Hastings and L Tejeda-Ashton, 'Financial Literacy, Information, And Demand Elasticity' (2008) National Bureau of Economic Research Working Paper No. 14538 <https://econpapers.repec.org/paper/nbrnberwo/14538.htm> accessed 29 August 2019.

[370] S Mullainathan and others, 'What's Psychology Worth? Evidence from a Consumer Credit Marketing Field' (n 236) 1-45.

[371] SP Carter, PM Skiba, and J Tobacman, 'Pecuniary Mistakes? Payday Borrowing by Credit Union Members' (2010) Pension Research Council Working Paper 201032 <http://pensionresearchcouncil.wharton.upenn.edu/wp-content/uploads/2015/09/0-19-969681-9-08.pdf> accessed 29 August 2019.

[372] B Catherine and JM Hogarth, 'Better Deals on Wheels: The Effects of Financial Education on Car Buying' (Minneapolis, Federal Reserve Bank of Minneapolis 2010).

[373] B Gunhild and B Zia, 'Harnessing Emotional Connections to Improve Financial Decisions: Evaluating the Impact of Financial Education in Mainstream Media' (2013) Policy Research Working Paper 6047 <http://responsiblefinance.worldbank.org/~/media/GIAWB/FL/Documents/Publications/Harnessing-Emotional-Connections-to-Improve-Financial-Decisions.pdf> accessed 29 August 2019.

[374]JJ Choi and others, 'Default Stickiness among Low-Income Individuals' (Los Angeles, RAND Corporation 2012).

These findings tend to challenge the validity of the life-cycle theory which is anchored on expected values of future income and consumption while ignoring the uncertainty that futuristic or forward-linking behaviours present for immediate action, in other words, over-optimism.[375] The impact of psychological manipulations applies to all categories of borrowers including educated and low-income earners,[376] and impairs consumers' decision-making ability.[377] Nevertheless, the uneducated poor borrower is more likely to be impacted the most because of their precarious circumstances such as limited economic bargaining power, limited choice of providers, thin economic and psychological capacities to absorb economic shock, social marginalisation, and limited literacy and numeracy or prior exposure to formal financial services.[378] The rich and better educated, in contrast, are less prone to manipulation because they can afford experts and because sellers realise this, they target more aggressively less educated, poorer consumers with products that are 'finely tuned' to exploit their mistakes.[379] Grubb[380] found that consumer overconfidence in demand forecasts gives firms incentives to offer contracts with quantities at zero marginal cost (eg, teaser rates) followed by steep marginal charges (eg, penalty fees) and potential default. It is important to emphasise that not all psychological interventions distort rationality. However, within the specific contexts where imperfect rationality has been identified, the insights are incredibly relevant to policy and provide an overarching rationale for regulation. BE's 'modest step beyond the analytic simplicity of neo-classical

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[375] See G Bertola, R Disney, and C Grant, *The Economics of Consumer Credit* (Cambridge, The MIT Press 2006) 8.

[376] R Mazer, K McKee, and A Fiorillo, *Applying Behavioural Insights in Consumer Protection Policy* (CGAP 2014).

[377]ibid.

[378]ibid. A recent discovery in brain science corroborates this finding. See B Babcock, *Using Brain Science to Design New Pathways out of Poverty* (Economic Mobility Pathways 2014).

[379] Bar-Gill and Warren, *Making Credit Safer* (n 236) 1-101.

[380] MD Grubb, 'Selling to Overconfident Consumers' (2009) 99 (5) The American Economic Review 1770– 1807.

approaches' provide a major rationale for regulatory intervention to 'de-bias' consumers.[381]

In summary, BE highlights the waning relevance of some policy orthodoxies. It introduces nuance into the intellectual debate on the reasons why some people over-borrow. Within the neo-classical narrative, thrift determines wealth and indebtedness is a symptom of individual determinism or lack of self-control. BE operates on the assumption that what separates the patterns of behaviour of the rich and poor is the fact that poverty or low income imposes an unprecedented amount of pressure on the thought processes of low-income consumers that substantially magnifies their myopia.[382] As poorer consumers have a narrow margin of error, a wrong decision would have a more detrimental impact on them. In other words, poverty or the 'scarcity of money, unpredictability of income, and lack of buffers' deprives the poor of the ability or 'bandwidth' to reason.[383]

3.5 A HUMAN RIGHT RATIONALE FOR CONSUMER CREDIT REGULATION

Global policy on financial consumer protection has evolved towards stronger protection. This evolution became necessary following new understandings of consumer behaviour, the complexities of financial risk, and the vulnerability of consumers of credit products and services. A central issue of interest is whether global emphasis on financial inclusion births a human rights rationale for consumer credit regulation. Such a right, if it could be established, will fall into the category of economic rights. This section will attempt to make a case for the strengthening of the rights of the consumer borrower by drawing on human rights concepts. A human rights approach to consumer credit regulation could be broken down into two inter-related rights: The right of access, and consumer protection as a human right. Before

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[381] Ramsay, *Consumer Law and Policy* (n 290); See also C Sunstein and R Thaler, 'Libertarian Paternalism' (2003) 93 American Economic Review 175 for implications of BE for consumer law.

[382] S Mullainathan and others, 'What's Psychology Worth? Evidence from a Consumer Credit Marketing Field' (n 236) 1-45.

[383] ibid.

turning to the argument for a human right approach to consumer credit regulation, however, it is imperative to briefly consider economic rights as a category of human rights.

3.5.1 Economic Rights and Human Capability

The exact contents of human rights have been a subject of dispute, but many critics are opposed to second-generation welfare rights, ie economic and social rights.[384] In his seminal papers, *Elements of a Theory of Human Rights* and *Human Rights and Capabilities*, Amartya Sen argued that freedoms of special importance amenable to social influence must be treated as human rights regardless of legislative backing. The feasibility of economic rights, according to Sen, is not so much in their enshrinement in constitutional provisions and Bills of Rights as it is on the ideals of consumerism embedded in neoliberal conceptions of liberty and freedom. He, therefore, argued for a pragmatic, open-ended recognition of certain capabilities as human rights inasmuch as such capabilities could 'respond to public reasoning and to the formation of social values'.[385]

Sen defined 'capability' as 'the opportunity to achieve valuable combinations of human functionings — what a person is able to do or be'.[386] Sen's list of capabilities (Capability Approach, CA) *did* not explicitly mention a right to credit but includes freedoms such as human rights to good nutrition, health, and education.[387] Sen, however, seems to leave room for including access to consumer credit as a 'capability',

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[384] A Sen, 'Elements of a Theory of Human Rights' (2004) 32 (4) Philosophy & Public Affairs 315-356.

[385]A Sen, 'Human Rights and Capabilities' (2005) 6 (2) Journal of Human Development 151-166.

[386] ibid.

[387] Several commentators have criticised Sen for failing to supplement his framework with a coherent list of important capabilities. See B Williams, 'The Standard of Living: Interests and Capabilities' in G Hawthorn (ed), *The Standard of Living* (Cambridge, Cambridge University Press 1987) 94-102; MC Nussbaum, 'Nature, Function and Capability: Aristotle on Political Distribution' (1988) Oxford Studies in Ancient Philosophy, Supplementary Volume 145-184; M Qizilbash, 'Capabilities, Well-being and Human Development: A Survey' (1996) 33 (2) Journal of Development Studies 143-162; DA Clark, 'Capability Approach' in DA Clark (ed), *The Elgar Companion to Development Studies* (Cheltenham, Edward Elgar 2006).

thus as human right, so long as this capability can withstand public scrutiny: 'the viability and universality of human rights and of an acceptable specification of capabilities are dependent on their ability to survive open critical scrutiny in public reasoning'.[388] The flexibility of Sen's approach to identifying 'capabilities' has led other scholars to further develop the concept, and to apply it in different ways.[389] The concept has overtime expanded to accommodate inequality, social justice, living standards and rights and duties.[390]

In a study carried out in South Africa, Clark found that most participants in the survey treasured 'jobs, housing, education, income, family and friends, religion, health, food, good clothes, recreations and relaxation, safety and economic security, as measures of good life'.[391] Sen, however, recognises limitations to certain capabilities such as 'being able to live long', 'to avoid cholera' which are dependent on luck and the environment, and therefore, unsustainable as fundamental rights.[392]

3.5.2 Consumer Credit as a Human Capability

If access to credit can facilitate the procurement of any of the capabilities identified above, it is, perhaps, not far-fetched to consider equal access to consumer credit as falling under one of Sen's categories of instrumental freedoms namely 'economic facilities, transparency guarantees and protective security' all worth regulatory protection because they contribute to the expansion of human capabilities.[393] The capability theory elevates the policy discourse from one of consumer protection to citizen rights. Consumer protection aims to manage consumer interface with the market, to ensure that consumers are safe and receive fair treatment within the marketplace. The concept of citizen or human rights on the other hand focuses on the

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[388]Sen, 'Human Rights and Capabilities' (n 386).

[389]S Alkire, *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (Oxford, Oxford University Press 2002).

[390] DA Clark, 'Capability Approach' (n 387).

[391] ibid.

[392]A Sen, 'Well-Being, Agency and Freedom: The Dewey Lectures' (1985) 82 (4) Journal of Philosophy 169-221; AK Sen, *Inequality Re-Examined* (Oxford, Clarendon Press 1992).

[393]AK Sen, *Development as Freedom* (Oxford, Oxford University Press 1999) Ch 2.

innate needs, aspirations and abilities of individuals as citizens, and the state's responsibility to provide the necessary conditions for the actualisation of these objectives.

Formal lenders vehemently oppose the idea of a human right to financial services.[394] In other words, they continue to insist that financial inclusion is not a fundamental right as that construct would otherwise negate private property rights. There have been two competing theories on how to resolve this conflict. One theory is the recognition by the state of a common floor of economic security for the citizenry in the form of a welfare state and the second is the enhancement of protection by placing reliance on traditional human rights rather than establishing a *sue generis* human right to credit. Both theories support the application of human rights principles and standards to the protection of consumer borrowers as the scope of credit risk[395] and the scale of harm[396] have expanded. Furthermore, low consumer education in the face of these new delivery channels for financial services, such as the mobile, electronic and branchless distribution of financial services, justifies a robust consumer policy to protect consumers while preserving the potential benefits of credit for consumers.[397]

(i) A Right to Consumer Credit

One way to examine the capability theory in relation to Nigeria is to proceed from the utility value of credit to households. Indeed, many respondents (consumer borrowers) justified borrowing as something they engaged in to meet basic

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[394] James (n 237) 71.

[395] This includes the evolving nature of risk such as credit reporting and financial innovation (securitisation, bespoke loans etc.)

[396] The scale of consumer harm has also grown quantitatively due to the ubiquity of consumer loans across all markets (including informal loans in developing countries), interconnectivity of financial markets, and the diffuse character of financial instruments enabled by digital credit. Digital channels are typically provided and accessed remotely allowing minimal or no contacts between lender and borrower such that contracts often expose consumers to risks of early termination fees, automatic renewals of contracts, or specific arbitration terms, and consumers often have difficulties in gaining access to justice. See S Fredman, *Human Rights Transformed: Positive Duties and Positive Rights* (Oxford, OUP 2008) 15–16.

[397] ibid.

subsistence. The sheer size of the informal credit market despites its high levels of risk underscores the importance of borrowing to the livelihood of many consumers.[398] On this basis, access to consumer credit is in theory a sort of capability, and it could also be considered a means to a plethora of capabilities. For example, affordable credit does have the potential to raise the country's ability to meet the Millennium Development Goals or the on-going Sustainable Development Goals.[399]

The idea of protecting economic rights is not alien to capitalism. In fact, such rights have been recognised as essential to the flourishing of capitalist systems. The European welfare states, for example, were established and have co-existed side by side with the markets essentially to mitigate the hardships suffered by 'losers' in competitive markets, and by extension, to stave off the implosion of the capitalist mode of production.[400]

Protection of economic and social rights undergird the creation of welfare states. Welfare states, in turn, are reflective of the specific conceptions of economic and social rights in different societies. Welfare states have been described as 'results of complex processes and successive steps of social and political engineering in the history of democratic industrial capitalist societies'.[401] The rationale for the creation of welfare states are particularly important for understanding the role of consumer credit as a

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[398]See para 2.7 in chapter two for a discussion of the informal credit market in Nigeria. See also chapter five for discussion of qualitative findings. Many respondents reported borrowing reluctantly, but the decision was rational considering it was their last resort.

[399]S Claessens and E Feijen, 'Financial Sector Development and the Millennium Development Goals' (2006) World Bank Working Paper 89 <https://openknowledge.worldbank.org/handle/10986/7145> accessed 30 August 2019; E Littlefield, J Morduch, and S Hashemi, 'Is Microfinance an Effective Strategy to Reach the Millennium Development Goals' (2003) CGAP Focus Note 24 <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Is-Microfinance-an-Effective-Strategy-to-Reach-the-Millennium-Development-Goals-Jan-2003.pdf> accessed 30 August 2019.

[400] G Comparato, 'The Design of Consumer and Mortgage Credit Law in the European System' in IN Domurath, HW Micklitz (eds), *Consumer Debt and Social Exclusion in Europe* (Taylor and Francis 2016); M Lazzarato, *Governing by Debt* (Boston, semiotext (e)/ Intervention series 17, MIT Press 2015).

[401]W Arts and J Gelissen, 'Three Worlds of Welfare Capitalism or More? A State-Of-The-Art Report' (2002) 12 (2) Journal of European Social Policy 137–158.

safety net. Esping-Andersen presents three ideal welfare regime types that he describes as either liberal, conservative, or social conservative. According to Esping-Andersen's classification, a liberal regime is primarily focused on decommodification;[402] a conservative welfare regime focuses on the role of the state in 'maintaining or breaking social stratification'; and the social democratic welfare regime emphasises universal and comparatively generous redistribution, full employment and income protection, and the promotion of equality through strong state intervention by means of a redistributive social security system.

Whether consumer credit could be classified a 'social' or 'commercial' service is a point for theoretical debate. Traditionally, neoliberal theory approached consumer lending and borrowing in terms of individual contracts and private transactions rather than a set of social services. Hence, their essences to individuals are not judged in the same sense that, say pensions or hospital emergency services, are assessed. Pensions and emergency services are considered essential services that every citizen must be given access to, whereas, a right to credit has never been popular in theory or practice.[403]

Esping-Andersen's classification is based on social policy in OECD countries hence ideology and political history are salient to the evolution of his typologies. It is not hard to imagine the varied roles that consumer credit could be deployed to in each typology of the welfare state; however, the utility of this classification to the current analysis (ie the role of consumer credit in developing countries' welfare states) is limited for two reasons. First, if the type of welfare state that evolves in a country is a function of the political and ideological tradition, such a framework would be of limited use for discussing welfare states in developing countries without clearly

[402]De-commodification refers to 'the degree to which a (social) service is rendered as a matter of right, and the degree to which a person can maintain a livelihood without reliance on the market' particularly in relation to unemployment benefit, sickness insurance and pensions. See W Arts and J Gelissen, 'Three Worlds of Welfare Capitalism or More? A State-Of-The-Art Report' (2002) 12 (2) Journal of European Social Policy 137–158.

[403] See earlier discussion of the perils of consumer credit in para 3.3.

defined governing ideologies including Nigeria.[404] Secondly, the degree of generosity of a welfare state is a function of other factors such as *means* ie the resources at the disposal of the state, and demography. As Nigeria is a much poorer country than the OECD clusters, its choice of welfare state is primarily shaped by its resources rather than ideological considerations.[405] Similarly, toxic heterogeneity ie the unhealthy rivalry between the various demographics –ethnic, religious, gender and age- and administrative corruption in Nigeria make affordable consumer credit an easier welfare channelling tool as credit is considered a less generous, hence less problematic, type of indirect state intervention which tends to be what obtains in diverse heterogenous societies where the sense of nationhood is particularly weak.[406]

An alternative classification which is more useful to the analysis of welfare states in developing countries is that proffered by Rudra dividing welfare states into three categories: welfare states 'directed towards promoting market development (a productive welfare state); those protecting select individuals from the market (a protective welfare state), or both (a dual welfare state)'.[407] In theory, affordable consumer credit would fit into the third category, furthering market development by expanding consumption while serving as a safety net to the poorer members of society.

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[404] Nigeria lacks any clear ideological commitments by local or national political actors that is not coerced or externally imposed, accepted and implemented primarily for the pleasure of transnational regulators and elite interests.

[405] G Esping-Andersen, '*The Three Worlds of Welfare Capitalism* (Cambridge, Polity Press 1990) 141; P Emmenegger and others, 'Three Worlds of Welfare Capitalism: The Making of a Classic' (2015) 25 (1) Journal of European Social Policy 3–13.

[406] CA Larsen, 'How Welfare Regimes Generate and Erode Social Capital' (2007) 40 Comparative Politics 83–101; L Thorpe, 'Social capital in Denmark' (2003) 26 Scandinavian Political Studies 27–48; B Lancee and HG Van de Werfhorst, 'Income Inequality and Participation' (2012) 41 Social Science Research 1166–78.

[407] N Rudra, 'Welfare States in Developing Countries: Unique or Universal?' (2007) 69 (2) The Journal of Politics 378-96.

In the context of this analysis, de-commodification as a regulatory objective could mean minimising the degree to which a person's socio-economic class impacts access to affordable credit and the cost of borrowing. In most of Europe and the United States, several governments have taken steps to subsidise student loans and mortgage credit, partly in recognition of the dangers of leaving pricing exclusively to the markets.[408]

The capability theory seems to have gained much traction since the Global Recession with respect to consumer protection.[409] Consumer over-indebtedness and subprime borrowing in Western capitalist markets have exposed several consumer incapacities from cognitive limitations and the exploitation of these limitations by lenders to the more radical rampage of predatory lenders. Paradoxically, the current regulatory paradigm at the transnational level has become more cautious about the expansion of credit as a form of capability. Indeed, this cannot be entirely disentangled from the critique of the retreat of the European welfare state, and the role of credit, excessive household leverage, and sustained austerity in advancing that outcome earlier discussed.

Overindebtedness in developed countries is not a sufficient reason to construe consumer capability as elimination of consumer borrowing in Nigeria. This is because exclusion from formal markets is not an efficient approach. To genuinely enhance consumer capability in the dual market system in Nigeria, protection from some types of harmful products can only be achieved by the provision of alternative products that are welfare enhancing for all classes of consumers. In other words, the key is *more*, not *less* access to consumer credit products. If credit is as critical to everyday survival as the evidence suggests,[410] the capability theory holds much promise in all its

[408]N Hillman, 'The Coalition's Higher Education Reforms in England' (2016) 42(3) Oxford Review of Education 330-45. See also B Akers and MM Chingos, *Game of Loans: The Rhetoric and Reality of Student Debt* (Princeton University Press 2016) 4.

[409] See paras 4.2.2 and 4.5.3, Ch 4 for a full discussion of the trends.

[410] See para 2.7 in chapter two for a discussion of the informal credit market in Nigeria. See also chapter five for discussion of qualitative findings. Many respondents reported borrowing reluctantly, but the decision was rational considering it was their last resort.

ramifications. Regulators must also weigh the benefits of consumer spending power to economic growth, as well as the cost-benefit analysis of consumer credit as an individual empowerment tool. This is one consideration that is missing from the theory that consumer credit is unsuitable for developing countries. Regulation, by current design, side-steps this, shifting responsibility to informal markets and fiscal planners.

The Nigerian constitution maintains the façade of a dichotomy between economic and political rights. This brings to the fore the leading critique of Sen's thesis. The main criticisms have bordered on their feasibility as they impose positive financial obligations on governments, with weaker states said to be unable or unready to carry the additional burden.[411] While chapter two of the constitution consists of laudable economic rights, they cannot be the subject of a lawsuit and no judicial remedies are available upon breach by the government ie they are non-justiciable.[412] Whereas, the rights contained in chapter four of the constitution designated 'fundamental rights' including the rights to life, private property, freedom of association, freedom of movement, freedom from discrimination, dignity of human person, and the freedom of thought, conscience and religion are considered inalienable and justiciable.[413] These rights often supply the arguments against state granted economic benefits such as those in chapter two, which are treated as prerogatives of government to be delivered where practicable.

Indeed, the Nigerian constitution respects some economic rights such as fundamental rights to private property ownership. However, it does not envisage a state beholden to its citizens based on any public claim to economic or social security. Similarly, the right to freedom of conscience contradicts the ability of the state to propagate the type of policy in chapter two which seeks to interfere with private agency. As the

[411] M Cranston, 'Are There Any Human Rights?' (1983) 112 (4) Daedalus 1-17. See also I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013); FA von Hayek, *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice* (London, Routledge and Kegan Paul 1976) 133.

[412] section 6 (6) (c) of the Constitution of the Federal Republic of Nigeria (as amended) 1999.

[413] See Chapter IV, Constitution of the Federal Republic of Nigeria (as amended) 1999.

assumption of absolute consumer agency ('the perfectly rational consumer') has been empirically discredited,[414] it is a flawed basis for regulatory design or understanding how to enhance consumer capability.

One feature of the welfare state that consumer credit policy could benefit from is non-discriminatory redistribution. The idea that every citizen is empowered to attain not only a basic level of economic sufficiency, but also one that is consistent with pre-existing socio-economic status in the society. The qualitative study reveals that this is the purpose that customary credit currently serves in Nigeria: a social security for all members of the community or association. Consumer credit under this paradigm becomes a means for enhancing individual capability, a symbol of belonging and a tool for social cohesion.

Financial markets occupy a strategic position in wealth creation and redistribution in modern economies such that state intervention in financial markets must recognise financial services as a new form of social rights. Such recognition will impose a responsibility to promote equal access to opportunities.[415] Advocates of this theory believe that the state must provide access to credit markets based on differentiated standards that recognise that specific individuals are '…caught in systems of disadvantage that are almost impossible to transcend'.[416] Consumer borrowers, particularly those in a weak bargaining position, fall into this category and therefore deserve state intervention that seeks to include them in the market on fair terms.

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[414] J Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (2014) 43 (2) The Journal of Legal Studies S209-S237; S Mullainathan and E Shafir, *Scarcity: Why Having Little Means So Much* (New York, Time Books 2013).

[415] LA Jacobs, *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (Cambridge University Press 2003); T Wilhelmsson, 'Services of General Interest and European Private Law' in CEF Rickeet and TGW Telfer (eds), *International Perspectives on Consumers' Access to Justice* (1st edn, Cambridge University Press 2003) 149.

[416] MA Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 (2) Emory Law Journal 251-275. See also J Rawls, *A Theory of Justice* (Cambridge, Harvard University Press 1971).

(ii) Consumer Protection as a Human Right

Promoting access to credit without necessarily promoting fair terms could undermine individual rights to dignity, privacy and equality, and ultimately result in financial exclusion, exclusion being the social consequence of over-indebtedness.[417] Regulation may serve as a vehicle for redefining the structure of the lender-borrower relationship by erecting more social safety nets.[418] New ideas founded on notions of human rights have been adopted by regulators at national and transnational levels to bolster the position of consumer credit users in the marketplace. Some of the most popular *ex ante* measures are embedded in responsible lending obligations, which though not directly based on human rights, enhance the individual right to dignity.[419] There has also been determined intellectual efforts to provide a theoretical basis for imposing such obligations on credit providers.

One suggestion is to treat credit as a 'service of general interest', to enable the introduction of extenuating circumstances favourable to the borrower that were hitherto unknown to strict contract law principles.[420] Wilhelmsson calls this a *social force majeure* principle that operates to absolve debtors of their obligations where loan

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[417] See para 3.3 for discussion of the dangers of credit. For example, over-indebtednesss limits debtors' ability to meet their basic need, including food and healthcare. Discrimination in credit markets also inevitably result in human rights violations, as are aggressive collection methods that may interfere with debtors' right to privacy or human dignity. See C Ondersma, 'A Human Rights Approach to Consumer Credit' (2015-16) 90 Tulane Law Review 373; G Comparato, 'The Design of Consumer and Mortgage Credit Law in the European System' in IN Domurath, HW Micklitz (eds), *Consumer Debt and Social Exclusion in Europe* (Taylor and Francis 2016).

[418] J Hembruff and S Soederberg, 'Debtfarism and the Violence of Financial Inclusion: The Case of the Payday Lending Industry' (2019) 48 (1) Forum for Social Economics 49-68. See also J Parker, 'Payday Lending in Ohio' (2013) 130(1) Members Only Brief 1–16 <https://www.lsc.ohio.gov/documents/reference/current/membersonlybriefs/130paydaylending.pdf> accessed 29 August 2019.

[419] Overindebtedness and bankruptcy arguably undermine human dignity regardless of how an individual consumer gets there.

[420] T Wilhelmsson, 'Services of General Interest and European Private Law' in CEF Rickeet and TGW Telfer (eds), *International Perspectives on Consumers' Access to Justice* (1st edn, Cambridge University Press 2003) 149.

default is a direct result of unemployment, precarious turn in family fortune or illness.[421] Similarly, Ondersma proposes a human rights approach that adopts 'debtor's ability to meet their basic needs' as the validity test for enforcing all consumer credit contracts. According to Ondersma, a contract becomes unenforceable once it deprives the consumer of the ability to meet her needs, and it should be immaterial that the consumer was adequately informed about the risks involved from signing such contract.[422] In a nutshell, she proposes that a human rights approach should place consumer safety above 'economic efficiency'. Like the capability approach, the rationale here is based on the theory that 'the overriding objective of development is the expansion of human capabilities rather than economic growth'.[423] These ideas are not perfect. While it is essential to supplement the language of economics with the language of human rights in consumer credit matters, consumer credit regulation is not just about consumer protection but also about market protection and to that extent, it is essential not to treat market efficiency and consumer safety as mutually exclusive.[424]

The more significant concern, however, is the premise for advocating a human rights approach and the practicality of implementing it in Nigeria and many other developing countries. To assume that adopting a human rights approach to consumer protection simpliciter will guarantee a global uniform standard of protection because of the transnational character of human rights is naive in the light of the reality that a vast number of existing human rights remain heedless principles in many developing

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[421] T Wilhelmsson, '"Social Force Majeure" — A New Concept in Nordic Consumer Law' (1990) 13 (1) Journal of Consumer Policy 1–14.

[422] C Ondersma, 'A Human Rights Approach to Consumer Credit' (2015-2016) 90 Tulane Law Review 373.

[423] Clark, 'Capability Approach' (n 391).

[424] It is not necessarily the case that a consumer credit contract cannot preserve consumer borrower rights and equally achieve economic efficiency. To the contrary, that has been convincingly demonstrated in the Community Reinvestment Act 1977 discussed below.

countries.[425] The role of national regulators and institutions to adopt, tailor, and own these doctrines in ways that further domestic interest cannot be overemphasised. Paradoxically, while transnational guidelines like Basel II and AML regulations have become soft law that financial institutions must comply with, the very idea of access to credit or consumer protection as human rights has yet to gain traction in Nigeria where the most vulnerable consumers dwell relative to developed economies. Instead, consumer credit regulation in Nigeria appears to be in stasis as a result of ideological orthodoxy.

The criticisms notwithstanding, a human right to credit may not exist, but existing human rights protection have been extended to consumer protection in many jurisdictions.[426]At the very minimum, it shows a commitment to consumer protection if not necessarily actual protection. The level of consumer protection a legal system affords its citizens is definitive of how it regards its citizen. A human rights approach is thus meant to promote the idea of the citizen consumer, a regulatory objective that goes far beyond market correction. It is, nevertheless, rooted in the narrative of unequal bargaining power where individual consumers must be protected from corporations as the new 'Leviathan'.[427] The approach also seeks to embed broader societal objectives such as care, dignity, and the promotion of responsible behaviour into consumer policymaking.[428]

3.5.3 An American Case Study: The Community Reinvestment Act 1977

The right to access credit remains controversial, and most lenders insist that access to credit is not a right because credit is but a 'market instrument, access to which must be earned'.[429] The right to access credit services may appear utopian, but the United

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[425] Human Rights Watch, 'World Report 2019: Events of 2018' (*HRW,* 2019) <https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf> accessed 10 December 2019.

[426] I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013); Ondersma, 'A Human Rights Approach to Consumer Credit' (n 423).

[427] ibid.

[428] S Fredman, *Human Rights Transformed: Positive Duties and Positive Rights* (Oxford, OUP 2008) 15–16.

[429] James (n 237) 71.

States has implemented some measure of it. The common human rights doctrine upon which such a right has been made contingent is freedom from discrimination. Anti-discrimination legislation may not amount to a right to a 'reasonable terms of credit',[430] but it provides a firm substructure upon which to break down barriers to access for low-income borrowers. A good example is the US Community Reinvestment Act 1977. Following centuries of discriminatory credit practices in the United States where minority groups are denied access to credit or exposed to a significantly higher subprime lending compared to whites with comparable credit rating,[431] this Act was enacted to help address such problems.

The Community Reinvestment Act of 1977 directed depository institutions (ie institutions whose deposits are insured by the Federal Deposit Insurance Corporation[432]) to reinvest financial capital in the communities where they are located. The Act assesses depository institutions' record of meeting the credit needs of its assessment area through home mortgage, small business/small farm, and community development lending. The rigour of this test was differentiated depending on the types, size and nature of lender's business.[433] Before 1995, most of the depository institutions easily passed this assessment by merely demonstrating 'efforts'. However, since 1995 the assessment is now based on actual performance ie lending outcome.

Table 1: Depository Institutions Earn One of Five Possible Ratings for Lending, Investment and Service Activities

	CRA Exam Component			
Rating	**Lending**	**Investment**	**Service**	**Overall**
Outstanding	12	6	6	20+

[430] Ramsay, 'The Regulation of Consumer Credit' (n 241) 383.

[431]Bar-Gill and Warren, *Making Credit Safer* (n 236) 1-101.

[432] Section 803, Community Reinvestment Act 1977, PL 95-128.

[433] Section 2903 Community Reinvestment Act 1977. Depository institutions are categorised into large retail, small retail, and wholesale/limited purpose institutions.

High Satisfactory	9	4	4	11-19
Low Satisfactory	6	3	3	11-19
Needs to Improve	3	1	1	5-10
Substantial Non-Compliance	0	0	0	0-4

Source: Federal Reserve Bank of Dallas, *A Banker's Guide to CRA*

The Community Reinvestment Act has been a controversial piece of legislation. Critics have derisively termed it 'credit allocation' and claimed it is inefficient in bringing down prices.[434] And yet while some accept the merit of investing in the community, they express ideological doubts about the extent of government intervention in the private lending decision process of financial institutions to realise that outcome, and especially detest the communitarian as opposed to an individual approach to creditworthiness assessment.[435] Nevertheless, the Act has produced substantial positive results since its enactment. A comparison of the lending patterns of lenders regulated by the Act and those outside of its framework revealed that the Act has expanded access to home mortgage to lower-income households and communities than they would without the Act.[436] More importantly, the Act affirms

[434] BA Rehm, 'House Pane; Eyeing Hearings, Seeks a Delay in CRA Reform' *American Banker* (19 January 1995) 2; C Cummins, 'Fed Criticizes Clinton Plan on Overhaul of the CRA' *American Banker* (13 December 1993) 1, 3.

[435] BA Overby, 'Community Reinvestment Act Reconsidered' (1995) 143 University of Pennsylvania Law Review 1431-1530. Ironically, similar criticism has been made of Sen's approach which is individual-oriented.

[436] Joint Center for Housing Studies Harvard University, 'The 25th Anniversary of the Community Reinvestment Act: Access to Capital in an Evolving Financial Services System' (Cambridge, Joint Center for Housing Studies Harvard University 2002)

the status of financial institutions as 'cultural, social and political participants in community life'.[437] Indeed, many of the lenders regulated by the Act 'reported that compliance-oriented activities are profitable, productive of good will, or both'.[438]

In most emerging markets, factors such as being female, coming from a caste that faces discrimination, or not speaking the dominant language are often grounds for discrimination.[439] While credit access in Nigeria is influenced more by economic class and geographical location more than race or ethnicity, the mischief for enacting the Act namely to end redlining and community disinvestment[440] are quite similar. When on top of this, one considers the relative dysfunction in the Nigerian market in terms of informational constraints, there is a compelling reason to introduce legislation akin to the Community Reinvestment Act in Nigeria.

3.6 SUMMARY

There are compelling reasons for regulating consumer credit markets. Consumer credit confers benefits on users, especially income smoothing. Credit use, however, comes with economic and social risks. These risks form an excellent rationale for regulation. This chapter focused mainly on the *rationale for regulating credit* markets and submits that there are broad economic and social rationale for regulatory

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<https://www.jchs.harvard.edu/sites/default/files/cra02-1.pdf> accessed 30 August 2019. See also MS Barr, 'Credit Where It Counts: The Community Reinvestment Act and Its Critics' (2005) 80 (2) New York University Law Review 513-652.

[437] Overby (n 436).

[438] Joint Center for Housing Studies Harvard University (n 437).

[439] L Brix and K McKee, Consumer Protection Regulation in Low-Access Environments: Opportunities to Promote Responsible Finance (2010) CGAP Focus Note No. 60 <https://www.cgap.org/sites/default/files/CGAP-Focus-Note-Consumer-Protection-Regulation-in-Low-Access-Environments-Opportunities-to-Promote-Responsible-Finance-Feb-2010.pdf> accessed 29 August 2019.

[440] 'Community disinvestment' is defined as a failure of institutions to reinvest their deposits in the area from which those deposits were obtained. See Overby (n 436); para 1.1 Ch 1 of this thesis on the impact of deregulation in Nigeria in the 1980s.

intervention both in developing and developed markets. Focus on addressing financial market imperfections such as credit reporting and moral hazard is useful but inadequate for correcting the disparity of access in Nigeria. Additional tools are required for a more robust consumer credit regulatory framework, including redistributive measures, and remedies hitherto considered paternalistic. These would be justified on the premises of rapid innovation, growing product complexity, and awareness of consumers' imperfect rationality. The next chapter will present a dialectical account of the various socio-economic phenomena that have influenced the gradual global shift from the more orthodox free-market approach to credit regulation to a more regulatory paradigm since the Global Recession of 2007-09.

CHAPTER FOUR

4.0 PARADIGMS IN CONSUMER CREDIT REGULATION

The previous chapter set out the broad rationale for regulatory intervention in consumer markets. The chapter showed that the neoliberal approach to consumer protection consisted of two broad objectives: Correcting market failures and preventing systemic risk. Market failure under this paradigm was narrowly understood to mean the lack of competition in the market (eg monopoly and coordination amongst suppliers of goods and services), believed to be the consequence of information asymmetry. Accordingly, this paradigm assumed that market transparency promotes effective market competition which in turn ensures systemic stability and consumer wellbeing. However, the chapter highlighted other rationale for regulation which, although were less influential prior to the Global Recession, are germane to consumer wellbeing in a functional market. One understated rationale for regulation is its market construction function which constitutes the very basis for the recognition and enforcement of private contracts. Another rationale for regulation is informed by behavioural science which highlights the limits of market protection and expounds the ramifications of information failure hitherto neglected by the neoliberal rationality approach. Thirdly, the chapter discussed the human rights rationale for regulation, highlighting the social protection imperatives of regulation.

The purpose of this chapter is to outline the current dominant transnational approach to the regulation of finance and the salience of the Global Recession of 2008 to the emergence of this approach. The first part of this chapter maps out the main themes of the current regulatory paradigm: Consumer-centredness; stronger legal frameworks; and a preference for proactive remedies. It demonstrates how this regime departs from traditional neoclassical approaches in most capitalist markets.[441] The

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[441] The analysis draws copiously on the World Bank's Good Practices for Financial Consumer Protection (GPs) 2017 as an analytical framework. Each theme will be discussed with references to reforms implemented in specific jurisdictions and internationally, to provide further insights.

second part discusses *why* the ideational shift from neo-liberal rationality theory as the preeminent philosophy for global market regulation became necessary. The final part argues that the Global Recession was a critical juncture that birthed a new paradigm of regulation in that it catalysed the mainstreaming of ideas that were on the periphery of the policy spectrum prior to the Global Recession, and more significantly, established a direct connection between consumer protection concerns and financial stability.

The chapter will illustrate the discussion with regulatory approaches favoured by IFIs, supranational organisations like the OECD, the EU,[442] as well as influential countries like the UK and the United States. The chapter thus takes an inductive approach in its analysis of a paradigm shift by presenting specific rules that fit into a common regulatory trend across several influential jurisdictions.[443] The chapter concludes that even though this paradigm offers a more robust protection to the consumer borrower in comparison to pre-Recession regulation and what currently obtains in Nigeria, it is inadequate in terms of addressing the issues frustrating Nigeria's financial inclusion drive, and in some respects contributes to the problem.

4.1 MAPPING AN EVOLVING PARADIGM: THE NEW APPROACH TO CREDIT REGULATION AFTER THE GLOBAL RECESSION

Developments in international financial regulation since the Global Recession of 2008 suggest that, at the minimum, a new paradigm is on the horizon. A paradigm is a set

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[442] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC [2002] OJ L 133/66 (Consumer Credit Directive 2008). See also the G20 High-Level Principles on Financial Consumer Protection (2011) which endorsed the approach.

[443] This approach is informed by the idea that law is pervasive and transnational regulation derives from diverse sources. According to Perry-Kessaris, 'a transnational perspective treats law as a global multi-layered phenomenon …[and] explore [s] the causes and effects of the use, abuse and avoidance of all kinds of law; in the name of legal development; and by and on all kinds of actors'. See A Perry-Kessaris, 'Law and Development- in Transnational Perspective, With Sociological Imagination and Experimental Attitude' (2016) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3469605>accessed 17 December 2019.

of ideas that outlines the goal(s) of policy, identifies the instruments to implement such goals, and within the market context, is the 'prism through which policymakers [see] the economy as well as their role within it'.[444] A shift in paradigm thus occurs 'when a proposal, out of many, is adopted, through consensus, by the community at large'.[445] A paradigm shift in consumer credit regulation, as used here, describes 'a fundamental change in [the] approach or underlying assumptions'[446] that shaped market regulation before the Recession.

4.2 THE REIGN OF THE CONSUMER

One of the positive developments under the current approach to regulation is the centrality of consumer welfare to regulatory policy. While IFIs had conceptualised market failure as the gravest source of consumer vulnerability, there is a remarkable shift from the narrow focus on market protection towards consumer protection.[447] According to the World Bank, 'the ultimate goal (of regulation) is to increase and maintain consumer confidence and trust in the financial system'.[448] The new found interest in the consumer is not unconnected with the link between consumer credit and systemic risk,[449] but such a connection does not itself diminish the reality of better

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[444] PA Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain' (1993) 25 (3) Comparative Politics 275-296. A paradigm has also been defined as 'a constellation of beliefs, values, and techniques shared by the members of the community at a particular historical period…[and] governs the[ir] thinking …until some of its basic assumptions are seriously challenged by new observations'. See V Grof, *Healing Our Deepest Wounds: The Holotropic Paradigm Shift* (Newcastle, Washington, Stream of Experience Production 2012).

[445] S Onega, 'The Notion of Paradigm Shift and the Roles of Science and Literature in the Interpretation of Reality' (2014) 22 (3) European Review 491–503.

[446] AS Hornby and others, *Oxford Advanced Learner's Dictionary of Current English 8th Edition.* (Oxford, Oxford University Press 2010).

[447]I Ramsay and T Williams, 'Peering Forward, Ten Years After: International Policy and Consumer Credit Regulation' (2019) JCP (forthcoming).

[448] World Bank, 'Good Practices for Financial Consumer Protection: 2017 Edition (English)' (2017) World Bank Working Paper Number 122011, 2017, 7 <https://www.worldbank.org/en/topic/financialinclusion/brief/2017-good-practices-for-financial-consumer-protection> accessed 09 September 2019.

[449]Ramsay and Williams, 'Peering Forward, Ten Years After' (n 447).

protection afforded the consumer under this regime. Two specific developments in regulatory frameworks illustrate the 'reign' of the consumer: (a) the legitimation of Consumer Protection Agencies; and (b) a more robust understanding of what it means to treat consumers 'fairly' in financial markets.

4.2.1 The Legitimation of Consumer Protection Agencies

In an ideological shift away from the aggressive market liberalisation policies that held sway from 1970 to the 2000s across global financial markets, the World Bank, under the current regime, advocates for a supervisory authority that has a 'mandate for consumer protection, rather than a general consumer protection authority or other authority outside the financial sector'.[450] The logic of this is easy to see but it was not always the case. In the US, the establishment of the Consumer Financial Protection Bureau (CFPB) under the Dodd-Frank Act marked the first time the US will mandate a particular body with financial consumer protection responsibility.[451] Before the Global Recession, such agencies were considered relics of 'unnecessary' state interference and accordingly were either non-existent or poorly funded in many countries.[452] The Financial Conduct Authority in the UK, for example, has recently emphasised the pre-eminence of consumer protection above all its other mandates.[453] Presently, not only are specialised consumer protection agencies being re-legitimated, but their traditional powers are being expanded beyond traditional financial institutions to non-bank financial institutions in rapidly innovating global markets (eg fintech start-ups).[454] This ensures that new kinds of lenders, especially those serving

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[450] World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 8.

[451] GE Elliehausen and others, *Consumer Credit and the American Economy* (New York, Oxford University Press 2014).

[452] See F Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (London, Allen Lane 2016) 152, 420, 550-59.

[453]Financial Conduct Authority, 'About the FCA' (*Financial Conduct Authority*, 19 September 2018) <https://www.fca.org.uk/about/the-fca >accessed 19 September 2018.

[454]World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 9.

low-income groups and vulnerable demographics are not left out of rules designed to protect consumers.[455]

4.2.2 A Robust Understanding of 'Fair Treatment' in Financial Markets

At least two important devices have been used to promote a better treatment of consumer borrowers in the marketplace namely responsible lending and financial capability requirements. The adoption of responsible lending and borrowing obligations for credit transactions[456] has enhanced stronger consumer protection through rules that require that consumers are only offered a product or service that is appropriate for them.[457] Responsible lending obligations impose a duty of care on lenders to assess credit affordability, borrower's ability to repay without compromising the ability to meet basic needs, seek all relevant information from the consumer to facilitate a fair and correct assessment, and prohibits remuneration structures that prevent staff from acting in the best interest of borrowers or cause staff to resort to aggressive commercial tactics to exploit consumer vulnerabilities.[458] It

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[455] ibid.

[456] World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 34.

[457]Principle 6 of the G20 FCP Principles notes that financial service providers should assess the 'financial capabilities, situation and needs of their customers' before providing them with a product, advice, or service.

[458]CONC 5, 'Consumer Credit Sourcebook' (Financial Conduct Authority 2019) <https://www.handbook.fca.org.uk/handbook/CONC/5.pdf>accessed 11 December 2019; Office of Fair Trading, 'Irresponsible lending – OFT Guidance for Creditors 2011' (*The National Archives*, 2 April 2014) <https://webarchive.nationalarchives.gov.uk/20140402162813/http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/consumer_credit_act/oft1107>accessed 11 December 2019. Examples of aggressive tactics used by lenders on consumers include unsolicited SMS loan offers increasingly used in digital credit and abusive loan collection practices (physical or moral threats to the borrower etc.). See International Finance Corporation, 'Responsible Debt Collection in Emerging Markets' (2012) Working Paper 94833 <https://openknowledge.worldbank.org/bitstream/handle/10986/21738/948330WP0Box380ebt0collection0Final.pdf?sequence=1&isAllowed=y>accessed 9 September 2019.

requires lenders to assess the negative effect of a credit agreement on consumer welfare and demonstrate how the concept of 'treating customers fairly' is embedded in all the stages of their business model and practices.[459] This approach to credit regulation evaluates the costs and benefits of regulation against the overall impact on consumer welfare. It seeks to provide consumers with access to finance under terms and conditions that do not create further stress, psychological and mental problems for the consumer.[460]

The UK Consumer Rights Act 2015 has also expanded the scope of an 'unfair contract', delivering a stronger protection regime.[461] In the United States, the Dodd-Frank Act considers an act or practice abusive if it materially interferes with the ability of a consumer to understand a term or condition of a financial product or service or takes

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[459] FCA, FCA Handbook CONC 5.2.1R (2-a); Mortgages and Home Finance: Conduct of Business 11.6. Implementing responsible lending regulation does have its challenges. The obligation is often imprecise with rules adopting terms such as 'adequate, suitable, responsible, and affordable [which] can be interpreted differently by different providers'. See World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 39. In a recent UK review of lenders' compliance with the responsible lending requirements contained in Chapters 11 & Chapter 11A of the Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) and the Senior Management Arrangements, Systems and Controls (SYSC) module of the FCA Handbook, the FCA found that firms have been engaging in practices that seek to avoid such requirements. The most prominent breaches of the requirements include firms basing lending decisions on equity, debt to income ratios or income multiples rather than on income and expenditure assessments; unchallenged but implausible disposable income calculations taking into account an applicant's credit profile; very poor income assessment for self-employed customers; unrealistic assumptions and a lack of transparency around what figures had been used to assess expenditure; some firms' quality assurance and oversight arrangements were not fully capable of identifying unaffordable loans and associated risk; and a willingness by lenders to accept supporting documents at face value, without carrying out further due diligence or authenticity checks etc. SYSC 3.2.6R <https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-second-charge-lenders.pdf>accessed 9 September 2019.

[460] AK Aldohni, 'The UK New Regulatory Framework of High-Cost Short-Term Credit: Is There a Shift Towards a More Law and Society-Based Approach?' (2017) 40 Journal of Consumer Policy 321–345.

[461] See part 2 and paras 11-15, 19 schedule 2 of the Consumer Rights Act 2015 which potentially mitigate the harshness of 'teaser' rates on subprime loans in the UK.

unreasonable advantage of a consumer's: (1) lack of understanding of the material risks, costs, or conditions of the product or service; (2) inability to protect his or her interests in selecting or using a financial product or service; or (3) reasonable reliance on the person offering or providing the product or service to act in his or her interests.[462] In the European Union, the Unfair Terms in Consumer Contracts Directive 93/13/EEC considers a term unfair if it causes a *significant imbalance* in the parties' rights and obligations arising under the contract, to the *detriment of the consumer*.

Arguably, the present responsible lending and unfair terms provisions bear a semblance to fiduciary obligations in that it requires lenders to act in the best interest of consumer borrowers, and not to unduly profit at their expense.[463] With the help of data analytics, regulators in more advanced jurisdictions can now review contract documents, and many countries have adopted an ongoing periodic review strategy.[464]

Since the Global Recession, an increasing number of countries have introduced statutory requirements to perform affordability assessments such as the EU Directive on Mortgage Credit (2014) and the Dodd-Frank Act in the United States. The EU, for example, has introduced a duty to 'educate' consumers about responsible borrowing and debt management following the social upheaval occasioned by the Recession.[465]

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[462] section 1031 (d) Dodd-Frank Wall Street Reform and Consumer Protection Act 2010.

[463] For example, a loan contract that exploits the imperfect rationality of a borrower (eg markets to them an unsuitable product) could still be valid at common law based on the principle of freedom of contract. However, such a contract could be vitiated by current statutory regulations. In practice, this imposes a duty of trust and confidence on lenders to advance the borrower's interest. According to Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 18: 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence… he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.' In other words, a lender is not subject to fiduciary obligations because he is a fiduciary, but because he is subject to fiduciary obligations, he is a fiduciary.

[464] World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 44.

[465] For the pre-financial crisis EU Paradigm, refer to the Consumer Credit Directive of 1987, 1995. An attempt to extend Belgian Usury laws to the EU was not welcome by members like the UK. So, the EU began on a more liberal footing and later aimed to shift to a more restrictive paradigm. As the EU's

Similar requirements are now in place in South Africa, Mexico, Australia, and Uganda, among others with a few exemptions for educational loans.[466] In 2011, the G20 evolved its high-level principles for consumer protection with ten key pillars. The framework acknowledges that 'transparency alone is not always sufficient' thereby making a case for 'measures that ensure responsible business conduct and improve financial education'.[467] The allure of responsible lending obligations follows from the evidence that irresponsible lending occurs because of lenders' efforts to avoid the costs of assessing creditworthiness in a competitive market, to win new business or increase market share or exploit consumers' imperfect rationality.[468]

Apart from responsible lending obligations, the UK introduced caps on the number of times a high-cost short term credit can be rolled over, and imposed a price cap on interest, fees and default charges.[469] Ultimately, the FCA has now published a report

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2002 draft directive sought to balance access with protection, protective measures that were thought to constrain access (price caps, interest ceilings) were rejected in some national jurisdictions including the UK. See I Ramsay, 'Changing Policy Paradigms of EU Consumer Credit and Debt Regulation' in D Leczykiewicz and S Weatherill (eds), *The image of the Consumer in EU Law* (Oxford, Hart Publishing 2016). The 2008 Credit Directive introduced a watered-down responsible lending regime.

[466] Article 8, Directive 2008/48/EC of the European Parliament and the Council (Official Journal of the European Union, L 133/66). See also G Davel, *Regulatory Options to Curb Debt Stress.* (CGAP 2013).

[467] OECD, *G20-OECD Task Force on Financial Consumer Protection* (OECD 2012) <http://www.oecd.org/finance/financial-education/g20-oecd-task-force-financial-consumer-protection.htm>accessed on 9 September 2019.

[468] K Fairweather, 'The Development of Responsible Lending in the UK Consumer Credit Regime' in J Devenney and M Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge, Cambridge University Press 2012) 84-110.

[469] Financial Conduct Authority, 'Detailed Rules for the Price Cap on High-Cost Short-Term Credit including Feedback on CP14/10 and Final Rules' (*FCA*, November 2014) <https://www.fca.org.uk/publication/policy/ps14-16.pdf>accessed 11 December 2019; Financial Conduct Authority, 'FS17/2: High-Cost Credit and Review of the High-Cost Short-Term Credit Price Cap' (*FCA*, January 2018) <https://www.fca.org.uk/publications/feedback-statements/fs17-2-high-cost-credit>accessed 11 December 2019.

advocating alternatives to high-cost-short-term credit such as borrowing from credit unions and lenders with 'social objectives'.[470] These changes indicate a departure from the Consumer Credit Act of 1974 and the intellectual resistance that had existed towards interest rate caps in the UK. For example, the neo-classical economic critique that interest rate controls are, at best, ineffective and inefficient,[471] and at worst, counterproductive to financial inclusion objectives[472] has been disproved by the FCA in the UK which found that interest rate caps have a net benefit to consumers of High-Cost Short Term loans and only excludes the most high-risk borrowers from the

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470 Financial Conduct Authority, 'Alternatives to High-cost Credit Report' (*FCA*, July 2019) <https://www.fca.org.uk/publication/research/alternatives-high-cost-credit-report.pdf>accessed 11 December 2019.

471 GE Elliehausen and others, *Consumer Credit and the American Economy* (New York, Oxford University Press 2014).

472 H Bodenhorn, 'Usury Ceilings and Bank Lending Behavior: Evidence from Nineteenth-Century New York' (2007) 44 (2) Explorations in Economic History 179-202; P Temin and HJ Voth, 'Financial Repression in a Natural Experiment: Loan Allocation and Change in the Usury Laws in 1714' (2008) 118 The Economic Journal 743-58; JR Barth, JJ Cordes, and AMJ Yezer, 'Benefits and Costs of Legal Restrictions on Personal Loan Markets' (1986) 29 (2) The Journal of Law and Economics 357-80; B Efraim and TJ Moskowitz, 'The Political Economy of Financial Regulation: Evidence from U.S. State Usury Laws in the 19th Century' (2010) 65 (3) Journal of Finance 1029-73; *contra* DJ Villegas, 'An Analysis of the Impact of Interest Rate Ceilings' (1982) 37 (4) Journal of Finance 941-54 that no evidence interest rates are reduced for the rich; DR Morgan, MR Strain, and I Seblani, 'How Payday Credit Access Affects Overdrafts and other Outcomes' (2012) 44 (2-3) Journal of Money, Credit, and Banking 519-531. However, some studies found that payday loans lead to an increase in bankruptcy filings. See DR Morgan and MR Strain, 'Payday Holiday: How Households Fare After Payday Credit Bans' (2008) Federal Reserve Bank of New York Staff Report Number 309; BT Melzer, 'The Real Costs of Credit Access: Evidence from the Payday Loan Market' (2011) 126 (1) Quarterly Journal of Economics 517-55; B Neil, PM Skiba, and J Tobacman, 'Payday Loan Choices and Consequences' (2015) 27 (2-3) Journal of Money, Credit and Banking 223-260. In the UK, a cap on the number of roll overs by the Financial Conduct Authority was justified as welfare enhancing. See BJ Wilson and others, 'An Experimental Analysis of the Demand for Payday Loans' (2010) 10 (1) The BE Journal of Economic Analysis & Policy 1-31; R Austin, 'Of Predatory Lending and the Democratisation of Credit: Preserving the Social Safety Net of Informality in Small Loan Transactions' (2004) 53 American University Law Review 1217.

market.[473] Overall, the regulatory focus has shifted from contract terms to the broader relationship between businesses and consumers.

The second important device that explains the pre-eminence of consumer wellbeing under the current regime is the pursuit of financial capability as a market outcome. The World Bank defines financial capability as 'the capacity of a consumer to make informed decisions and act in one's best financial interest, given socio-economic and environmental conditions.'[474] Although this definition of financial capability offers much greater clarity about the scope of the concept than Armatya Sen's earlier definition,[475] it does not go far as Sen's approach to argue for an open-ended recognition of specific capabilities as human rights.[476] The World Bank's approach to financial capability currently stops short of establishing a consumer right in the form advocated by Sen and others. However, it adds to the growing evidence against the presumption of consumer rationality, and offers a ground to challenge the validity of loan contracts entered into by consumers lacking the 'knowledge, skills, attitudes, and confidence [required] to make financial decisions that are appropriate to their circumstances'.[477]

Aside from the World Bank, other international institutions are committing more resources to support regulators to meet the 'need to equip' consumers with financial capabilities. The OECD has developed the High-Level Principles on National Strategies for Financial Education and the Guidelines for Private and Not-for-Profit

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[473] Financial Conduct Authority, *High-cost Credit Review – Update* (*FCA,* January 2018) <https://www.fca.org.uk/publication/feedback/high-cost-credit-review-update.pdf>accessed 9 September 2019. See also IFF/ZEW, 'Study on Interest Rate Restrictions in the EU' (2010) Final Report for the EU Commission DG Internal Market and Services Project No. ETD/2009/IM/H3/87 <https://publications.europa.eu/en/publication-detail/-/publication/46a336d0-18a0-4b46-8262-74f0e0f47eb3>accessed 9 September 2019.

[474] World Bank, *Financial Capability Surveys Around the World: Why Financial Capability Is Important and How Surveys Can Help* (World Bank Group 2013).

[475] A Sen, 'Human Rights and Capabilities' (2005) 6(2) Journal of Human Development 151-66. See para 3.5.1.

[476] A Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) Philosophy & Public Affairs 315-56.

[477] ibid.

Stakeholders in Financial Education towards this objective, and with the guidance of the International Network on Financial Education. The World Bank recommends the establishment of National Financial Capability Strategy that identifies capability gaps of citizens, especially youth, women, low-income groups, and the elderly and all others with the greatest need for financial education.[478] One good example of international financial capability and literacy measurement instrument developed to support financial consumers is the World Bank's Financial Capability and Consumer Protection Questionnaire,[479] designed by the World Bank's Responsible Financial Access Team to measure financial capability and financial literacy projects by the OECD and the Alliance for Financial Inclusion.[480]

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[478] See National Strategies for Financial Education: OECD/INFE Policy Handbook (OECD 2015).

[479] E Kempson, V Perotti, and K Scott, *Measuring Financial Capability: A New Instrument and Results from Low- and Middle-Income Countries* (International Bank for Reconstruction and Development and the World Bank 2013) <http://pubdocs.worldbank.org/pubdocs/publicdoc/2015/6/942081434378248135/ measuring-financial-capability-a-new-instrument-andresults-from-low-and-middle-income-countries-summary. pdf.>accessed 9 September 2019.

[480]OECD, 'Russia-OECD-World Bank Financial Literacy Programme' (*OECD*, June 2013) http://www.oecd.org/daf/fin/financial-education/russia-oecd-world-bank-financial-literacy.htm.>accessed 9 September 2019. See also OECD, 'Recommendation on Principles and Good Practices for Financial Education and Awareness' (*OECD*, July 2005) <https://www.oecd.org/daf/fin/financial-education/35108560.pdf>accessed 9 September 2019; World Bank, 'Financial Education Programs and Strategies: Approaches and Available Resources' (2014) World Bank Brief 1/108104 <http://documents.worldbank.org/curated/en/901211472719528753/Financial-education-programs-and-strategies-approaches-and-available-resources>accessed 9 September 2019; IBRD and World Bank, 'Making Sense of Financial Capability Surveys around the World: A Review of Existing Financial Capability and Literacy Measurement Instruments' (2013) World Bank Working Paper 80614 <https://openknowledge.worldbank.org/bitstream/handle/10986/16251/806140WP0Revie0Box0379807B00PUBLIC0.pdf?sequence=1&isAllowed=y>accessed 9 September 2019; A Lusardi and OS Mitchell, 'The Economic Importance of Financial Literacy: Theory and Evidence' (2014) 52 (1) Journal of Economic Literature 1–40.

Thus, consumer protection under this regime employs a cost-benefit analysis (CBA) approach that quantifies in monetary terms the consequences of consumer borrowing to all members of the society as opposed to narrow trade-offs in utility gains to markets and individual borrowers.[481]

4.3 THE COLLAPSE OF THE INFORMATION PARADIGM

A second important character of the current regulatory regime is the decline of information as an all-enough consumer protection tool. Financial market regulation before the Global Recession was an information regime. Information was a particularly attractive tool because regulators find it convenient to minimise cost,[482] shift difficult choices to private individuals, under the working assumptions that consumer access to information is easy (presumably facilitated by technology), and because the consumer is a rational utility maximiser.[483] Ostensibly, it was deemed to be in the consumer's interest to 'decentre regulation' and to transform regulatory forms and arrangements, from the traditional command-and-control to a co-regulatory regime and in some cases self-regulation.[484] Regulation requiring *more* than providing information to consumers was considered inefficient.[485] The traditional

[481]A CBA undertakes a systematic cataloguing of impacts as benefits (pros) and (cons), valuing in dollars (assigning weights), and then determining the net benefits of the proposal relative to the status quo (net benefits equal benefits minus costs). See AE Boardman and others, *Cost-Benefit Analysis: Concepts and Practice* (4th ed, Cambridge, Cambridge University Press 2018).

[482]KJ Hopt and others, *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford Scholarship Online 2012) 307.

[483] Commission of the European Communities, 'Green Paper on Retail Financial Services COM 2007/226' (*EUR-Lex*, April 2007) 32 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007DC0226>accessed 9 September 2019.

[484] J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 (1) Current Legal Problems 103–46.

[485]A Ogus, 'Regulation Revisited' (2009) Public Law 332. Co-regulation departs from 'the notion that society has needs (problems) and government has capacities (solutions)' in favour of one that sees both as having problems (needs) and solutions (capacities), and 'mutually dependent on each other for their resolution and use'. Self-regulation or private regulation, on the other hand, is often articulated as regulation that avoids the problems of public regulation (command and control) but one that co-ordinates, steers, influences, and balances interactions between actors/systems, and creates 'new

neo-classical theory was that the government's social objective towards protecting a borrower is to educate her about her economic and financial vulnerabilities- as to do more will be paternalistic.[486] For example, the EU's Consumer Credit Directive 1987 preferred the information approach to provisions stipulating terms[487] lenders must include in contracts for the benefit of consumers.[488]

The gains of financial information from a consumer protection perspective are, however, negligible.[489] For example, the model failed to pre-empt the Global Recession of 2007-09.[490] The causes of the decline of the information paradigm include growing financial product complexity over the last three decades and its global

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patterns of interaction which enable social actors/systems to organise themselves, using such techniques as proceduralization, collibration, feedback loops, redundancy, and above all, countering variety with variety.' One critique of self-regulation, however, is that it is 'self-serving, self-interested, lacking in sanctions, beset with free-rider problems, and simply a sham'. See J Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 (1) Current Legal Problems 103–46.

[486] J Gathergood, 'Self-Control, Financial Literacy and Consumer Overindebtedness' (2012) 33 Journal of Economic Psychology 590-602.

[487] For example, providing that lenders must inform borrowers of the annual percentage rate of charge for credit, or the total amount that the consumer must pay for credit. See Preamble, Articles 4 and 5, Consumer Credit Directive, 1987 (87/ 102/EEC).

[488] The EU's adoption of the information model was, in part a capitulation to the domestic policies of the more influential member states like the UK and Germany. Both countries vehemently opposed the attempt to extend Belgian Usury laws to the EU. The EU would later take the lead in shifting to a more protective approach after the Global Recession. See I Ramsay, 'Changing Policy Paradigms of EU Consumer Credit and Debt Regulation' in D Leczykiewicz and S Weatherill (eds), *The Image of the Consumer in EU Law* (Oxford, Hart Publishing 2016).

[489] D Fernandes, JG Lynch, and RG Netemeyer, 'Financial Literacy, Financial Education, and Downstream Financial Behaviors' (2013) 60 (8) Management Science 1861 – 1883.

[490] I Ramsay, 'The Regulation of Consumer Credit' in G Howells, I Ramsay, T Wilhelmsson, and D Kraft (eds), *Handbook of Research on International Consumer Law* (Cheltenham, Edward Elgar Publishing Limited 2010) 383.

spread,[491] advances in behavioural science,[492] and a falling belief in the ability of free markets to self-correct.[493]

With greater reliance on behavioural science,[494] regulators must now make rules that take consumers' bounded rationality into cognizance .[495]According to the Financial Conduct Authority in the UK, a BE-informed approach to regulation allocates consumer and firm responsibility based on 'how individuals in markets behave in practice rather than just according to theory'.[496] The Court of Justice of the European Union has also received guidance from DG Sanco recommending that judges consider the latest insights of BE in interpreting the provisions of the Unfair Commercial Practices Directive.[497]

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[491] For example, Digital credit poses a severe danger of ineffective disclosure because too often the terms of the loan are incomplete and displayed on a small screen, while contracts are rapidly and remotely concluded leaving no room for customers to ask questions of staff. See also GR Krippner, 'The Financialization of the American Economy' (2005) 3 Socio-Economic Review 173-208.

[492]R Baldwin, 'Is Better Regulation Smarter Regulation?' (2005) Public Law 485.

[493]I Ramsay, 'Between Neoliberalism and the Social Market: Approaches to Debt Adjustment and Insolvency in the EU' (2012) 35 (4) Journal of Consumer Policy 421-444. See also I Ramsay and T Williams, '"The Crash That Launched A Thousand Fixes": Regulation of Consumer Credit after the Lending Revolution and the Credit Crunch' in K Alexander and N Moloney (eds), *Law Reform and Financial Markets* (Cheltenham, UK, Edward Elgar 2011) 221; G Bertola, R Disney and C Grant (eds), *The Economics of Consumer Credit* (Boston, MIT Press 2006) Ch 1; *contra* P Lunn, 'Behavioural Economics and Policymaking: Learning from the Early Adopters' (2012) 43 (3) The Economic and Social Review 423-49.

[494] GE Elliehausen and others, *Consumer Credit and the American Economy* (New York, Oxford University Press 2014); World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 14.

[495] M Stearns and TJ Zywicki, *Public Choice Concepts and Applications in Law* (St. Paul, West 2009).

[496] Financial Conduct Authority, 'FCA Mission: Our Future Approach to Consumers' (*FCA*, December 2017) <https://www.fca.org.uk/publication/corporate/our-future-approach-consumers.pdf>accessed 9 September 2019.

[497] Council Regulation 2005/29/EC Concerning Unfair Business-To-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22. Doing this is, however, more difficult

A panoramic view of all the specific rules in the particular jurisdictions discussed points to a new paradigm under which strict disclosure rules have been implemented to regulate not only what information lenders must present but also how they present it.[498] This change is significant because it neither constrains regulation's role to simply curing information asymmetry nor assumes that information asymmetry simply means the absence of information.[499] Specifically, regulators have introduced new obligations on lenders to present information in targeted ways with an emphasis on form and format, highlighting/standardising disclosure of crucial features, and consumer testing.

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for judges compared to regulators because of the threshold of proof required. See Ramsay, 'Changing Policy Paradigms of EU Consumer Credit and Debt Regulation' (n 488).

[498] World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 15.

[499]A Rona-Tas, 'The Role of Credit Bureaus in Globalised Economies: Why They Matter Less Than We Think and How They Can Matter More' in HW Micklitz and IM Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (London, Routledge 2016). Generally, information is a preferred tool under the neo-liberal approach. Secondly, the rationality approach favoured this tool because of the neo-classical economists' principled opposition to paternalism. Paternalism has been defined as 'the interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good happiness, needs, interests or values of the person being coerced'. See G Dworkin, 'Paternalism' in RA Wasserstrom (ed), *Morality and the Law* (California, Wadsworth Belmont 1971) 108. See also J Kleinig, *Paternalism* (Manchester, Manchester University Press 1983) chapter 1. The underlying assumption is that regulators can improve social welfare by promoting preferences individuals ought to adopt if they had responded rationally to the information supplied. Neo-classical market traditions disapprove of paternalism for several reasons beginning again with autonomy, costs, and perverse incentive. The philosophical argument that individuals are rational agents who must be trusted to make their own decisions is taken further with the critique that to allow the government to make such decisions for individuals is to undermine autonomy and encourage dependence on government. See KJ Hopt and others, *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford Scholarship Online 2012) 307. See also S Breyer, *Regulation and Its Reform* (Cambridge, Harvard University Press 1982) 33-34; CR Sunstein (ed), *Behavioral Law and Economics* (Cambridge, Cambridge University Press 2000); cf claims that information leads to consumer sophistication. See BJ Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 Villanova Law Review 1705-56.

4.3.1 Form

Traditional contract law has always regulated terms of contract and advertising contents such as rules around misrepresentation, explaining terms to infants, the disabled, and the illiterate.[500] Equitable remedies such as undue influence and duress have also protected consumers from overbearing businesses/merchants.[501] The key distinction of the current approach is that it is more outcome-oriented ie 'is/can the information [be] understood by an average consumer?' The law of contract is ultimately more interested in *keeping the consumer informed*, whereas the current approach seeks to design regulation that mandates service providers to guide consumers towards *making welfare-enhancing* decisions and does not treat information as an end. The former approach considered cognitive biases and socio-economic factors (for example product suitability and compulsory creditworthiness assessment by lenders) extraneous to law and without weight in determining the outcome/fairness of transactions.[502] However, empirical findings have shown that *normal* human cognition is *inherently* biased such that being attentive to this cognitive bias (deemed subjective under the traditional approach) is the objective way to design effective regulation.[503] This can be illustrated with the *caveat emptor* rule that underlined the legal dichotomy between patent and latent defects in goods in relation to contract enforcement. The traditional approach took for granted that consumers are

[500] In addition to introducing a licensing regime that enabled the Credit Commissioner to suspend irresponsible lenders from market participation, courts were empowered to void 'extortionate' (now supplanted by an unfair relationship test), 'grossly exorbitant' credit contracts or contracts that run against the principle of fair dealing. See ss 137 (1), 138 (1-5) Consumer Credit Act 1974.

[501] *Barton v Armstrong* [1976] AC 104.

[502] For example, the Crowther Committee recommended an open, transparent and competitive market as the way forward noting that users of consumer credit are 'adults who are capable of managing their financial affairs' and tight restrictions would merely 'protect the relatively small minority who get into difficulties' at the expense of access. See Committee on Consumer Credit Law, *Consumer Credit: Report of the Committee* (Cmnd 4596,1971).

[503] See para 3.4.4 Ch 3 for a fuller discussion of the impact of behavioural insights on policy.

always able to make the right choice where there is a patent defect,[504] where the puff can be easily spotted,[505] and so long as they have been allowed to look at the agreement in a language they understood. The BE-informed approach seeks to prevent the marketing of defective and harmful products from the market altogether. It thus sets a higher floor for consumer protection. Under the current approach, an unsuitable loan contract, which could be considered a form of patent defect, is voidable under the provisions of responsible lending legislation where the borrower defaults on repayment obligations or seeks to avoid the contract.[506]

4.3.2 Format and Plain Language

The current approach to disclosure regulation recognises that the format in which information is presented could have a profound impact on comprehension and welfare outcomes for consumers. Accordingly, the use of plain, everyday language is now preferred to archaic and formalistic language in contracts. A good example is South Africa, where the National Credit Act stipulates that documents must use 'plain language'. Plain language is defined as a language for which it is 'reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and importance of the document without undue effort.'[507] In the UK, similar provisions are now embedded in sections 68-69 of the Consumer Rights Act 2015.

4.3.3 Key Fact Statements

The World Bank recommends that disclosures and communications in loan contracts give prominence to such critical features of the loan as price, the credit limit, the total amount due, due date, the minimum payment required, and total interest cost that

[504] *Chandelor v Lopus* Cr Jac 4 79 Eng Rep 3 (1603). Also see *Parkinson v Lee* 2 East 314, 102 Eng Rep 389 (1802).

[505] *Dimmock v Hallett* LR 2 Ch App 21.

[506] See para 4.2.2 above.

[507] Section 64 of South Africa's National Credit Act 34 of 2005.

will accrue if the borrower pays less than the total amount due.[508] The shift in the disclosure requirements is instructive. The focus of contract regulation traditionally was to ensure that lenders make only true statements. For example, misrepresentation in contractual terms was defined as 'a false statement of fact or law which induces the representee to enter a contract'.[509] However, with the current regulatory approach, parties who design credit contracts must ensure that they not only present truthful statements but present such statements in a way that can be understood by consumers, and does not exploit their cognitive biases. For example, in Australia and the United States, there are requirements for credit card statements to prominently display the number of months or years it would take customers to pay off the total balance should they continue to pay only the minimum amount.[510] Important terms like these can be emphasised using a differentiating format such as font size and bold font, as well as placement.[511]

4.3.4 Consumer Testing

Finally, there is a growing preference for consumer testing of disclosures to see how words and language are construed and understood. This can be achieved through focus groups and interviews[512] and active engagement between authorities and financial service providers to resolve consumer biases using better disclosure tactics supported by consumer research.[513]

In summary, regulators, before this regime, were more content to provide information to financial consumers, and placed too much weight on individual agency. However,

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[508] World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 24. See also COBS 13, 'Conduct of Business Sourcebook' (Financial Conduct Authority 2019) <https://www.handbook.fca.org.uk/handbook/COBS/13.pdf>accessed 11 December 2019.

[509] Misrepresentation Act 1967 s 7.

[510] ibid.

[511] ibid.

[512] Section 64 of South Africa's National Credit Act 34 of 2005.

[513] International Telecommunications Union, 'ITU-T Focus Group: Digital Financial Services' (ITU 2017) <https://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-DFS-2017-4-PDF-E.pdf>accessed 9 September 2019.

the new approach to disclosure rules is designed to restrict the deliberate exploitation of consumer biases by financial firms in a way that a mere focus on consumer education does not.[514] It ignores the problem of paternalism which preoccupied policymaking under the rationality approach but instead seeks to improve social welfare by promoting the preferences individuals ought to adopt had they responded rationally to the information supplied.[515]

4.4 FROM COMPENSATION TO APPREHENSION/PREVENTION

Post-Global Recession regulation is, in many ways, an *ex ante* regime. In terms of supervision and enforcement, this regime is 'risk-based and forward-looking', and empowers the regulatory authority to 'negotiate and impose pre-emptive and corrective measures', preferably proactive protection regimes.[516] Two main reasons justify this shift namely the cost of *ex post* recourse for weaker consumers and the ever growing power of lenders in the age of digitisation.

Ex ante recourse is especially suitable to the needs of consumers on a low income who may lack the awareness, knowledge, confidence, education levels, or means to afford overly formal procedures to enforce contractual or other forms of rights.[517] However, where consumers have to resort to *ex post* remedies, the World Bank strongly recommends alternative models to the courts such as independent ombudsman services, ADR services offered by regulators, conciliation schemes, financial dispute resolution centres, industry associations or industry-led schemes, and collective

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[514] J Armour, 'Regulating Consumer Finance' in J Armour and others (eds), *Principles of Financial Regulation* (Oxford, Oxford University Press 2016).

[515] KJ Hopt and others, *Corporate Governance in Context: Corporations, States, and Markets in Europe, Japan, and the US* (Oxford Scholarship Online 2012) 307. See also S Breyer, *Regulation and Its Reform* (Cambridge, Harvard University Press 1982) 33-34; CR Sunstein (ed), *Behavioral Law and Economics* (Cambridge, Cambridge University Press 2000).

[516] World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 16.

[517] OECD, 'Update Report on the Work to Support the Implementation of the G20 High-Level Principles on Financial Consumer Protection G20/OECD Task Force on Financial Consumer Protection: Principles 4, 6 and 9 (*OECD*, September 2013) <https://www.oecd.org/daf/fin/financial-education/G20EffectiveApproachesFCP.pdf>accessed 9 September 2019.

redress mechanisms (such as collective actions and collective settlements).[518] This is very important because in many developing countries, the judicial system is 'too burdensome, expensive, unreliable, intimidating, or not timely for poor consumers'.[519]

Secondly, global credit markets are more complex today than at any point in history and while this has improved intermediation particularly in advanced markets, the scale of risk to consumers is unprecedented thereby rendering *ex post* remedies inadequate for new lending models.[520] Take the case of digitisation which has tilted the balance of power ever more towards lenders. One sensitive area is credit reporting:

> Credit reporting is a crucial component of modern financial systems and a critical driver for efficiency in lending to consumers. Databases containing information relevant to making credit decisions, such as credit histories, personal data, and other information, represent a great concentration of power. For this reason, the impact of misuse, mishandling, or errors is potentially damaging to individuals.[521]

The flow of customers' personal information between financial service providers and agents and between members of a corporate group and the increasing likelihood of information being received and held electronically poses a corresponding increase in the risk of remote, unauthorized access to such data.[522] To manage this risk, the trio of the OECD, the World Bank, and the United Nations have focused mainly on

[518] World Bank, 'Good Practices for Financial Consumer Protection' (n 448) 51.

[519] Principle 9 of the G20 FCP Principles.

[520] Digital finance presents new risks for the consumer, along with the exciting opportunities for financial inclusion. One example is how it problematises the principle of informed consent. A vivid illustration is the rate at which retail agents of digital financial services in developing countries have access to customers' transaction PINs or passwords to assist customers complete transactions. Although such access is usually with the consent of the customer, the risk to data security is real, especially for an uneducated class of consumers. See International Telecommunications Union, 'ITU-T Focus Group: Digital Financial Services' (ITU 2017) <https://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-DFS-2017-4-PDF-E.pdf>accessed 9 September 2019.

[521] World Bank, *General Principles for Credit Reporting* (Washington, DC, World Bank 2011).

[522] ibid.

promoting consumers' autonomy in the market place through a proactive system of consumer rights to privacy to prevent the abuse of data by keeping consumers 'informed about data-sharing, [giving] access to [personal] data and to obtain the prompt correction or deletion of inaccurate, or unlawfully collected or processed data'.[523] In furtherance of this regulatory trend, in 2018 the EU introduced the General Data Protection Regulations, arguably the most far-reaching data privacy law globally.[524]

In summary, at all stages of the dispute resolution process beginning with the internal procedures for how consumers can raise complaints, the time taken to process customer complaints, the language in which complaints can be made, and the overall cost of lodging a complaint eg distance travelled, transportation cost, or time spent on the waiting list, lenders are required to ensure that consumers are addressed in the most efficient manner.[525]

4.5 THE NEW ASSUMPTIONS ABOUT CONSUMER WELFARE

The first part of this chapter highlighted the vital changes in the approach to credit market regulation after the Global Recession. Although some of these ideas were in place in some jurisdictions before 2008, they became more influential after the Recession. These changes are fundamental in terms of outcomes for consumers, and because they derive from a new set of assumptions about how best to promote consumer welfare through regulation.

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[523] World Bank, 'Good Practices for Financial Consumer Protection' (n 448); UNCTAD, *Guidelines for Consumer Protection* (2016) United Nations Guideline UNCTAD/DITC/CPLP/MISC/2016/1>accessed 9 September 2019. See also the EU's General Data Protection Regulation 2016/679 implemented in 2018.

[524] Council Regulation (EU) 2016/679 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

[525] R Mazer and N Garg, 'Recourse in Digital Financial Services: Opportunities for Innovation' (*CGAP*, December 2015) <https://www.cgap.org/sites/default/files/researches/documents/Brief-Recourse-in-Digital-Financial-Services-Dec-2015.pdf >accessed 9 September 2019.

This section examines more closely the underlying reasons for adopting the regulatory changes discussed in the previous section. Understanding the lessons of the shift in regulatory approach is critical to understanding why such a pro-consumer turn at the transnational level does not automatically translate to improved regulation both for access to consumer credit and protection in Nigeria. Secondly, it highlights how national regulators in powerful countries depart from neoliberal economic orthodoxies when it suits them, setting the stage for the discussion of why regulators in developing countries are weaker and slower to adapt policy to new market realities in subsequent chapters.

4.5.1 The Lost Allure of Credit and Reversal of the Democratisation Narrative

The transnational regulatory shift received impetus from better appreciation of the dangers of unrestricted access to consumer borrowing and the behaviours of credit providers. It is worth mentioning, however, that the dynamics of developed markets are unique. The reason consumer credit expansion became unpopular in developed markets does not explain financial exclusion in Nigeria. In much of the developed markets, harmful consumer lending was mainly undertaken by *mainstream* financial institutions, consumer borrowers enjoyed relatively lower interest rates, higher overall income prospects, and a more robust insolvency regime compared to consumer borrowers in developing countries. The Recession was therefore not caused by *access* to consumer credit or regulation, but mainly by lax regulation and weak supervision of financial markets which allowed unsafe products to be floated on the market.[526] There was, nevertheless, a deliberateness to the synergy between fiscal and monetary policy which was instrumental to the low interest rates and income levels in developed markets.[527] This coordination was self-interested and even though

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[526] BS Bernanke, TF Geithner, and HM Paulson, *Firefighting: The Financial Crisis and its Lessons* (New York, Penguin Books 2019) 25. See also US Department of the Treasury, 'Financial regulatory reform: A new foundation' (2009) <http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf> accessed 13 August 2019.

[527] N Hillman, 'The Coalition's Higher Education Reforms in England' (2016) 42 (3) Oxford Review of Education 330-345. See also B Akers and MM Chingos, *Game of Loans: The Rhetoric and Reality of Student Debt* (Princeton University Press 2016) 4.

inadequate, was well-intentioned in that it aimed to sustain consumption by supplementing stagnating wages with credit expansion.[528] In the UK for example, the Bank of England found that consumer credit grew at an annual rate of 10.9 per cent between 2005 and 2016 fuelled by extended interest-free periods on credit card balance transfer offers and an increase in credit card limits in some parts of the unsecured personal loan market.[529]

After the Global Recession, regulators sought to eliminate unsafe lending practices while preserving banks' capacity to advance safe loans to keep the economy going. OECD countries responded to the Global Recession by extending consumption packages, adjusting tax policies to stimulate demand, recapitalising banks with explicit safeguards to enhance banks' capacity for financing SMEs including public credit guarantees, insurance, factoring for receivables and better payment discipline by governments.[530] To further cushion the impact of the new stringent rules on sub-prime borrowers in OECD countries, government initiated additional measures including cutting employment taxes or social security charges and extending temporary unemployment programmes.[531] In some emerging markets, India, for

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[528] A Barba and M Pivetti, 'Rising Household Debt: Its Causes and Macro-Economic Implications—A Long-Period Analysis' (2009) 33 (1) Cambridge Journal of Economics 113. For references to the recent literature on this model, see S Fazzari and B Cynamon, 'Inequality and Household Finance During the Consumer Age' (2013) Levy Economics Institute Working Paper 752 <http://www.levyinstitute.org/pubs/wp_752.pdf>accessed 9 September 2019. See also G Dumenil and D Levy, *The Crisis of Neoliberalism* (Cambridge, Harvard University Press 2012); RG Rajan, *Fault lines: How Hidden Fractures Still Threaten the Economy* (New Jersey, Princeton University Press 2010) 21, 8-9: 'Cynical as it may seem, easy credit has been used as a palliative throughout history by governments that are unable to address the deeper anxieties of the middle class directly'. See also C Crouch, *The Strange Non-Death of Neo-Liberalism* (Cambridge, Polity Press 2011) who develops the concept of 'privatised Keynesianism'.

[529] Bank of England, 'Record of the Financial Policy Committee Meeting 22 March 2017' (*Bank of England,* April 2017) <https://www.bankofengland.co.uk/-/media/boe/files/record/2017/financial-policy-committee-meeting-march-2017.pdf>accessed 9 September 2019.

[530] A Sinha, R Kumar, and SC Dhal, 'Financial Sector Regulation and Implications For Growth' (2011) BIS Papers No 62 <https://www.bis.org/publ/bppdf/bispap62g.pdf>accessed 9 September 2019.

[531] ibid.

example, exempted hard hit sectors from compliance with the risk weights and general provisions on capital exposure.[532]

As noted earlier,[533] unlike developed markets, it is a misnomer to speak of the democratisation of credit, especially consumer credit, in Nigeria. Much of consumer lending in Nigeria is conducted by fringe lenders, interest rates are very high across both formal and informal markets, individual insolvency regimes are restrictive, and income prospects are low.[534] To compound these, synergy between monetary and fiscal policy is sub-optimal due to poor fiscal management and a 'conservative' central bank preoccupied with holding down inflation and less interested in 'stimulating' consumer borrowing.[535] For example, in response to the the Nigerian banking crisis which coincided with the Global Recession (2007-09), the federal government failed to implement fiscal policy initiatives[536] to supplement the CBN's response (to bail out big time debtors), especially to guarantee lending to SMEs and consumers.[537] The further contraction of consumer lending by formal lenders in Nigeria since 2009 is, therefore, no accident but the outcome of *deliberate* regulatory policy which has led to more unsafe borrowing.[538]

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[532] ibid.

[533] See para 3.3.2 Ch 3.

[534] See chapter five for findings of the qualitative case study.

[535] The CBN no doubt liberally promotes credit expansion but not for consumption purposes, and to that extent 'conservative'. The logic of maintaining high prime lending rates so as not to further 'stimulate' consumption is however disingenuous given that consumer borrowing in informal markets is an ongoing reality, and a major welfare concern for Nigerian consumers. See para 3.2.2 for discussion of the realities of consumer borrowing in Nigeria. A more honest and logical claim would be that the CBN is overburdened by its primary duty to keep down inflation, partly because fiscal policy is less supportive. See S Apati, *The Nigerian Banking Sector Reforms: Power and Politics (First Edition)* (Palgrave Macmillan Studies in Banking and Financial Institutions 2012) 71.

[536] Endemic corruption, weak infrastructure and a narrow extractive economy undermine its capacity to provide social security for about 195 million citizens in the form that exists in Western States.

[537] See para 5.2 Ch 5 for a discussion of the CBN's policy responses to the banking crisis.

[538] See para 5.2.1 below for a full discussion of this point.

For decades, IFIs have committed enormous resources to financial inclusion as a key pillar of poverty reduction campaigns in the developing world[539] but have dithered to define a robust framework for consumer lending by mainstream financial institutions in these countries. Instead, microfinance schemes were championed to provide low-income earners with access to financial services, especially credit.[540] Ironically, financial inclusion through microfinancing absolves mainstream financial institutions of any obligation of the type borne by MFIs even though the former is better placed in terms of resources to meet such 'needs'.[541] While microfinance has helped to include millions of low-income individuals in the formal financial market, it has failed to significantly fulfil its social promise to provide the poor with affordable credit for investment in basic consumer needs like education and healthcare.[542] Where microcredit availed low-income households, it was found to be expensive and led to higher debt levels and poverty.[543] One reason for this is that although microfinance is designed for small businesses, many borrowers use advances for consumption purposes for which they are unsuitable. More importantly, microfinance credit is found to flow to the rich too often rather than lower-income groups. In India, microfinance loan portfolio grew at a substantially higher rate than branches, employees or clients leading to the concentration of more debt within the same client

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[539] M Johnson, 'Financial Sector Reform in Structural Adjustment Programmes' in WV der Geest (ed), *Negotiating Structural Adjustment in Africa* (New York, United Nations Development Programme 1994) 175-85.

[540]IMF, 'Global Financial Stability Report: Household Credit Growth in Emerging Market Countries' (*IMF*, September 2006) Ch II <https://www.imf.org/~/media/Websites/IMF/imported-flagship-issues/external/pubs/ft/GFSR/2006/02/pdf/_chap2pdf.ashx>accessed 9 September 2019.

[541] Johnson, 'Financial Sector Reform in Structural Adjustment Programmes' (n 539).

[542] A Khazanov and others, 'The Microfinance Disappointment: An Explanation Based on Risk Aversion' (2018) CEPR Discussion Paper No. DP12659 <https://warwick.ac.uk/fac/soc/economics/staff/omoav/cepr-dp12659.pdf>accessed 9 September 2019.

[543] ibid.

segments and potentially a large-scale default.[544]As they advanced more credit to a few clients, less emphasis was placed on savings.[545] Furthermore, the microfinance approach forces consumers into multiple borrowing because loan amounts are typically too small to make a real difference.[546]

For developed countries, the assumption that credit democratisation will lift people out of poverty in the absence of employment opportunities or some welfare system has been discredited not just by the drastic decline in consumer welfare after the Global Recession and austerity in some European countries, but because radical credit democratisation policies are now understood to bear a causal relation to systemic risk and financial instability.[547] However, while the shift towards stronger regulation at the transnational level significantly addresses many of the underlying causes of the Global Recession of 2008, consumer credit restrictions are not sufficient to address the challenges confronting consumer borrowers in Nigeria unless the underlying reasons why people resort to borrowing are addressed.[548] In the absence of some form of state welfare and high wage jobs, there is a rather compelling case for expanding affordable consumer credit due to the inevitability of borrowing by lower-end borrowers to meet basic needs.

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[544]MS Sriram, *Inclusive Finance India Report* (New Delhi, SAGE 2016); V Prathap and R Khaitan, 'When is Microcredit Unsuitable?' (*CGAP*, December 2016) <http://www.cgap.org/publications/when-microcredit-unsuitable>accessed 9 September 2019.

[545]C Nestor, 'Commercialization of Microfinance' (*CGAP*, October 2011) <http://www.cgap.org/blog/commercialization-microfinance>accessed 9 September 2019; Microfinance Banana Skins, *Staying Relevant: The CSFI survey of Microfinance Risk* (Centre for the Study of Financial Innovation 2012).

[546] G Wright, 'Digital Credit – Have We Not Been Here Before with Microfinance?' (*Microsave Consulting*, August 2017) <http://blog.microsave.net/digital-credit-have-we-not-been-here-before-with-microfinance/>accessed 9 September 2019.

[547] Ramsay and Williams, 'Peering Forward, Ten Years After' (n 447).

[548] F Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (London, Allen Lane 2016).

4.5.2 Financialisation and the Perpetuation of Class Disparity to Credit Access

The democratisation of access to credit is integral to the phenomenon that is now frequently described in the literature as the financialisation of everyday life. [549] This involves the making of 'finance capitalism through particular narratives, actors, and technologies that emphasise individual responsibility, risk-taking, and calculative assessment in managing personal financial security and well-being'.[550] It involves the transfer of responsibilities from state actors to individual actors and is facilitated by technologies such as credit scoring, financial profiling and pension reforms which prompt the individual actor to discipline the self and submit to oversight by the market and state.[551] Krippner defines financialisation as 'a pattern of accumulation in which profit-making occurs increasingly through financial channels rather than through trade and commodity production'.[552] It features the growing power of shareholders and the associated pressure on firms to turn short-term value,[553] the explosion of capital markets,[554] and creates class disparities in access to financial

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[549] K Lai, 'Financialization of Everyday Life' in GL Clark and others (eds), *The New Oxford Handbook of Economic Geography* (Oxford, Oxford University Press 2018) 612.

[550] ibid.

[551] ibid.

[552] GR Krippner, 'The Financialization of the American Economy' (2005) 3 Socio-Economic Review 173-208.

See also G Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (London, Verso 2009).

[553] J Froud and others, 'Shareholder Value and Financialisation: Consultancy Promises and Management Moves' (2000) 21 Economy and Society 80-110; W Lazonick and M O'Sullivan, 'Maximizing Shareholder Value: A New Ideology for Corporate Governance' (2000) 29 (1) Economy and Society 13-35; K Lai, 'Financialization of Everyday Life' in GL Clark and others (eds), *The New Oxford Handbook of Economic Geography* (Oxford, Oxford University Press 2018) 611.

[554]D Felix, 'Asia and the Crisis of Financial Globalization' in D Baker, G Epstein, and R Pollin (eds), *Globalization and Progressive Economic Policy* (Cambridge, Cambridge University Press 1998) 163-191; D Henwood, *Wall Street: How it Works and for Whom* (London, Verso Press, 1997); K Phillips, *Wealth and the American economy: A political History of the American Rich* (New York, Broadway Books 2002).

services[555] particularly as financial institutions turn away from consumer needs to upmarket investments in financial instruments.[556]

Financialisation is relevant to the analysis of consumer credit policy because it creates a disparity in *terms* of contracts where low-income consumers are given inferior rights and privileges.[557] Financialisation casts borrowers as neoliberal subjects, 'entrepreneur[s] of the self'[558] stratified as either creditworthy or unworthy. The creditworthy is incentivised to respect her debt obligations if she must remain within and participate in the benefits of the credit market while the unworthy are encouraged to focus on paying down deficits and rebuilding their creditworthiness ultimately to be re-admitted into the market.[559]

The trend and impact of financialisation follow a similar pattern in Nigeria as with many other jurisdictions. The current wave of financialisation began with the rise of

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[555] N van der Zwan, 'Making Sense of Financialization' (2014) 12 Socio-Economic Review 99–129.

[556] GF Davis, *Managed by the Markets: How Finance Re-Shaped America* (Oxford University Press 2009).

[557] G Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (Cambridge, Harvard University Press 2011).

[558] Ramsay and Williams, 'Peering Forward, Ten Years After' (n 447). See also M Foucault, *The Birth of Biopolitics*: *Lectures at the Collège de France, 1978-1979* (M Senellart ed, G Burchell tr, New York, Palmgrave MacMillan 2008) 27; M Lazzarato, *Governing by Debt* (semiotext (e)/ Intervention series 17, Boston, MIT Press 2015) 104; B Waine and T Cutler, 'Social Insecurity and the Retreat from Social Democracy: Occupational Welfare in the Long Boom and Financialization' (2001) 8 Review of International Political Economy 96–118; P Langley, 'Securitising Suburbia: The Transformation of Anglo-American Mortgage Finance' (2006) 10 Competition & Change 283–99.

[559] P Langley, *The Everyday Life of Global Finance* (Oxford, Oxford University Press 2008); M Beggs, D Bryan, and M Rafferty, 'Shoplifters of the World Unite! Law and Culture in Financialized Times' (2014) 28 (5) Cultural Studies 976-96; M Lazzarato, *The Making of the Indebted Man* (Amsterdam, Semiotext 2012). Lazzarato argues that the borrower in this scenario becomes blind to the reality that 'debt is not primarily a question of budget and economic concerns but a political relation of subjection and enslavement'. See M Lazzarato, *Governing by Debt* (semiotext (e)/ Intervention series 17, Boston, MIT Press 2015). For example, in the UK and US, neo-liberal governments promote policies that encourage citizens to participate actively and invest in financial products in a way legitimizing state reduction in pension benefits. See A Finlayson, 'Financialization, Financial Literacy and Asset-Based Welfare' (2009) 11 British Journal of Politics and International Relations 400-21.

the neoclassical monetarist theory which assumed powerful influence on public policy as conservative governments won elections in the United States and the UK from 1970 through the 1980s.[560] Free market intellectuals exercised enormous influence during the administrations of Margaret Thatcher and Ronald Reagan in policy formulation and implementation.[561] In Nigeria, the introduction of the Structural Adjustment Programme (SAP) of the World Bank/IMF in 1983,[562] and capital and liquidity pressures imposed by the banking consolidation exercise of the CBN in 2005, and the implementation of BASEL II reforms[563] affected lenders' behaviour in that banks began to engage in rent-seeking behaviours including lending to non-priority sectors such as the Nigeria Stock Exchange (NSE), mostly in the form of margin loans and proprietary trading, disguised as loans and foreign exchange speculation with depositors' funds.[564] Over this period, formal lenders in Nigeria restricted credit supply to elite borrowers or less than 6 per cent of the adult population and excluded low-income borrowers ostensibly on grounds of systemic risk despite consumer borrowers in Nigeria owing too little, and therefore posing very little risk to the

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[560]Hall, 'Policy Paradigms, Social Learning, and the State' (n 444).

[561]G Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (London, Verso 2009); N Fligstein, *The Transformation of Corporate Control* (Cambridge, Harvard University Press 2001); H Magdoff and PM Sweezy, *Stagnation and the Financial Explosion* (New York, The Monthly Press Review 1987).

[562] The policy emphasised privatisation, liberalisation and formalisation. See World Bank, *World Development Report: Financial Systems and Development World Development Indicators* (Oxford, Oxford University Press 1989) 3.

[563]SL Sanusi, 'Global Financial Meltdown and the Reforms in the Nigerian Banking Sector' (Abubakar Tafawa Balewa University Convocation Central Bank of Nigeria Lecture, Bauchi, 2010) 116 <https://www.cbn.gov.ng/OUT/SPEECHES/2010/GOV_ATBU%20CONVOCATION%20LECTURE.PDF>accessed 9 September 2019.

[564] Central Bank of Nigeria, 'Financial Stability Report January 2009 - June 2010' (*CBN,* June 2010) 58 <http://www.cenbank.org/OUT/2010/PUBLICATIONS/BSD/FINANCIAL%20STABILITY%20FINAL%20TO%20PRINTER%20-%2015102010.PDF> accessed 9 September 2019.

financial system.[565] Bank regulators continue to pander to elite customers with policy responses that endorse *too big to fail* but deems lower-end consumers too irrelevant to save.

While the new regulatory regime has focused on minimising subprime debt, there is no adequate evidence that fiscal policy is changing to address the social crisis of the 'unworthy' borrower.[566] Whereas in Nigeria, the existence of a larger informal market for the poor and a smaller formal market that caters mostly to elite borrowers is unfair because it ensures that the poor continues to pay more for credit and highly vulnerable to ruthless lenders.[567]

4.5.3 Human Rights and Access to Consumer Credit: From Boon to Foil

Financial inclusion goes beyond the access to required payments services but also implies 'access to appropriate credit products which address income smoothing and consumption needs'.[568] While financial inclusion drives in the West benefitted from the human rights imperative to promote fairness and prevent discrimination in the marketplace,[569] consumer safety and welfare have become central concerns in the

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[565] Euromonitor International, 'Country Report: Consumer Lending in Nigeria' (*Euromonitor International*, October 2018) <https://www.euromonitor.com/consumer-lending-in-nigeria/report>accessed 9 September 2019.

[566] For example, austerity policies continue to be implemented in the UK in 2018.

[567] H Herr and B Ruoff, 'Labour and Financial Markets as Drivers of Inequality' in A Gallas and others (eds), *Combating Inequality: The Global North and South* (London, Routledge 2016) 61-79; AC Santos, CA Lopes, and S Betzelt, 'Financialisation and Work in the EU: Inequality, Debt and Labour Market Segmentation' (2017) 46 Revista de Economía Mundial 91-116.

[568] Ramsay, 'Changing Policy Paradigms of EU Consumer Credit and Debt Regulation' (n 488); CA Lopes and C Frade, 'The Way into Bankruptcy: Market Anomie and Sacrifice among Portuguese Consumers' (2012) 35 Journal of Consumer Policy 477; D Beland, 'The Social Exclusion Discourse: Ideas and Policy Change' (2007) 35 Policy and Politics 123.

[569] Recital 4 of EU Consumer Credit Directive caters to this. See H Micklitz, 'Social Justice and Access Justice in Private Law' (EUI 2012); D Mabbett, 'Polanyi in Brussels or Luxembourg? Social Rights and Market Regulation in European Insurance' (2014) 8(2) Regulation and Governance 186-202; V Schmidt, 'Ideas and Discourse in Transformational Political, Economic Change in Europe' in G Skogstad (ed), *Policy Paradigms, Transnationalism and Domestic Politics* (Toronto, University of Toronto Press 2011) 46-

current regime and checks to reckless credit expansion through responsible lending obligations, caps on interest rates, and caps on roll-overs. It follows the knowledge that access to credit is more welfare-enhancing when combined with a commitment to reducing unemployment and guaranteeing social security.[570]

The most critical shift in policy is the increased willingness by policymakers to depart from minimalist regulation, which dominated the old approach under the guise of neoliberalism. The current regime preserves debt-driven consumption, especially in Western countries,[571] but attempts to end the pre-Recession 'debt for all' policy

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47. See also discussion in M Dawson, *New Governance and the Transformation of EU Law* (Cambridge, CUP 2011).

[570]N Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge, Cambridge University Press 1999) 123. See also T Williams, 'Empowerment of Whom and for What? Financial Literacy Education and the New Regulation of Consumer Financial Services' (2007) 29 Law and Policy 226; D Marron, 'Informed, Educated and More Confident: Financial Capability and the Problematization of Personal Finance Consumption' (2013) 17 (5) Consumption Markets and Culture 491-511; M Attwood, *Payback: Debt and the Shadow Side of Wealth* (Toronto, House of Anansi Press 2008). Social security could take the form of low-cost alternatives to high-cost credit. The UK experimented with low-cost credit alternatives for low-end borrowers with initiatives like the Growth Fund administered by the Department of Work and Pension to promote financial inclusion and the Social Funds to cater to low-income earners with lump-sum payments and interest-free loans. Although concerns about the sustainability of these Funds existed, the underlying objectives were being met until the conservative coalition government discontinued them. In their place, the government adopted a strategy to promote credit unions to provide affordable loans and encouraged local councils to improvise. See S Collard, C Hale, and L Day, Evaluation of the DWP Growth Fund: Revised Final Report (Bristol, Personal Finance Research Centre 2010) <http://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc1101.pdf.>accessed 9 September 2019; D Mckillop, AM Ward, and JOS Wilson, 'Credit Unions in Great Britain: Recent Trends and Current Prospects' (2011) 31 (1) Public Money & Management 35–42; E Kempson, S Collard, and S Taylor, *Social Fund Use Amongst Older People* (2002) Department for Work and Pensions Research Report no 172; S Rahilly, 'The End of the Discretionary Social Funding' (2011) 18(4) Journal of Social Security Law 147–49.

[571]A debt-driven consumption pattern is critical to the continuation of austerity policies in the West. For the creditworthy, debt has been reconstructed as an investment in asset holding through instruments like Mortgage-Backed Securities and Collateralized Debt Obligations. See D Bryan and M Rafferty,

orthodoxy[572] by excluding individuals lacking creditworthiness and those with flamed credit history from the credit market.

Regulatory sensitivity to human rights was achieved in part with capital and liquidity ratios which were explicitly designed to checkmate speculative or risky lending. The Financial Stability Board (FSB) which shared the mandate to develop action plans for the implementation of the G-20 high-level principles with the OECD issued a series of recommendations and principles to strengthen the global financial system. Among them is the *Report on Enhancing Market and Institutional Resilience*, which called for limits on bank leverage, higher margin requirements for derivatives trades, and a reassessment of value-at-risk models and fair value accounting.[573] In its *Principles for Sound Compensation Practices*, the FSB set out principles for executive compensation and compensation to be adjusted for all types of risk, to be symmetric with risk outcomes, and to be sensitive to the time horizon of risks.[574] And finally, in its *Recommendations for Addressing Procyclicality in the Financial System*, the FSB set out a mix of quantitative, rules-based, discretionary measures. These recommendations aimed to mitigate mechanisms that amplify procyclicality in both good and bad times and are to be implemented over time when financial markets have stabilised.[575]

'Reframing Austerity: Financial Morality, Savings and Securitisation' (2017) 10 (4) Journal of Cultural Economy 339-55.

[572] ibid.

[573] Financial Stability Forum, 'Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience (*Financial Stability Board,* April 2008) <https://www.fsb.org/wp-content/uploads/r_0804.pdf>accessed 9 September 2019.

[574] Financial Stability Forum, 'Principles for Sound Compensation Practices' (Financial Stability Board, April 2009) <https://www.fsb.org/wp-content/uploads/r_0904b.pdf>accessed 9 September 2019.

[575] Financial Stability Forum, 'Report of the Financial Stability Forum on Addressing Procyclicality in the Financial System' (*Financial Stability Board*, April 2009) <https://www.fsb.org/wp-content/uploads/r_0904a.pdf>accessed 9 September 2019.

4.6 A NEW PARADIGM FOR CREDIT REGULATION?

The previous sections have presented some of the significant changes in the transnational[576] framework for consumer credit regulation since the Global Recession and accounted for the socio-economic dynamics behind these changes. This section will try to achieve two things namely to understand what made these changes possible and secondly to determine if the current regime could be described as a new paradigm.

Several factors could be used to explain the reforms in global regulation of consumer credit: the growing strength of behavioural science and the tendency for advanced societies to embrace the scientific; consumer 'wokeness' and growing international labour activism, or the inevitability of change. A careful appraisal of the history of financial regulation, however, shows that all these factors were always there even as neoliberalism flourished since the 1970s. Some of the ideas central to behavioural economics were first expressed in the 1980s, the size of labour movements as a ratio of multinational corporations was bigger such that it is difficult to argue that any of these regulatory changes was inevitable.

One theory that stands out, however, in understanding the changes under review is that crisis points have a cathartic effect for regulatory subjects and the Global Recession of 2008 has, to a significant extent, served as a catalyst for policy change. This theory construes crisis points as critical junctures, 'moments in which uncertainty as to the future of an institutional arrangement allows for political agency and choice to play a decisive causal role in setting an institution on a certain path of development, a path that then persists over a long period of time'.[577] According to this theory, it is easier to impose necessary reforms or orchestrate a paradigm shift at critical junctures

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576 IFIs eg the World Bank, IMF, BASEL Committee on Banking Supervision; supranational organisations like the EU, OECD, the G20; and national regulators like the CFPB under Dodd-Frank Act in the US, and the FCA in the UK.

577 G Capoccia, 'Critical Junctures and Institutional Change' in J Mahoney and K Thelen (eds), *Advances in Comparative-Historical Analysis* (Cambridge University Press 2015).

than during settled times[578] because of uncertainties about the future and limited strength of traditional elite political alliances and resistance.[579] As Hall[580] noted, for a shift in paradigm to occur, an idea, or a set of ideas existing on the periphery requires proximity to power to translate to official policy. A classic illustration is the coincidence of the Global Recession with the election of Barack Obama in 2008 which provided a proximity to power for pro-regulation politicians, activists and academics like Elizabeth Warren and Oren Bar-Gill to frame the Recession as a failure of neoclassical economics, and successfully engineering the enactment of the Dodd-Frank Act. The reforms overturned a policy of liberalisation and privatisation that had been entrenched since the last economic crisis of the 1970s when monetarism was prescribed as the solution by conservative governments in the EU, US and the UK.[581]

Old belief systems become discredited after critical junctures precisely because they are blamed for producing the crisis.[582] This point is especially helpful in understanding some of the reforms adopted by the FCA under the Conservative Coalition in 2014 in the UK. In the US it led to more vigorous enforcement. For example, the Consumer Financial Protection Bureau's enforcement powers was expanded to include payday loans, prepaid cards, and debt collections, areas not

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[578]See discussion in A Swidler, 'Culture in Action: Symbols and Strategies' (1986) 51 (2) American Sociological Review 273–86; G Capoccia and RD Kelemen, 'The study of Critical Junctures: Theory, Narrative, and Counterfactuals in Institutional Analysis' (2007) 59 (3) World Politics 341–69.

[579] GA O'Donnell and PC Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore, Johns Hopkins University Press 1986).

[580] Hall, 'Policy Paradigms, Social Learning, and the State' (n 444).

[581] M Blyth, G*reat Transformations: Economic Ideas and Institutional Change in the Twentieth Century* (Cambridge, Cambridge University Press 2002); M Blyth, 'Structures Do Not Come with an Instruction Sheet: Interests, Ideas and Progress in Political Science' (2003) 1 (4) Perspectives on Politics 695–706; M Blyth, 'When Liberalisms Change: Comparing the Politics of Inflations and Deflations' in R Roy, A Denzau, and T Willet (eds), *Neoliberalism: National and Regional Experiments with Global Ideas* (London, Routledge 2007) 71-96; R Krebs, 'International Conflict and the Constitutional Balance: Executive Authority after War' in E Kier and R Krebs (eds), *In War's Wake: International Conflict and the Fate of Liberal Democracy* (Cambridge, Cambridge University Press 2010) 187–210.

[582] P Drahos, 'Regulatory Globalisation' in P Drahos (ed), *Regulatory Theory* (Canberra, ANU 2017) 257.

specifically implicated as proximate causes of the Recession. The CFPB was given the power to regulate and prosecute any 'unfair, deceptive, or abusive act or product',[583] to redefine 'unfair' and 'deceptive' as it sees fit unencumbered by judicial precedent. According to Elliehausen and others, the establishment of the CFPB in the US '...reflects a sea change in the intellectual foundation of the federal government's approach to financial consumer protection'.[584]

It is however difficult to speak declaratively of a new coherent transnational paradigm for consumer credit regulation for several reasons. First, it is barely a decade since the Global Recession, and the shift has not occurred on a straight line in many jurisdictions.[585] Secondly, some of the ideas central to the current regime such as responsible lending and behavioural economics were part of the regulatory framework in some jurisdictions before the Global Recession. However, the ascendance of these tools into mainstream practice and the elevated status of consumer protection on the regulatory agenda through inclusion in prudential rules are strongly emblematic of a paradigm shift. More importantly, the shift has created a clear divide between mainstream transnational regulation and the Nigerian consumer credit regulatory policy which continues to follow the neoclassical path comprehensively discredited by the Recession and academic studies as counterproductive to the interest of consumers in developing markets.[586] It is helpful

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[583] USC (p 539) 5536 (a) (1) (B).

[584] GE Elliehausen and others, *Consumer Credit and the American Economy* (New York, Oxford University Press 2014).

[585] The election of Donald Trump in the US has seen vigorous attempts made to repeal parts of the Dodd-Frank Act and roll back the powers of the CFPB. Similarly, the election of Jair Messias Bolsonaro in Brazil has seen consumer rights threatened in Brazil across different policy areas.

[586] D Acemoglu, and JA Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London, Crown Business 2012) 106; H Soifer, 'The Causal Logic of Critical Junctures' (2012) 45 (12) Comparative Political Studies 1572–97; D Slater and E Simmons, 'Informative Regress: Critical Antecedents in Comparative Politics' (2010) 43 (7) Comparative Political Studies 886–917; B Steensland, 'Cultural Categories and the American Welfare State: The Case of Guaranteed Income Policy' (2006) 111 (5) American Journal of Sociology 1273–1326.

to briefly outline some of the key areas of divergence between current transnational regulation and the Nigerian framework:

a. In terms of the role of government in credit markets, regulators in Nigeria oppose interest rate controls, intervention in private loan contracts based on behavioural science and responsible lending obligations, and are indifferent to the plight of the informal consumer borrower who they believe is 'on his own';

b. In terms of consumer protection, dispute resolution and consumer recourse are broadly *ex post* in Nigeria, and consumer borrowers are not excluded from the credit market to further consumer safety and interest such that exclusion from formal markets engenders exposure to unsafe products. In other words, access to finance in Nigeria is very limited even to the class of consumers that would be considered creditworthy in a developed market.[587]

However, it is not a neat case of a pro-consumer transnational regulatory paradigm and a retrogressive regulatory policy in Nigeria because the former undercuts financial inclusion policies currently being promoted in Nigeria since 2012. For example, the reforms initiated by the Basel Committee on Banking Supervision to strengthen the resilience of financial institutions, particularly, Global Systemically Important Banks (GSIBs) namely the requirement to hold more capital and of higher quality as a ratio of their total lending and to hold more liquid assets and cash to check bank runs[588] present significant costs to economic growth and consumer welfare in the short term even though projected benefits were expected to manifest over the long term.[589] Thus, in practice, higher capital and liquidity ratios constrain access to credit,

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[587] International Monetary Fund, 'Regional Economic Outlook: Sub-Saharan Africa Restarting the Growth Engine' (Washington, DC, 2017) <https://www.imf.org/en/Publications/REO/SSA/Issues/2017/05/03/sreo0517>accessed 9 September 2019.

[588] Bank for International Settlements, 'Basel Committee On Banking Supervision High-Level Summary Of Basel III Reforms' (*Bank for International Settlements*, December 2017) 1 <https://www.bis.org/bcbs/publ/d424_hlsummary.pdf>accessed 9 September 2019.

[589] According to the report of the Basel Committee on Banking Supervision and Financial Stability Board, the estimated cost of the reforms would be an output loss of 0.03per cent per annum. See Bank

especially by lower-end consumers typically considered to be riskier and made to pay more where credit is advanced to them.[590] In emerging markets, the adverse impact of increased liquidity and capital requirements on credit flows to small businesses and individual consumers is more prominent as lenders confront persistent liquidity shortages due to shallow capital markets and customers' lack of capacity to leave deposits with banks for a long time.[591]

The problem of Basel II for Nigeria is not whether the objectives are altruistic or not, or that developing countries, including Nigeria, must choose between financial inclusion and financial stability. That, of course, is a false choice considering that

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for International Settlements, 'Macroeconomic Assessment Group – Final Report Assessing the Macroeconomic Impact of the Transition to Stronger Capital and Liquidity Requirements' (Bank for International Settlement, December 2010) <https://www.bis.org/publ/othp12.pdf>accessed 9 September 2019. The International Institute of Finance (IIF) on the other hand published a less optimistic estimate of a 3.2 per cent lower level of GDP growth after five years with an output loss of 0.7 per cent per annum while an OECD study estimated an average increase in lending spreads of 50 basis points by 2019 and found that a 1 percentage point increase in bank capital requirement could create an average negative impact of 0.04per cent per annum and 0.20per cent on the GDP level five years after implementation. See Institute of International Finance, 'The Cumulative Impact on the Global Economy of Changes in the Financial Regulatory Framework' (Institute of International Finance, September 2011) 9 <https://www.iif.com/system/files/nciseptember2011.pdf >accessed 9 September 2019; P Slovik and B Cournède, 'Macroeconomic Impact of Basel III' (2011) OECD Economics Department Working Paper no 844 <https://www.oecd-ilibrary.org/economics/macroeconomic-impact-of-basel-iii_5kghwnhkkjs8-en>accessed 9 September 2019.

[590] I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Oxford, Hart 2012) 44.

[591] A Sinha, R Kumar, and SC Dhal, 'Financial Sector Regulation and Implications for Growth' (2011) BIS Papers No 62 <https://www.bis.org/publ/bppdf/bispap62g.pdf>accessed 9 September 2019. A cursory study of three African financial markets- Ethiopia, Kenya and Lesotho- found that despite increased competition and greater effort to promote financial inclusion, the weak funding structure (a bank based financial system) of financial institutions makes it difficult for the lower end of the market to access credit. See R Gottschalk, 'What Financial Regulation for Stability and Financial Inclusion in Africa? The Views of Regulators of Ethiopia, Kenya and Lesotho' (2015) Overseas Development Institute Working paper 414 <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9590.pdf>accessed 9 September 2019.

effective regulation can balance both needs. Rather, BASEL II is only one of the prudential policy tools that could be implemented to stabilise the economy, ineffective when applied in isolation, and the tool that hurts lower-end borrowers the most. Obsession with higher liquidity and capital requirement, without adequate regulation to address loan concentration[592] and proprietary trading is ineffective as a prudential tool for Nigeria (and by extension other Sub-Saharan African markets) because of the existing high magnitude of non-performing loans and the extremely volatile financial environment.[593]

The second area of negative relationship between the transnational paradigm described in this chapter and national regulation in Nigeria is that Nigerian regulators continue to adhere to dogmas popularised and enforced by IFIs, whereas the current paradigm has a weak enforcement mechanism to catalyse a shift by Nigerian regulators to the current paradigm even as the incentive to voluntarily adopt these reforms is hostage to elite interests.

4.7 SUMMARY

The new paradigm seeks to produce an outcome that curbs overindebtedness and introduce stronger consumer protection in global credit markets. This paradigm offers a more robust protection to the consumer borrower in comparison to what currently obtains in Nigeria. However, it is inadequate in terms of addressing the issues frustrating Nigeria's financial inclusion drive, and in some cases contributes to the problem. This divergence of outcomes especially in the tension between consumer protection and access to safe credit products is central to this thesis because less access to safe credit products exposes consumers to unregulated products in the informal

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[592]A Narain, P Rabanal, and S Byskov, 'Prudential Issues in Less Diversified Economies' (2003) IMF Working Paper WP/03/198.

[593]NV Loayza and others, 'Macroeconomic volatility and welfare in developing countries: An introduction' (2007) 21(3) The World Bank Economic Review 343-357. Nigeria's HLA and CAR, like in many other African countries, was already above BASEL III but that in itself could not prevent the crisis of 2009. See L Kasekende, J Bagyenda, and M Brownbridge, 'Basel III and the Global Reform of Financial Regulation: How Should Africa Respond? A Bank Regulator's Perspective' (FSB Watch, 2011) 11 <http://fsbwatch.org/pdf/Basel_III_2011_kasakende.pdf>accessed 9 September 2019.

market.[594] The next chapter studies the impact of this paradigm on lending practices and regulatory policies in Nigeria based on qualitative interviews with mostly formal financial institutions and regulators.

[594] T Wilson, 'Responsible Lending or Restrictive Lending Practices? Balancing Concerns with Addressing Financial Exclusion' in M Kelly-Louw, JP Nehf and P Rott (eds), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Aldershot, Ashgate Publishing Limited 2008) 91-106.

CHAPTER FIVE

5.0 A SYNOPSIS OF CONSUMER LENDING PATTERNS IN FORMAL FINANCIAL INSTITUTIONS AND LENDERS' RESPONSES TO REGULATORY REFORMS IN NIGERIA

This chapter seeks to understand the behaviours of formal lenders in Nigeria as they respond to credit policy changes introduced by national regulators. Nigeria, like many developing countries, eagerly adopts international principles, codes and guidelines for regulating financial markets sometimes on a voluntary or mandated basis.[595] However, the subjects of regulation operate under national dynamics. Hence, common rulebooks can trigger different reactions from regulatory subjects across jurisdictions. For example, as the credit uptake levels in developing countries diverge significantly from what obtains in advanced markets, it is reasonable to expect that the nature of risks and lenders' tolerance levels may differ significantly amongst lenders in developing markets in response to a uniform consumer credit policy.

In chapter one, the thesis established that transnational institutions historically shape financial regulation in Nigeria through colonial links, the country's external borrowing, and increasingly by trade and globalisation. IFI assumptions about consumer needs in developing markets, and how best to meet these needs have, however, produced adverse outcomes for lower-end consumers too often. While many outcomes occur by design, some are well-intentioned policies with counterproductive welfare outcomes for consumers.[596] One theory advanced by this thesis is that there is a significant variance between the perception of consumer needs by international institutions operating from distant (developed) countries, and the market realities of consumers in developing countries. International institutions are

[595] Even when international rules, code and guidelines are designed to apply voluntarily, the IMF could enforce compliance, for example, through the Financial Action Task Force (FATF).

[596] For example, SAP produced more deregulation (by design), more informality (contrary to design), and weaker consumer protection (by indifference) in most of the affected countries, including Nigeria.

prone to misdiagnosing the reasons for inefficient credit markets in Nigeria and prescribing policy solutions that are either insensitive to the political and institutional environment, inadequate to deal with the problems, or counterproductive to desired outcomes.

Chapter four established three cardinal elements of the current transnational paradigm: consumer-centredness; stronger legal frameworks; and a preference for proactive remedies. While these have improved welfare outcomes for consumers in Western markets, their outcomes for consumers in Nigeria are more complicated. IFIs such as the World Bank and IMF, for a long time, have assumed that borrowing for consumption is anathema in developing countries but rather that poor people must be encouraged to be net savers, borrowing only for entrepreneurial purposes.[597] This vision ignores the reality of precarious consumer borrowing, and minimises the social role of financial institutions to the purely financial under the guise that finance is amoral. This view is, however, not very tenable as financial experts have begun to amplify the call for financial services to assume more responsibility on social and existential issues like climate change.[598] Finance always had a role in human development as it is, for example, critical to the attainment of the Sustainable Development Goals (SDG). In developing countries like elsewhere, people continue to borrow to smoothen consumption needs from unregulated alternative sources. Hence the premise for lending for 'production' purposes only could have an overall negative impact on consumer welfare. One of the objectives of this chapter is to test

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[597] This is the theory behind the establishment of microfinance institutions. See also IMF, 'Global Financial Stability Report: Household Credit Growth in Emerging Market Countries' (*IMF*, September 2006) Ch II <https://www.imf.org/~/media/Websites/IMF/imported-flagship-issues/external/pubs/ft/GFSR/2006/02/pdf/_chap2pdf.ashx>accessed 9 September 2019. In an earlier study of emerging markets, the IMF reached the conclusion that credit booms in emerging markets ultimately contract consumption. See International Monetary Fund, *World Economic Outlook: Advancing Structural Reforms, World Economic and Financial Surveys* (Washington DC, IMF 2004) 158.

[598] M Carney, FV de Galhau and F Elderson, 'The Financial Sector Must be at the Heart of Tackling Climate Change' *The Guardian* (London, 17 March 2019) <https://www.theguardian.com/commentisfree/2019/apr/17/the-financial-sector-must-be-at-the-heart-of-tackling-climate-change>accessed 19 April 2019.

this assumption with qualitative data on formal lenders' attitudes toward consumer lending in Nigeria.

The second assumption that this chapter seeks to test is whether direct state intervention is a necessary step in promoting lending to lower-end consumers by formal lenders. Policies such as SAP aggressively rolled back state involvement in financial markets in Nigeria and promoted free-market doctrines instead. Nigerian regulators continue to favour competition and credit reporting as principal regulatory tools for regulating consumer lending.[599] The emerging transnational credit paradigm is, however, accommodating of 'anti-capitalist' measures like interest rate controls and less trusting of market competition and credit reporting as consumer protection tools. Equally significant, the emerging transnational paradigm is not quite pro-credit expansion. This chapter, therefore, examines the likely impacts of fully adopting the transnational paradigm on access to consumer credit and protection for lower-end borrowers in Nigeria.

The final assumption that this chapter seeks to test is the focus on formalisation as the panacea for financial exclusion on the premise that informal markets are improper channels for credit delivery. IFIs consider excessive regulation as one of the fundamental reasons why informal markets exist, and in policy terms, support deregulation as a necessary first step to formalisation. This chapter will test this assumption by examining the behaviours and activities of both lenders and borrowers across both the formal and informal markets in Nigeria.

[599] For example, the World Bank recently upgraded Nigeria from 44th to sixth place on the Getting Credit indicator of the World Bank's Ease of Doing Business Index 2018. The basis for this leap in rank is Nigeria's adoption of international regulatory prescriptions considered necessary for improving access to credit. Nigeria's reforms package includes enacting the Credit Reporting Act 2017, the Secured Transactions in Movable Assets Act, 2017, and sanctioning out-of-court enforcement of security rights. The rise on the Index is, however, not reflected in the latest credit access figures as reported in chapter one, and enforcement of these laws remains imperfect in many ways. The rise in the ranking, as well as the Index itself, can, however, mask the urgent need for radical reforms to expand financial services to those currently excluded simply by underestimating the difficulty of access.

5.1 BACKGROUND TO INTERVIEWS

This chapter aimed to conduct a small-scale investigation of the behaviours of formal lenders in response to consumer credit regulation in Nigeria. Data collection was completed using the semi-structured interview format.[600] As mentioned in chapter one, the interviews are meant to provide a synopsis of lenders' and regulators' perspectives on consumer lending, but does not engage in great breadth with the perspectives of other stakeholders because of the limitations highlighted in that chapter.[601] The study included three categories of respondents: eight individual borrowers;[602] four regulators,[603] and four practitioners consisting of two legal

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[600]The relevant categories include lenders (commercial banks, microfinance institutions, cooperative societies, fintech operators, and other informal money lenders), consumer borrowers, regulators (the Central Bank of Nigeria (CBN), the Small and Medium Scale Enterprises Development Agency of Nigeria (SMEDAN), the Consumer Protection Council of Nigeria (CPC), the Nigeria Deposit Insurance Corporation (NDIC etc.), and debt recovery practitioners (barristers and solicitors, law academic, police officer/bailiffs).

[601] See para 1.4.3 Ch 1.

[602] The eight respondents consist of people from diverse vocational backgrounds, but the interviews focused primarily on consumer borrowing. They include: a textile seller in Abejukolo, Kogi State (Consumer Borrower 1), a journalist with a media outfit in Abuja (Consumer Borrower 2), a contractor resident in Abuja (Consumer Borrower 3), two mid-level civil servants from the Federal Ministry of Foreign Affairs (Grade Levels 7 and 10) (Consumer Borrower 4, Consumer Borrower 5), a director in the Ministry of Finance (Consumer Borrower 6), a senior civil servant in Ankpa Local Government Kogi State (Grade Level 15) (Consumer Borrower 7), a police officer (Assistant Superintendent of Police) in the Special Anti-Robbery Squad (SARS) unit of the Nigeria Police Force (NPF) (Consumer Borrower 8).

[603] The Central Bank of Nigeria (Regulator 1), the Federal Ministry of Finance [Budget and Planning] (Regulator 2), the Small and Medium Scale Enterprises Development Agency (Regulator 3), and the Consumer Protection Council of Nigeria (Regulator 4). Questionnaires for regulators were structured to elicit responses on the CBN's regulatory purpose (monetary policy target, credit expansion, approach to banking supervision, informal financial markets, consumer protection, non-performing loans, and bailouts), the role of SMEDAN (advisory role, financing, and collaboration with other agencies), Ministry of Finance's role (fiscal policy, public debt, employment, and social security), and the Consumer Protection Council (data on consumer complaints, types of complaints received, process of lodging complaints, and the typical time taken to process complaints).

practitioners,[604] a police officer,[605] and an academic[606] to offer insight into the operations of both the formal and informal markets. Admittedly, the sample for the different categories is insufficient to be deemed representative of the entire spectrum of critical actors in the Nigerian consumer credit market.[607] Instead, what these interviews sought to accomplish is capture *possible ramifications* of lenders' reactions to specific policy reforms and the impact on *some* consumers' experiences.[608]

5.2 FINDINGS: HOW FORMAL LENDING PRACTICES RESPOND TO FINANCIAL REFORMS

5.2.1 Unintended Outcomes of Financial Reforms

Questions administered to formal lenders were calibrated to elicit from respondents, their firm's responses to regulatory changes in the credit market. Several respondents indicated that their natural response was to devise 'coping' or 'survival' strategies to keep their businesses afloat and that new policies have given lenders very 'little latitude' to lend to consumers as it pleases them.[609] The policies most identified as influential to lending practices, and which provoked the most responses inimical to the interest of lower-end borrowers are outlined below.

5.2.2 Prudential Regulation: Banking Consolidation

A policy reform that frequently came up in interviews with formal lenders and the CBN was the CBN's banking consolidation exercise of 2005. The official rationale for the consolidation exercise was to curtail reckless lending and to stabilise the financial

[604] Legal Practitioner 1 and Legal Practitioner 2.

[605] Consumer Borrower 8, Inspector, The Special Anti-Robbery Squad (SARS) Unit, Nigeria Police Force Headquarters (Abuja, Nigeria, 2018).

[606] Legal Practitioner 3.

[607] The ultimate objective is to show the significance of captured behaviours, if any, for policy.

[608] Questionnaire for this set of respondents broadly covered questions on individual attitudes to borrowing, reasons for borrowing, the type of loan obtained, whom they borrowed from, satisfaction with the process of borrowing and the overall satisfaction with the loan.

[609] Interview with UBAd, Credit Risk Manager, UBA (Abuja, Nigeria, 2018).

system after a streak of bank failures in the 1980s and 1990s.[610] The CBN raised the capital base for commercial banks in Nigeria from N2 billion [USD 5 million] to a minimum of N25 billion [USD 68 million].[611] Consequently, the 89 licensed banks, through mergers and acquisitions, coalesced into 25 and now 20.[612] This exercise had many ramifications for lenders who had to find means to stay in business or migrate to a different market. According to one respondent, 'we were happy to have survived the exercise, but our [banks] numbers became fewer than before the exercise, and loan applications sky-rocketed beyond our capacities to advance'.[613] This was good news for the 'surviving' lenders who had to deal with less competition but more importantly acquired the leverage to become more selective. 'We had to become more inventive. Because we needed to stay above a higher liquidity threshold while catering to a significantly increased loan demand, our way of doing this was to lend for short-term and focus on quick turnovers'.[614] This was particularly necessary because pressures on banks' liquidity mean they can only issue loans that could be called back at the earliest signs of distress: the 'market is volatile, reserves are constantly fluctuating, and default could materialise at any time'.[615] The pool of borrowers at this time was 'inevitably filtered down to mainly state governments, politicians, and corporate borrowers as opposed to MSMEs and individuals at the bottom of the pyramid'.[616] This class of borrowers always needed 'urgent cash' which they repay

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[610] Interview with Regulator 1, Head of MSMEs (Financial Inclusion Secretariat), CBN (Abuja, Nigeria, 2018).

[611] SL Sanusi, 'Global Financial Meltdown And The Reforms In The Nigerian Banking Sector' (Abubakar Tafawa Balewa University Convocation Central Bank of Nigeria Lecture, Bauchi, 2010) 116 <https://www.cbn.gov.ng/OUT/SPEECHES/2010/GOV_ATBU%20CONVOCATION%20LECTURE.PDF>accessed 9 September 2019.

[612] Although the bank consolidation exercise was partly to reduce dependence on the public sector for funds (bailouts and MDA current accounts), the subsequent recession following the implementation of the Treasury Single Account reform in 2015 shows otherwise.

[613] Interview with PBc, Head of Credit Operations, PB (Abuja, Nigeria, 2018).

[614] Interview with Regulator 3, Business Development Service Officer, SMEDAN (Abuja, Nigeria, 2018).

[615] Interviews with GTBf, Credit Operations Unit, GTB (Abuja, Nigeria, 2018).

[616] UBAd (n 609).

within short periods.[617] This response was almost universal amongst all the commercial banks interviewed.

In 2009, the CBN implemented BASEL II in response to a national banking crisis, and to cushion against the effects of the Global Recession.[618] The CBN increased banks' capital adequacy ratio (CAR) and higher loss absorbency (HLA) requirements to 16 per cent and 35 per cent, respectively, to avert the risk of systemic failure.[619] The response of commercial banks to BASEL II was more complex than the response to the bank consolidation four years earlier: 'BASEL II is a different ball game, after consolidation, we worried about our survival as a going concern. However, what BASEL II has done is to change the way we perceive risk'.[620] Another respondent noted that 'our customer risk assessment had to change. The current climate does not accommodate sub-prime lending any longer'.[621] The general pulse of the respondents garnered from the interviews revealed that formal lenders considered their terrain to be business lending and consumer lending to be a foray into 'foreign' territory.[622]

Some respondents revealed an acute awareness of their new status in the credit market as 'survivors' of the radical financial reforms implemented in 2005 and 2009:

> We are the big league now. We serve big business, and we respect the boundaries of the smaller banks. If you need a small loan, the appropriate place would be your family, associations or microfinance banks.[623]

This sentiment was quite common amongst the bigger commercial banks. 'It is not that we do not want to serve poor people, the issue is that their risk profile is fuzzy,

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[617] ibid.

[618] See para 4.6 (n 635) for details of BASEL II requirements.

[619] S Apati, *The Nigerian Banking Sector Reforms: Power and Politics (First Edition)* (Palgrave Macmillan Studies in Banking and Financial Institutions 2012) 1-15.

[620] Interview with UnBb, Credit Risk Operator, UnB (Abuja, Nigeria, 2018).

[621] GTBf (n 615).

[622] Interview with FCMBa, Head of Credit Operations, FCMB (Abuja, Nigeria, 2018).

[623] Interview with ZBi, Credit Officer, ZB (Lafia, Nigeria, 2018).

and their endeavours do not quite fit into our business model'.[624] This is not to say that big commercial banks do not provide retail loans which may be used for consumption purposes: 'We lend to someone that we know has a good character and the ability to repay[625] and that ability to repay is strong…'.[626] The main instruments used to assess capacity include 'cash flow', 'employer guarantee', and 'collateral'. All commercial banks interviewed expressed a preference for salaried employees of the government or reputable organisations.[627] For character verification, on the other hand, various respondents mentioned biometric information, applicant's credit history, 'station in life', 'where he works', and 'agreement to terms and conditions' as the different acceptable means to go about assessment.[628]

Although commercial banks consider themselves to be more selective, they also tend to record a higher level of default. According to some respondents, many incidents of default are down to poor Know Your Customer (KYC) checks by lenders occasioned by an obsessive focus on the borrower's socioeconomic status, and too little attention to the borrower's character.[629]

5.2.3 Credit for Production

The purpose of credit is a critical factor in lending decisions by formal lenders. Commercial banks consider their primary commitment to financing businesses. 'We see our mission as the financing of companies and businessmen'.[630] This self-imposed

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[624] Interview with ABe, Credit Risk Unit, AB (Abuja, Nigeria, 2018).

[625]Union Bank PLC, 'Personal Loans for Individuals' (Union Bank, 21 December 2018) <https://www.unionbankng.com/everyday-banking/personal-loans-for-individuals/#1486633960164-36e91d26-a31c >accessed 16 September 2019.

[626] PBc (n 613).

[627] GTBf (n 615); ZBi (n 623).

[628] CBN, The Guide to Charges by Banks and Other Financial Institutions in Nigeria 2017; Prudential Guidelines for Deposit Money Banks in Nigeria (2010), paragraph 3.8; Diamond Bank PLC, 'Requirements for a Diamond Personal Loan' (Diamond Bank, 21 December 2018) <https://www.diamondbank.com/personal/loans/personal-loan/>accessed 16 September 2019.

[629] Regulator 1 (n 610).

[630] ZBi (n 623); ABe (n 624).

mandate is for several reasons. One essential factor lenders mentioned frequently was 'profitability'. Lenders strongly link profitability to the ability to repay. 'We believe borrowing for productive reasons makes repayment easier and more realistic'.[631] As another respondent puts it, 'basically we only lend to you if we think you can pay back not just the interests but the principal as well'.[632] Consumer loans are perceived to be riskier than business credit because 'they could deteriorate quickly'.[633] Business borrowers tend to hold assets that lenders can quickly liquidate in the event of default.[634] Profitability is also associated with loan volume and monitoring costs. The relatively small returns from small loans make consumer lending less attractive to big lenders.[635] 'We would rather invest in federal government bonds and treasury bills, which are weighted in favour of our liquidity assessment than lend in small bits to borrowers for consumption purposes'.[636] Many respondents pointed out that banks had to allocate enormous resources to monitor a loan which is not profitable.[637]

Apart from profitability, some commercial banks follow a classical economics thinking tradition which opposes consumer credit. One respondent expressed this view thus:

> We are a consumer economy. All we do is consume imported goods and services; many of our customers have the propensity to borrow for consumption purposes without demonstrating their capacity to afford adopted lifestyles. You might think it is none of our business, but it is our business that suffers if they do not repay the loans.[638]

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[631] Interview with SBg, Head of Credit Operations, SB (Lagos, Nigeria, 2018).

[632] FCMBa (n 622).

[633] ZBi (n 623).

[634] ibid. See para 3.2.2 Ch 3.

[635] GTBf (n 615).

[636] UnBb (n 620); Regulator 3 (n 614); PBc (n 613); FCMBa (n 622).

[637] Interview with UBNh, Credit Risk Officer, UBN (Abuja, Nigeria, 2018).

[638] ibid.

This type of reasoning is not limited to commercial banks. MFIs were equally committed to lending for production rather than consumption. 'Our mandate is to provide micro-credit to micro, small and medium enterprises, and not to lend for consumption purposes'.[639] Small entrepreneurs may apply MFI credit to consumer needs, but the basis for obtaining the loan has to be 'entrepreneurial or connected to some entrepreneurial goal (s)'.[640] The critical difference between the commercial bank and MFI approach to lending is one of scale rather than ideology:

> The vision of the central bank for us was to provide small loans to small businesses, whether formally or informally organised. We do not lend to big business say for export and import or foreign exchange transactions. However, we do not lend for purely consumption purpose either unless you have an independent means of establishing repayment capacity.[641]

Many MFIs provide consumer loans to borrowers if it helps their business or trade to thrive. 'We have some customers whose homes also serve as their place of business. If they seek a loan to pay off rent or renovate, we would usually approve it as long as their business or trade is profitable'.[642] MFIs consider low-cost consumer lending the remit of co-operatives, family and friends, and other lenders not subject to prudential oversight. Pressures of the sort reported by commercial banks were also present in the expressions of MFI respondents.

Business loans pricing makes sense on the presumption that the business generates adequate returns to cover the high-interest rates; hence, they are typically unsuitable for consumption purposes. For the past five years, interest rates in Nigeria have consistently risen.[643] Many individual respondents expressed aversion to borrowing citing reasons such as peace of mind, faith-related concerns about usury, and fear of

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[639] Interview with ICBl, Branch Manager, ICB (Abejukolo, Kogi State, Nigeria, 2018).

[640] Regulator 3 (n 614); Interview with HMBk, Credit Adviser, HMB (Abuja, Nigeria, 2018).

[641] HMBk ibid.

[642] ICBl (n 639).

[643] FCMBa (n 622).

embarrassment.[644] Respondents who reported borrowing from formal lenders noted it was as a 'last resort'.[645] This finding is interesting because it seems to indicate, without generalising, the unique experiences of the five per cent of the population who have access to formal credit but choose not to borrow. There is, however, a commonality with lower-end borrowers in that they borrow only when it has become unavoidable, except that the latter often turn to moneylenders where interest rates are anything from 30-200 per cent.[646]

One respondent would not take any loan because she feared it could deprive her of al-Jannah [paradise] and bring her family into disrepute should she die before she can repay the loan entirely.[647] Philosophical and economic objections to interest also play significant roles in terms of credit uptake. Nigeria is predominantly composed of Christians and Muslims who self-identify as actively practising their faith.[648] Muslim respondents preferred to borrow from Islamic banks, 'it is not good to accept *riba* [interest], I can only borrow from *Jaiz* [an Islamic bank] because they do not charge interest'.[649] Islamic banks, on the other hand, avoid consumer lending for a peculiar reason:

> As an Islamic bank, we operate on the principle of Sharia, which means that we do not charge interest. For this reason, many customers like our loans. What many of them do not realise though is that we share in profits earned from whatever halal [lawful] business you finance with the loan we advance. So, if you are borrowing for non-

[644] Interview with Consumer Borrower 1, Abejukolo Township Market (Abejukolo, Kogi State, Nigeria, 2018); Interview with Consumer Borrower 5, Senior Executive Officer, Finance and Accounts, Ministry of Foreign Affairs (Abuja, Nigeria, 2018).

[645] Interview with Regulator 4, Consumer Complaints Officer, CPC (Abuja, Nigeria, 2018).

[646] Regulator 4 (n 645).

[647] Consumer Borrower 1 (n 644).

[648] National Bureau of Statistics, 'Social Statistics Report 2017' (*NBS,* December 2018) https://www.nigerianstat.gov.ng/download/866>accessed 16 September 2019.

[649] Interview with Consumer Borrower 6, Head of International Economic Relations, Federal Ministry of Finance (Abuja, Nigeria, 2018).

> business purposes, we are constrained to decline your application. Otherwise, we are bound to fail as a business.[650]

Consumer credit, based on the preponderance of responses, appears to be unpopular amongst some formal lenders based on a construction of profitability that is detached from social responsibility. This feeling appears to be shared by some consumers who consider loan costs prohibitive. At least one respondent who leverages his access to the formal credit market considered the disciplining function of borrowing to be worth the price: 'I have a soft mind, I can't have money and refuse somebody else's request, but once I have borrowed and spent in advance, when they come to borrow from me, I can simply disclose my debt status and not feel bad'.[651] While this rationale has been used to transfer responsibilities from state actors to individual actors in Europe through welfare cuts, pension reforms and to sustain a debt-driven economy,[652] it is a tool for managing the multiple webs of communal relationships and dependencies that exert on people's disposable income in Nigeria.

5.2.4 Anti-Money Laundering Regulation

Qualification for credit, as mentioned earlier, requires applicants to satisfy basic identification procedures for several reasons. One key reason is to comply with anti-money laundering (AML) regulations which mandate enhanced due diligence for all customers. Generally, lenders consider proper customer identification a salient procedure to ascertain eligibility and secure the recovery of advances. This applies to

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[650] Interview with JBq, Head of Customer Services, JB (Abuja, Nigeria, 2018). Christians were less likely to borrow from Islamic banks despite the non-interest arrangement due to perceptions [unfounded] that such banks only lend to Muslims.

[651] Interview with Consumer Borrower 8, Inspector, The Special Anti-Robbery Squad (SARS) Unit, Nigeria Police Force Headquarters (Abuja, Nigeria, 2018).

[652]K Lai, 'Financialization of Everyday Life' in GL Clark and others (eds), *The New Oxford Handbook of Economic Geography* (Oxford, Oxford University Press 2018) 612.

co-operatives, MFIs, moneylenders, but such procedures are not a choice for commercial banks, and usually more stringent:[653]

> For us, customer biometric identification is not something we approach simply as a matter of choice, our regulator [CBN] specifically requires us to monitor transactions affecting lower-end borrowers both for the safety of their deposits, but more importantly to checkmate sub-prime lending that may compromise the safety and soundness of the financial system.[654]

Means of identification acceptable locally are not necessarily acceptable for trans-boundary transactions. 'We operate an international banking licence under which we commit to checkmate money laundering by politically exposed persons, and those funnelling money to terrorist activities'.[655] Transactions most affected by this regulation include remittance claims and direct lending to lower-end consumers, particularly those working in informal markets:

> It is not difficult to satisfy our identification requirements you know? All citizens are entitled to freely register for a voter's card, national identity card or a driver's licence. We are not asking for an international passport! And yet we have many individuals who cannot satisfy this requirement in rural areas.[656]

By their accounts, this highlights the information asymmetry problem in the country. Some formal lenders do not grant consumer loans to borrowers in the lower economic segments or informal sector not necessarily because of liquidity constraints but ostensibly on account of information asymmetry. Lenders argue that they lack the

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[653]eg they accept trade union identification cards as opposed to commercial banks that insist on any one of national identity card, international passports and driver's licence often unavailable to the rural poor.

[654] FCMBa (n 622).

[655]GTBf (n 615); ABe (n 624). See sections 1, 13, 16, 31-34, and Schedule II of the CBN (Anti-money Laundering and Combating the Financing of Terrorism in Banks and Other Financial Institutions in Nigeria) Regulations 2013. See also the Money Laundering (Prohibition) Act 2011 (as amended), and the Terrorism Prevention Act 2011 (as amended).

[656] UBNh (n 637).

expertise, efficient risk assessment model, and strategic patience to serve this category of borrowers without violating prudential guidelines.[657] AML requirements also weigh into commercial banks' decision in terms of branch expansion. 'We appreciate that there are many rural dwellers with significant capacity to make deposits, but many also lack the proper documentation to open a formal account'.[658] For example, many individuals live in neighbourhoods without proper street numbering or cut off from utilities such as electricity, pipe-borne water, or telephone lines and thus unable to produce utility bills to prove their address properly. As a result, they are considered sub-prime borrowers by most formal lenders.[659] This is where regulators consider the role of MFIs most relevant. In contrast, the majority of MFIs interviewed operated state licences with only a few operating a national licence and thus subject to less stringent enforcement.[660] 'Yes, we accept trade association cards, but we also need to establish where you live. That is why [the lack of] street numbering affects lending by us'.[661]

The pattern of responses from co-operatives, ROSCAs, and borrowers from fintech lenders are different. Lending by co-operatives is based on trust developed from years of living together in the same community, intermarriage, working together in the same establishment, and referral from a person that meets any of these criteria.[662] Whereas, one borrower from a fintech start-up described the loan application process as 'entirely online, and all I needed was a bank account and disclosure of my monthly earnings'.[663] Fintech lenders at the moment depend on bank infrastructure to conduct

[657] UnBb (n 620); Regulator 3 (n 614); PBc (n 613).

[658] SBg (n 631); GTBf (n 615).

[659] In many cases, these people have made alternative private arrangements where they own their own houses, power their homes with generating sets, and drill boreholes. For credit purposes, however, it is difficult to evidence creditworthiness with these assets.

[660] Interview with FMBj, Loan Officer, FMB (Lagos, Nigeria, 2018); Interview with MTMBn, Loan Officer, MTMB (Lagos, Nigeria, 2018).

[661] FMBj (n 660).

[662] Interview with CFANp, Executive Secretary, CFAN (Abuja, Nigeria, 2018).

[663] Interview with Consumer Borrower 2, Defence Correspondent, The Nigerian News (Abuja, Nigeria, 2018).

customer due diligence. To access fintech products, a borrower must own a bank account, but do not have to be eligible for bank loans.

5.2.5 From a Regime of Control to a Regime of Transparency

Nigeria implemented new laws to foster financial market transparency in 2017. This includes enacting the Credit Reporting Act 2017[664] and the Secured Transactions in Movable Assets Act, 2017.[665] The CBN respondent noted with pride that:

> The era when we dictated to commercial banks whom to lend to or what rate to charge as interest is over. We believe that with the coming on board of credit bureaux, borrowers are on track for a better deal from banks.[666]

This optimism, however, was not widely shared by respondents. While the emerging global approach is to restore more 'control' regulation, Nigeria is moving the other way. Transparency is not bad for credit markets, but it is limited as a consumer protection tool in Nigeria due to weaknesses in infrastructure and organisational information management culture,[667] and creates new security concerns in the form of data security which has prompted more proactive regulation in other countries.[668]

Many commercial banks noted that although the Credit Reporting Act was a positive development, it will not fundamentally alter lending practices in the short term, at least. 'The Act is an improvement on the previous CBN regulation, but it is not very clear that information on people in the informal sector is going to significantly improve overnight'.[669] The weak link that many respondents reported was the integrity of data from MFIs and other non-bank financial institutions. The credit

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[664] See para 2.5.3 for an overview of the key provisions of the Act.

[665] International Bank for Reconstruction and Development / The World Bank, Ease of Doing Business Report 2018.

[666] Interview with Regulator 1, Head of MSMEs (Financial Inclusion Secretariat), CBN (Abuja, Nigeria, 2018).

[667] See para 4.3 Ch 4.

[668] See para 4.5.3 Ch 4.

[669] UBAd (n 609).

reporting system leaves a lot of room for omission due to delays in reporting and leaks in data chains.[670] One MFI staff noted that they do not update the database directly but store their data in the head office: 'That is what we were made to understand, as a branch we are answerable to the regional office which in turn is answerable to the head office'.[671] One credit manager at a commercial bank complained that 'credit data processing takes too long to be forwarded to the credit bureaux, which is a problem because then the integrity could be questioned, plus a dubious customer can sneak into another bank within the period of delay'.[672]

Semi-formal lenders such as co-operative societies and moneylenders interviewed do not as of practice, submit credit data to credit bureaux at present.[673] Hence, many respondents found credit reporting useful but insufficient for approving a loan in the absence of the typical requirements mentioned earlier, having been fully satisfied.[674] Information missing from a credit report such as debt obligations to informal lenders could be gleaned from carefully reviewing bank statements and asset registries. Credit reporting has, however, assisted banks to recover non-performing loans from customers who otherwise would never have repaid the loan.

On the other relevant legislation, the Secured Transactions in Movable Assets Act 2017, respondents expressed divergent opinions on its impact on lending. MFIs were more inclined to accept movable assets as collateral, compared to commercial banks. Borrowers in the informal sector disproportionately rely upon movable assets for collateral,[675] however, it has yet to gain traction with commercial banks despite supporting the legislation.

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[670] PBc (n 613).

[671] ICBl (n 639); Interview with OCBm, Branch Manager, OCB (Odagba, Kogi State, Nigeria, 2018).

[672] PBc (n 613).

[673] Interview with SCMFAo, Staff Co-operative, Ministry of Foreign Affairs (Abuja, Nigeria, 2018); CFANp (n 662).

[674]UBNh (n 637); FCMBa (n 622).

[675] HMBk (n 640); Regulator 1 (n 666).

> A moveable asset as collateral is not a friendly aspect in the Nigerian banking setting today because of the risks attached to it. The possibility of losing such moveable assets within a twinkle of an eye because of the security situation in Nigeria today is very high, and the stakeholders of banks are not comfortable with that idea. So practically, that is not achievable, it is not gaining ground, acceptability in Nigeria banking. Sincerely speaking, that is just the fact.[676]

5.3 SUMMARY AND DISCUSSION OF FINDINGS ON LENDERS' ATTITUDES TO CONSUMER CREDIT

Responses from all the categories of respondents indicate there is a lack of popularity of consumer lending and lending to lower-income consumers, especially those in informal markets. This is consistent with the literature that formal lenders do not tend to lend to the informal economy because of information asymmetry.[677] Stringent prudential rules in Nigeria generally discourage unsecured lending by banks and provides for civil and criminal liabilities for bank officers and corporate liabilities for the bank.[678] This has created a business climate where formal lenders have little appetite for risk-taking. As lower-end borrowers are more likely to apply for unsecured loans and less likely to own collateral, this provision naturally impacts them more harshly.[679]

Commercial banks cited reasons such as short-term lending models and profitability. Much of these claims were however not supported by evidence. Perception of all

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[676] FCMBa (n 622).

[677] MS Sriram, *Inclusive Finance India Report* (New Delhi, SAGE 2016); V Prathap and R Khaitan, 'When is Microcredit Unsuitable?' (*CGAP*, December 2016) <http://www.cgap.org/publications/when-microcredit-unsuitable>accessed 9 September 2019; A Barba and M Pivetti, 'Rising Household Debt: Its Causes and Macro-Economic Implications—A Long-Period Analysis' (2009) 33 (1) Cambridge Journal of Economics 113.

[678] See section 20 of the Banks and Other Financial Institutions Act, Cap B3, LFN 2004.

[679] G Bertola, R Disney and C Grant (eds), *The Economics of Consumer Credit* (Boston, MIT Press 2006) 8.

lower-income consumers as subprime is an unintended outcome of tight prudential regulation. For example, AML regulations have had the unintended consequence of further contributing to the exclusion of lower-end and informal sector borrowers from accessing formal financial services in Nigeria. The two most significant drivers of money laundering have been corruption by politically exposed persons who loot the national treasury to store in off-shore accounts in Europe, the Caribbean and the United States, and more recently the tide of terrorism in the northeastern region of Nigeria where the ISIL and Al Qaeda-linked terrorist organisation, Boko Haram, has been fighting the Nigerian government since 2009.[680] The standard of due diligence required has had collateral damage both for politically exposed persons and lower-end borrowers.[681]

Several respondents suggested that lending to the poor was unprofitable, and this perception seemed to grow as banks grew bigger following consolidation. This is consistent with studies in the United States which found that big banks were more likely to violate the Community Reinvestment Act that mandates lending to lower-end borrowers in the United States,[682] and in Australia, where the biggest lenders tend to avoid lending to lower-end borrowers.[683] Such claims have, however, been repudiated in both countries.[684]

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[680] Regulator 1 (n 666). See also European Commission, 'European Commission adopts new list of third countries with weak anti-money laundering and terrorist financing regimes' (*European Commission*, February 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_781>accessed 12 December 2019.

[681]S Kang, 'Rethinking the Global Anti-Money Laundering Regulations to Deter Corruption' (2018) 67 (3) International & Comparative Law Quarterly 695-720.

[682] 682 BA Overby, 'Community Reinvestment Act Reconsidered' (1995) 143 University of Pennsylvania Law Review 1431. See para 3.5.3 for discussion of the Community Reinvestment Act.

[683] T Wilson, 'Responsible Lending or Restrictive Lending Practices? Balancing Concerns with Addressing Financial Exclusion' in M Kelly-Louw, JP Nehf and P Rott (eds), *The Future of Consumer Credit Regulation: Creative Approaches to Emerging Problems* (Aldershot, Ashgate Publishing Limited 2008) 91-106.

[684] ibid 98.

Failure to lend to the poor for prudential reasons may be legitimate, but a financial system that excludes the majority of citizens from accessing the more transparent credit products available on the market raises many questions. Arguably, formal lenders have a social duty to serve all categories of consumers or at least, to ascertain the credit risk of all loan applicants before declining a loan request. Profitability should not be a reason to avoid such assessment, especially when financial technology competitors inclined to serve this group are kept out of banking business by the regulator. It is problematic to designate borrowers from this segment of the economy subprime on account of lenders' unwillingness to ascertain their credit risk.[685] Although lower-end borrowers in Nigeria are often unable to provide officially designated (valid) means of identification, provide an adequately kept book of account to evidence cash flow of up to six months, or evidence employment status because they operate businesses that are typically unregistered,[686] designating them sub-prime borrowers appears to be a mere excuse by banks in order to avoid allocating credit for this category. The reluctance of traditional lenders to invest in financial technology models that could enable them to serve the poor despite the initial regulatory advantage banks enjoyed over fintech operators and Mobile Telecommunication Companies (TELCOs) in Nigeria comes down to perceptions of profitability.[687] Ironically, TELCOs have proved to be more adept at serving lower-end consumers in developing countries with M-Pesa[688] and MoKash revolutionising financial services delivery to the poor in Kenya and Rwanda, respectively.[689] The same

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[685] C Udry, 'Credit Markets in Northern Nigeria: Credit as Insurance in a Rural Economy' (1990) 4 (1) The World Bank Economic Review 251–269.

[686]Regulator 1 (n 666).

[687]Interview with Legal Practitioner 3, Professor, Faculty of Law, University of Nigeria (Nsukka, Nigeria, 2018). See, for example, The CBN's Guidelines for the Regulation of Agent Banking and Agent Banking Relationships in Nigeria 2013 and the Mobile Money Regulations 2009. The Mobile Money Regulations of 2009 expressly excluded TELCOs from accepting mobile money deposits from depositors or engaging in activities that mimicked traditional banking, eg lending.

[688] 'M' stands for mobile, while 'pesa' is Swahili for money.

[689] MTN Rwanda, 'MoKash FAQs' (*MTN Rwanda,* 15 August 2019) <http://www.mtn.co.rw/Content/Pages/452/MoKash_FAQs> accessed 15 August 2019.

has also been implemented in Ghana with reasonable success.[690] For example, fintech companies like M-Pesa and InVenture in Kenya use innovative forms of credit scoring technology to include lower-end borrowers.[691] The lack of competition from other service providers and consequent low investment in an algorithm-driven process[692] has meant that Nigerian banks instead continue to rely on relational lending, which arbitrarily allocates 'business' credit exclusively to the rich.[693]

Another interesting finding is that perceptions of risk are associated with the borrower's socio-economic class, ie lower-end consumers are automatically riskier under the hypersensitive risk climate post-Global Recession. This climate shaped many lenders' analysis of profitability. For instance, formal lenders routinely ignore prudential requirements to lend to rich and influential customers.[694] Prudential guidelines are very stringent and are rarely ignored except for rich, powerful and influential borrowers.[695] Many respondents on the borrowing side alleged that banks were not transparent in the lending process, and some claimed to have been denied access to credit because they did not know someone at the bank.[696] All the bank interviewees dismissed such claims. A few bankers, however, qualified their rebuttal:

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[690] Bank of Ghana, 'Impact of Mobile Money on the Payment System in Ghana: An Econometric Analysis' (Bank of Ghana 2017) <https://www.bog.gov.gh/privatecontent/Public_Notices/Impact%20of%20Mobile%20Money%20on%20the%20Payment%20Systems%20in%20Ghana.pdf> accessed 15 August 2019.

[691] S Siroya, 'A Smart New Business Loan for People with no Credit [TED video]' (Youtube 2016) <https://www.youtube.com/watch?v=kSR8G8mfp84>accessed 9 January 2019.

[692] This is important for them because in the absence of investment in algorithm-based data collection and processing, and reliable credit reporting, the salary and collateral are useful tools to assess creditworthiness and customer loan limit.

[693] The rich inevitably benefit from the aversion to consumer lending and preference for producer credit. See para 5.6.3 below for how the digital credit exclusion might mimick the traditional exclusion patterns.

[694] *Federal Republic of Nigeria v Dr (Mrs) Cecilia Ibru* FHC/L/297C/2009; *Intercontinental Bank v Erastus Bankole Oladipo Akingbola and others* 2009 Folio 1680.

[695] Interview with SBg, Head of Credit Operations, SB (Lagos, Nigeria, 2018).

[696] SCMFAo (n 673).

'where favouritism comes in is when you do not have all it takes, and that is why most of these loans go bad'.[697] Some banks have a 'blind trust that a rich borrower would not default, clearly against available evidence'.[698] Other respondents observed that pressures from the bank board sometimes make it feel like 'enormous gallantry' is required for staff to do the right thing.[699] This confirms findings in the previous study by Odetola[700] about the influence of socio-cultural elements on lending such as the 'cultural tendency to worship the rich and influential; and exalt social status over merit' in Nigeria. This underscores the limits of the market transparency regime and points to the need for some market controls.

5.4 STRUCTURES OF LENDING AND CONSUMER WELFARE IMPLICATIONS: FORMALITY v INFORMALITY

This study was also interested in observing the impact of lenders' organisational forms on the performance of consumer loans. Specifically, to understand what similarities and differences exist between formal and informal credit.

5.5 COMMERCIAL BANKS AND MFIs

Commercial banks are the archetype of formality in the financial system. The insignia of formality identified by respondents include incorporation as limited liability company, ownership of a banking licence, listing on the stock exchange, massive buildings, formalised procedures, adherence to a code of conducts, the dress code of staff, and 'a lot of paperwork'.

Respondents communicated perceptions of formalisation in different ways. Respondents (formal lenders) expressed pride in the corporate brand, national and international presence, efficiency, and profitability.[701] In contrast, interviewed

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[697] UnBb, (n 620).

[698] Regulator 1 (n 666).

[699] Interview with ABe, Credit Risk Unit, AB (Abuja, Nigeria, 2018).

[700] O Odetola, 'Corporate Debt Restructuring and the Global Harmonisation Process: Emerging Trends in Africa' (PhD thesis, University of Kent 2018) 207.

[701] ZBi (n 623; UBAd (n 609).

borrowers saw formal institutions, mainly commercial banks through different lenses. Many in rural areas thought of banks as distant, unrelatable, for educated people, or extensions of the government.[702] Respondents in the formal sector considered bank loans variously as inaccessible, expensive, deceptive, and without a soul.[703] However, all respondents would consider keeping their money in commercial banks because they are safe, reliable, and accountable.[704]

One interesting finding is that although the institutional vision for MFIs is to cater to the financing needs of small businesses in Nigeria, they have become extended sources of financing for wealthy individuals, especially consumer loans.[705] Although the CBN's microfinance policy framework provides for a lending ratio of 80:20 in favour of micro-businesses, many MFIs deviate from that policy. Big time borrowers often approach MFIs for loans and many MFIs have collapsed because of lending more than they should.[706] Such risky undertakings by MFIs account for most MFI failures in Nigeria[707] and create additional pressures on the surviving MFIs.

Lenders believe these perceptions impact the attitude of borrowers in specific ways. 'Some borrowers believe that we are government or so and do expect handouts from us'.[708] According to UnBb, 'Many of them think that bank money is free money or some form of the "national cake"'.[709] This attitude was more common amongst wealthy borrowers than lower-income borrowers, in part because access to bank loans is very exclusive.

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[702] Consumer Borrower 1 (n 644); Regulator 3 (n 614).

[703] Consumer Borrower 5 (n 644).

[704] Interviews with Consumer Borrower 4, Secretary of Staff Co-Operative, Ministry of Foreign Affairs (Abuja, Nigeria, 2018); Consumer Borrower 6 (n 649); Interview with Consumer Borrower 7, Department of Agriculture, (Ankpa, Kogi State, Nigeria, 2018).

[705] FMBj (n 660); HMBk (n 640).

[706] HMBk (n 640).

[707] ibid.

[708] FCMBa (n 622).

[709] PBc (n 613).

> Some people are just so wicked, they owe you five million [in default], but they will go and spend 20 million on a wedding or some parties, hire a live band! …in [a] weekend they would have spent more than they owe [but would not repay] you on a party![710]

All formal lenders interviewed reported frequent resort to the justice system to enforce contractual obligations and believed some borrowers default on purpose.[711] In some cases, they deployed unlawful methods to recover loans. Illegal debt recovery practices by lenders and law enforcement agencies involving the intimidation, physical violence, detention, arbitrary seizure of borrowers' assets and other breaches of the fundamental rights of borrowers have been documented in a long line of case law in Nigeria.[712] All respondents interviewed agreed that the illegal use of force for debt recovery is rampant involving either the police or thugs. They, however, disagreed on the role of the police in the process.

Lenders expect customers to be proactive, and to report to them when a default is about to occur and not after. Where the circumstances are 'genuine', banks are willing to restructure the loan to assist the borrower.[713] Microfinance institutions showed more flexibility to accommodate 'proactive' customers than commercial banks, and sometimes go to extreme lengths to engage with third parties on behalf of clients at no extra cost to the client:

> If it means the bank helping you to get to the [government] ministry if they have a means of tracking your payment, we are happy to assist. However, where default crystallises easily is where the customer tends to withhold information.[714]

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[710]ibid .

[711] Interview with ABe, Credit Risk Unit, AB (Abuja, Nigeria, 2018).

[712] *Economic & Financial Crimes Commission v Diamond Bank Plc & Ors* (2018) LPELR-44217(SC). See also *AG Plateau State v AG Nasarawa* (2005) 129 LRCN 1523 at 1531; *UNIBIZ v Commercial Bank* (2005) 125 LRCN 1484 at 1495; *University of Ilorin v Oyelana* (2001) FWLR (Pt. 83) 2193 at 2209.

[713] PBc (n 613); UnBb (n 620); HMBk (n 640).

[714] HMBk (n 640).

The approach to debt recovery is more radical where lenders perceive that a borrower has the capacity but is unwilling to repay the loan, or where the borrower lied about their capacity *ab initio.*[715] Usually, lenders start with rapprochement and then go on to escalate the process where that fails. Many of the lenders, and legal practitioners who often act on their behalf described a scenario where the lender may have to practically turn 'a beggar' in order to recover: 'When you find yourself in this situation, the borrower will scrutinise your demeanour, and if your humility, helplessness, and deference is not apparent, they could choose to stress your life before repaying whatever amount they're owing'.[716] Lenders and recovery agents thus often appeal to debtor's morality, recruit faith leaders to intervene, and believe themselves to be in a 'weak' position after disbursement.[717]

5.6 INFORMAL AND SEMI-FORMAL LENDERS

5.6.1 Family and Friends

The general sentiment is that while loans from family and friends are best because they tend to be interest-free, the most significant challenges are insufficient funds, typically very short-term, and a fear of an acrimonious ending that could lead to a breakdown in familial ties.[718] Many respondents expressed reservation about lending to family members or friends because of the 'difficulty' and 'awkwardness' of recovering the money.[719] 'If somebody comes to me, be they, family or friends, to borrow money, what I do is give them the little money I know I could forfeit, I will not lend to the person in case of a problem'.[720]

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[715]ICBl (n 639); Interview with Legal Practitioner 2, Associate, Abdullahi & Santino (Lagos, Nigeria, 2018).

[716] Interview with Legal Practitioner 1, Associate, S.I. Ameh (SAN) & Company (Abuja, Nigeria, 2018); Consumer Borrower 7 (n 704).

[717] FMBj (n 660).

[718] Consumer Borrower 7 (n 704).

[719] Consumer Borrower 4 (n 704); Consumer Borrower 5 (n 644); Consumer Borrower 6 (n 649); Consumer Borrower 2 (n 663).

[720]Consumer Borrower 5 (n 644).

5.6.2 Cooperatives

Cooperatives are the most accessible sources of small informal and short-term consumer loans in the country outside the family. The interest rates for all the cooperatives interviewed ranged from 0-15 per cent, lower than the rates offered by commercial banks and microfinance banks.[721] The relative affordability of cooperative loans is in many cases a function of their set up: 'the cooperative is a membership body that pools funds from staff contributions, to assist staff members in distress'.[722]

Cooperatives also operate as a channel to the formal lenders whereby members can leverage the cooperative to meet the criteria of commercial banks that they on their own could not meet. According to Regulator 3, 'Bodies like the Cooperatives Financing Agency of Nigeria [CFAN] serve a vital role in the formalisation process'.[723] CFAN is 'an umbrella organisation for cooperatives in Nigeria that helps to pool facilities from formal lenders on behalf of our members, especially subsidised facilities like agricultural loans'.[724] It is important to remark, however, that consumer bodies such as CFAN have shown a somewhat tame ambition in that they have been unable, if not unwilling, to leverage their influence in lobbying for a radical reform of bank lending practices. This may not be unrelated to the regressive impact of the distributional consequences of regulatory proposals for collective action.

According to Olson's theory of collective action,[725] consumer groups have widely dispersed interests and suffer low costs of policy per capita, such that they are less able to match the organising capacity of small business groups who benefit from the status quo. According to Olson, 'rational, self-interested individuals will not act to achieve their common or group interests' voluntarily in the absence of force or incentive.[726] CFAN is a large cluster of cooperatives and trade unions including

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[721] CFANp (n 662).

[722] Consumer Borrower 4 (n 704).

[723] Regulator 3 (n 614).

[724] CFANp (n 662).

[725] M Olson, *The Logic of Collective Action* (Cambridge, Harvard University Press 1961).

[726] ibid 2.

farmers, artisans, and traders who are not *commonly* interested in consumer loans. For example, the interviewee frequently mentioned subsidised agricultural and MSME loans as top priorities rather than consumer loans. A group's effectiveness in lobbying is undermined where its leadership has an interest that is narrower than the group's overall objective.[727] Assuming, however, that CFAN's limited lobbying for consumer borrowing was due to consumer credit being outside its purview, there appears to be considerable scope to push for additional reforms in the lending structure of formal institutions that remains unexplored. For example, many of the respondents interviewed are unaware of the many opportunities that fintech presents and thus unlikely to challenge CBN restrictions of such players in the credit market which favours the banks and a few elite borrowers. Overall, it is instructive to note that unions like CFAN organise in opposition to powerful business and political interests and as such will struggle to defeat the status quo. Unlike consumer borrowers who are organised some of the times ie 'only in special circumstances',[728] formal lenders and their interests are organised as 'as a general rule'.[729]

Secondly, the CBN has not involved co-operative societies and credit unions in its financial inclusion policy in the way that MFIs are promoted. The imperative of semi-formal credit channels to Nigeria's financial inclusion strategy given they provide the most affordable credit seems obvious, but the notion that these channels primarily provide consumer loans which are not as desirable as producer or enterprise loans subdue their appeal to regulators. It is also a testament to the fact that regulators have not given much thought to the potential of informal credit sources that could be harnessed by linking them to mainstream institutions.

The main challenges with accessing finance through cooperatives have to do with narrow eligibility and co-operatives' limited capacity to lend. Access to a co-operative loan is restricted to members of the co-operative only. Secondly, much like family and friends, a co-operative typically has minimal funds available because they depend on

[727] ibid 5.

[728] eg on subsidised agricultural loans which, in any case, benefits industrial-scale farmers more.

[729] Olson, *The Logic of Collective Action* (n 725) 143.

member contributions whereas member incomes can be volatile, eg when government salaries at state and local government levels are irregular.[730] Also, because cooperatives offer desirable rates, there usually is a high demand for facilities by members than often can be met.[731] Finally, cooperatives are very responsible lenders even though they are not subject to prudential oversight by the CBN. They adhere strictly to the lending limits stipulated in the Labour Act, and in the event of default, more amicable ways are adopted in loan recovery and dispute resolution generally.[732]

5.6.3 Fintech Start-Ups

Fintech has been included as an informal source of financing in this chapter because the licensing regime is still very ambiguous. The CBN issued mobile money regulations and agent banking regulations in 2009, which created a mobile banking platform that is bank-led and mobile payment services that are open to fintech and telecommunications companies to participate. According to the CBN, a total of about 22 mobile banking licences have been issued, but no official list of licensees is published on the CBN's website. However, there are over 50 fintech operators advertising mobile banking services online, many of them with registered business addresses across Nigeria.

Respondent banks acknowledged that the tide is moving in the direction of digital finance but insist that is not yet central to their lending model. Engagement with technology is mostly at the operational level, while credit assessment is predominantly relational.[733] Despite not having adopted much of technology, many of the banks are confident fintech will be more of a collaborator rather than a competitor:

> Over time, I think they will be an added advantage to banking because it might look as if they have taken over the market, but they cannot do

[730] CFANp (n 662).

[731] ibid.

[732] Regulator 4 (n 645).

[733] ZBi (n 623); PBc (n 613); Interview with UnBb, Credit Risk Operator, UnB (Abuja, Nigeria, 2018); HMBk (n 640).

> the real banking. So, one way or the other, they might merge with other banks or enter into a partnership because they need the clients the bank have, they have the technology, but some banks already have that technology.[734]

PBc expressed reservation about fintech in terms of consumer protection as follows:

> Fintech is challenging because if commercial banks which are currently subject to prudential regulation are still actively stealing and engaging in malfeasance, just imagine the loopholes in fintech and the link to terrorism.[735]

5.7 DEFAULT RISK AND CONSEQUENCES ACROSS LENDING CHANNELS

Non-formal lenders reported lower default rates. It was not clear from the responses why this is so. It appeared that the cost of credit correlated with positive repayment behaviours. The cheapest and most patronised sources of personal loans are co-operative societies and credit unions which charge on the average 0-15 per cent interest.[736] One cooperative society's secretary explained the reason: '… the money belongs to them [members] in any case because it is through deductions from their monthly salaries that we can raise our funds to lend'.[737]

Other factors that some lenders associated with high repayment rate are the social bond that exists between cooperative members, fear of ruining workplace reputation, and the fact that liabilities are liquidated through advance salary deductions. For example, one respondent stated: 'I was indebted to my credit union and had a payment plan in place. However, when my wife had complications with childbirth, I pleaded with them to freeze deductions for a while, and they did without extra charges. No bank will listen to that'.[738] In contrast, commercial banks' prime lending

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[734] HMBk (n 640).

[735] PBc (n 613).

[736] Consumer Borrower 4 (n 704).

[737] ibid.

[738] Consumer Borrower 5 (n 644).

rate is 16.68 per cent[739] and without a maximum cap.[740] The base interest rate is one per cent above the Monetary Policy Rate (MPR).[741] Although MFIs lend at an average of 30 per cent,[742] the successful ones build a close relationship with their customers that go beyond the banking hall, which is value addition that endears customers and improve repayment.[743]

The perceived impersonal approach of commercial banks is a recurring issue at every stage of reported transactions with respondents, from legalistic contracts, exploitative terms, to a lack of flexibility with distressed customers.[744] Commercial banks interpret their duties narrowly to mean informing clients of terms. According to PBc, 'the bank will write you your offer letter in the most legalistic form, whether you understand it or not is your headache'.[745] Bank lending procedures do not account for the personal circumstances of individual borrowers. 'Once they endorse their signature, we feel that because it is written in the English language, both parties understand the meaning. Any complaints after that are not valid'.[746] This account was corroborated by legal practitioners representing borrowers in recovery proceedings. According to Legal Practitioner 2:

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[739] Subsidised agricultural loans are generally lower, with one respondent lending at 4.20 per cent. See Nigeria Galleria, 'Nigeria Banks' Lending Rates' (*Nigeria Galleria*, 16 November 2018) <https://www.nigeriagalleria.com/Galleria_Finance/Bank-Lending-Interest-Rates.html>accessed 16 September 2019.

[740] CBN, 'Money Market Indicators (In Percentage)' (*CBN*, November 2018) <https://www.cbn.gov.ng/rates/mnymktind.asp>accessed 16 September 2019.

[741]MPR was 14 per cent as of May 2018 when this study took place. See CBN, The Guide to Charges by Banks and Other Financial Institutions in Nigeria 2017. See also CBN, 'Monetary Policy Decisions: Key Decisions of the Central Bank of Nigeria Monetary Policy Committee on November 21 and 22' (*CBN*, 23 November 2018) <https://www.cbn.gov.ng/MonetaryPolicy/decisions.asp>accessed 16 September 2019.

[742] ICBl (n 639).

[743] HMBk (n 640).

[744] Consumer Borrower 4 (n 704); Regulator 4 (n 645).

[745] PBc (n 613).

[746]FCMBa (n 622).

> The illiterate, when they go to banks, are given forms and all that, they sign, and they rely on the verbal instructions which could be trading puffs told to them by the bankers, they rely strictly on that. It is when they get into contract properly that they see some of those terms which are included in the document that they have failed to read.[747]

Apart from interest rates, some borrowers identified what they often referred to as 'hidden charges', ie transaction fees not revealed in the offered interest rate as a significant disincentive to credit uptake. All the respondents on the lenders' side disagreed with consumer claims about hidden charges but instead attributed such notion to financial illiteracy and desperation. According to them, customers often fail to appreciate the distinction between simple interest and compound interest[748] and yet some borrowers wrongfully construe Value Added Tax and management fees as hidden charges.[749] The CBN has contributed to this confusion by permitting commercial banks to charge various fees (such as management fee, facility enhancement fee, and restructuring fee (where applicable) in addition to the offered interest rate, provided the fees do not exceed 2 per cent of the loan amount.[750] In contrast to the post-Recession paradigm laid out in chapter four,[751] the CBN does not require banks to disclose such fees or even the offered interest rate on the mandatory 'minimum information on credit print-out' which lenders must provide for the borrower before the loan contract is executed.[752]

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[747]Interview with Legal Practitioner 2, Associate, Abdullahi & Santino (Lagos, Nigeria, 2018).

[748] Consumer Borrower 6 (n 649); PBc (n 613).

[749] HMBk (n 640).

[750] CBN, The Guide to Charges by Banks and Other Financial Institutions in Nigeria 2017.

[751] See para 4.3 Ch 4.

[752]Union Bank PLC, 'Personal Loans for Individuals' (*Union Bank*, 16 September 2019) <https://www.unionbankng.com/everyday-banking/personal-loans-for-individuals/#1486633960164-36e91d26-a31c>accessed 16 September 2019.

Another primary source of consumer vulnerability is the general illiteracy level, but specifically the low financial literacy levels.[753] Many consumers do not understand the economic welfare consequences of a loan contract and as such, find it hard to recognise the possible harm that could flow from there: 'I would say that many of them do not have what we call financial literacy. Financial literacy has to do with "what do I do with funds when I get them?"' Also, 'how do I get them? What should be my mentality when I have funds that are borrowed or when funds come into the business? Am I able to distinguish between borrowed funds and personal funds?'[754]

There seems to be a consensus amongst the respondents that harm does result from many credit contracts, but very little agreement as to who is at fault. Most of the lenders interviewed find behavioural science plausible but reject its policy prescriptions. Some banks raised concerns about paternalism associated with BE[755] and the probability that consumers ignorant of the benefits of such studies could misinterpret policy based on it as designed to deprive them of access: 'The problem, in practical terms, is how you tell that a person looking very sound is imperfectly rationale without making him feel insulted, especially when he is in serious need of the money!'[756] This, however, proves the essence of behavioural economics in the first instance. Consumers routinely display overconfidence regarding capacity to repay.[757] Indeed, many borrowers in Nigeria are over-optimistic and over-precise in terms of their willingness to borrow despite their admission that the government often delays

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[753] CBN, 'Financial Literacy' (*CBN,* 11 January 2019) <https://www.cbn.gov.ng/Devfin/finliteracy.asp>accessed 16 September 2019.

[754] Regulator 3 (n 614).

[755] ZBi (n 623); UBAd (n 609); PBc (n 613).

[756] Regulator 3 (n 614); Regulator 4 (n 645).

[757] JA Shepperd and others, 'A Primer on Unrealistic Optimism' (2015) 24 Current Directions in Psychological Science 232. See Financial Conduct Authority, *Credit Card Market Study: Consultation On Persistent Debt And Earlier Intervention Remedies* (2017) Consultation paper CP17/10, <https://www.fca.org.uk/publications/consultation-papers/persistent-debt-earlier-intervention-cp17-10> accessed 29 August 2019. See also para 3.4.4 Ch 3 for full discussion of BE.

[757] MD Grubb, 'Overconfident Consumers in the Marketplace' (2015) 29 (4) The Journal of Economic Perspectives 9-35.

salaries and contract mobilisation funds.[758] Some banks questioned the instrumentality of BE policy, 'given the socio-economic status of those who currently have access to finance in the formal sector, it is appropriate to assume that they can comprehend.[759] This argument, however, suffers from two defects. First, the evidence indicates that all categories of consumers including the educated have a bounded rationality.[760] Secondly, although financial literacy amongst formal sector consumer borrowers ordinarily should not be much of a concern considering that the consumer base is narrow, and exclusive to civil servants and elite business people, structural dysfunction in the public sector and mediocre recruitment processes mean many civil servants are not entirely educated or well-informed about money matters.[761]

Some banks insisted they were doing way too much already, including offering verbal explanations from the point of marketing products to a prospective client to the point of disbursement.[762] 'Verbal explanations', however, have a limited utility to the average consumer in Nigeria. It is difficult to show that loan terms were misrepresented to the borrower by a loan officer's verbal instruction or trade puff unless the same is contained in the contract.[763] This is because 'where the contract between the parties is reduced into writing, extrinsic evidence is not permitted to add, vary, subtract from or contradict the terms of the written instrument'.[764] Section 128

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[758] S Lichtenstein, B Fischhoff, and LD Phillips, 'Calibration of Probabilities: The State of the Art to 1980' in D Kahneman, P Slovic, and A Tversky (eds), *Judgment Under Uncertainty: Heuristics and Biases* (New York, Cambridge University Press 1982) 306–334; TG Silk, 'Examining Purchase and Non-Redemption of Mail-in Rebates: The Impact of Offer Variables on Consumers' Subjective and Objective Probability of Redeeming' (PhD Dissertation, University of Florida 2004) <http://etd.fcla.edu/UF/UFE0004380/silk_t.pdf> accessed 29 August 2019.

[759] FCMBa (n 622).

[760] R Mazer, K McKee, and A Fiorillo, *Applying Behavioural Insights in Consumer Protection Policy* (CGAP 2014); B Babcock, *Using Brain Science to Design New Pathways out of Poverty* (Economic Mobility Pathways 2014).

[761] Regulator 4 (n 645); Legal Practitioner 1 (n 687).

[762] UBNh (n 637); FCMBa (n 622).

[763] *Afegbai v AG Edo State* (2001) LPELR-193(SC).

[764] *Atiba Iyalamu Savings & Loans Limited v Mr. Sidiku Ajala Suberu & Anor* (2018) LPELR-44069(SC).

of the Evidence Act 2011 provides for exceptions where a claimant is able to prove that such verbal explanations evidence the existence of a vitiating element in the contract; clarify or introduce terms omitted from the written contract; or show the existence of a separate oral agreement which is a condition precedent to the loan contract. Such a claimant will have to overcome the practical problems of finding witnesses who are willing to support her case.

The rejection of BE policy is not the only area where the Nigerian regulatory framework diverges from the emerging international paradigm but also the former's reliance on *ex post* remedies. Nigerian regulators lean toward the position of lenders on these issues. It is fair to say that the CBN and Nigerian courts take a very limited approach to consumer protection on the assumption that information and competition in the credit market are adequate tools to protect consumers. Generally, the courts respect the freedom of parties to contract and are reluctant to intervene to relieve any party of obligations under the contract. Accordingly, when persons of full age and sound mind lawfully agree, they are bound by the terms.[765] In principle, an illiterate borrower could avoid a loan contract if, because of illiteracy, they could not have understood the terms of the loan. The courts in Nigeria, however, define an illiterate to be someone unable to read or write in *any* language and exclude any person who can read or write in a language other than that used in the loan agreement.[766] This automatically erodes protection for the typical consumer borrower from the formal and semi-formal sectors in Nigeria.

5.7.1 A Familiar Tale of Corruption and Institutional Weknesses

As demonstrated above, the Nigerian approach to credit regulation is misguided for two reasons. First, formal lenders in Nigeria are few and highly constrained by tight prudential guidelines which limit their capacity to lend or compete effectively. Amongst the few active formal lenders in the market, competition has not impacted prices because credit products in the formal market are not very diverse. Hence, consumers are ill-equipped – given financial literacy levels and limited credit supply-

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[765] *Uwah & Anor v Akpabio & Anor* (2014) LPELR-22311(SC).

[766] *Itaken v Offiong & Anor* (2016) LPELR-41223(CA).

to harness the benefits of competition.[767] When commercial bank products are very homogenous as in Nigeria, it becomes more difficult for consumers to comprehend and process information correctly.[768] According to Consumer Borrower 4, for example:

> I took a loan for seven months; the bank staff encouraged me to extend it to nine months. I thought they were doing me a favour, but I ended up paying about an extra hundred thousand, which I was never advised about.[769]

There is a broad sense amongst respondents that the legal system built on the Common Law is neither serving the interest of lenders nor lower-end users of consumer credit in Nigeria.[770] While other common law jurisdictions have adopted responsible lending legislation which enables borrowers to avoid unsuitable loan contracts as an *ex ante* consumer protection measure, Nigerian courts have invoked the doctrines of equity[771] and public policy[772] to reject such an approach in the absence of legislation similar to what obtains in the other jurisdictions. According to the Supreme Court of Nigeria in *Fasel Services Ltd & Anor v NPA & Anor,*[773] the borrower having voluntarily entered into and taken the benefit of the agreement, ie the

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[767]O Bar-Gill and E Warren, 'Making Credit Safer' (2008) 157 (1) University of Pennsylvania Law Review 1-101.

[768] I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Oxford, Hart 2012) 44.

[769] Consumer Borrower 4 (n 704).

[770] There is an on-going global debate about the choice of law for business between the common law and civil law with one school of thought claiming that the former is more pro-business and correlates to more credit access in countries where it operates, in contrast to the civil law system. It seems rather anachronistic to rely primarily on 19th and 20th century legal philosophies for consumer protection in the 21st century other than as aid to interpreting statutes. See R Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57 The American Journal of Comparative Law 765.

[771]*Bulet Int'l (Nig) Ltd & Anor v Olaniyi & Anor* (2017) LPELR-42475(SC).

[772] *BB Apugo & Sons Ltd v OHMB* (2016) LPELR-40598(SC).

[773] (2009) LPELR-1245(SC)

drawdown, equity will not allow him to seek to avoid his obligation thereunder by challenging the legality of the transaction. However, not all advantages of the common law confer on lenders. A significant proportion of loan default is attributed to the slow grind of the common law. In Nigeria, the gain derivable from non-repayment outweighs the punishment for default for some category of borrowers.[774] According to respondents from commercial banks interviewed, senior government officials, wealthy and influential borrowers are in particular very challenging: 'If you make too much noise the government will come down on your neck, and you will lose business. If you are a minister somewhere and we are expecting you to give us billions in business, we do not want to touch you or be too aggressive'.[775] As a result, influential loan defaulters could not be 'disturbed' while they 'flew first class [plane tickets] up and down'.[776] This class of borrowers understands the loopholes in the legal system and would rather pay lawyers to exploit such loopholes to their advantage than repay their loan.[777]

Corruption is not a uniquely Nigerian pathology, but human beings and corporations everywhere tend to misbehave where the likelihood of avoiding punishment is high. For example, big companies like Amazon, Apple and Starbucks routinely maintain schemes to avoid paying taxes in advanced countries and remorselessly so.[778] Indeed, public office confers a disproportionate amount of power, influence, and riches on politicians in developing countries or countries with weak institutions compared to their counterparts in advanced and democratic societies.[779] For example, the World

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[774]J Zinman, 'Consumer Credit: Too Much or Too Little (or Just Right)?' (2014) 43 (2) The Journal of Legal Studies S209-S237.

[775] PBc (n 613).

[776] UBNh (n 637).

[777] PBc (n 613).

[778] See S Pearlstein, *Can American capitalism survive? Why Greed Is Not Good, Opportunity Is Not Equal, and Fairness Will Not Make Us Poor* (New York, St. Martin's Press 2018). See also MJ Sandel, *What Money Cannot Buy: The Moral Limits of Markets* (New York, Farrar, Straus & Giroux 2013).

[779] D Acemoglu, and JA Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (London, Crown Business 2012) 106.

Justice Project's (WJP) Rule of Law Index 2017-2018 ranked Nigeria 97th out of 113 in the world and 13th out of 18 in sub-Saharan Africa. The WJP Index measures the effectiveness of the rule of law in 113 countries and on eight factors, one of which is the absence of corruption. On this factor, the Index considers three forms of corruption: bribery, improper influence by public or private interests, and misappropriation of public funds or other resources. These criteria are then applied to government officers in the executive branch, the judiciary, the military, police, and the legislature, and on this factor, Nigeria is ranked 100th out of 113.

Even in countries with strong institutional cultures, litigants with resources to hire the best lawyers are more likely to obtain a favourable judgment under the common law system.[780] In Nigeria, the justice system is more expensive because of the higher relative poverty of the average Nigerian, and the inefficiency of the court system which affects the fairness of judicial decisions, and undermines private sector growth.[781] For example, some respondents observed that collateral enforcement is a difficult endeavour to pursue because of such delays, and people's sentimental attachment to properties. Debtors often invoke deceased benefactors and the need to protect inheritances ('legacies') to attract sympathy and mercy from bailiffs who often succumb to such 'antics'.[782]

Although serious efforts are being made to reform the system such as the adoption of the new High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018 which now provides for electronic service of court processes, a new cost of N200 [USD 0.55] for late filing of a court process, fast track procedure for bank/customer disputes where the transaction value exceeds N50 million [USD 137 000], and stronger discretionary powers on the judge to refer matters to alternative dispute resolution

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[780] Judiciary of England and Wales, 'The Lord Chief Justice's Report 2015' (*Courts and Tribunals Judiciary*, January 2019) <https://www.judiciary.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf>accessed 16 September 2019.

[781]M Dakolias, 'Court Performance around the World: A Comparative Perspective' (1999) 2(1) Yale Human Rights and Development Journal 87-142.

[782] Legal Practitioner 1 (n 716); PBc (n 613); Legal Practitioner 2 (n 747); Odetola (n 700) 207.

etc. These reforms, however, do not go far enough. Court processes and proceedings are yet to be fully computerised such that filings and note-taking by judges are still done manually; the fine for late filing is grossly insufficient to deter dubious litigants bent on avoiding loan repayment, and awards from Alternative Dispute Resolution (ADR) proceedings must return to courts for endorsement and execution. The fast-track procedure is likely to further negatively impact lending to lower-end borrowers because small loans do not qualify for fast track, and the system diverts judicial resources away from the poor to the wealthiest transactions. This criticism also applies to ADR as according to practitioners, lenders consider ADR practitioners too costly to hire to recover the typically small personal loan sizes often in dispute.[783]

5.8 MONEYLENDERS AND EXTREME ABUSES OF CONSUMER RIGHTS

Moneylenders, both licensed and unlicensed, constitute the black market for consumer credit in Nigeria. Unlicensed moneylenders are highly predisposed to predatory lending. They have better customer information than formal/semi-formal lenders such as the family ties and circle of friends of the borrower and are not constrained by the burden of preserving/protecting any operational licence. Better information affords them higher-quality credit risk assessment, and the absence of licensing constraints means they can use every means possible to ensure compliance, including enforcement against a third party.

Unlicensed moneylenders have little or no regards for consumer welfare at the time of lending. They would advance the loan if they had a guarantee of getting it back legally or illegally.[784] In other words, they prey on the desperate circumstances of their clients:[785]

> I am currently in court against this guy who approached my client for a loan. The person got a contract, which he had to execute within two

[783] O Adekoya, O Philip-Idiok, and PA Iwu, *Arbitration Guide: Nigeria* (IBA Arbitration Committee 2018).

[784] Legal Practitioner 1 (n 716).

[785] This example is not about a consumer loan but the account is similar to the experiences of consumer borrowers whose desperation is preyed upon by these lenders.

> months. The value of the contract is NGN15, 000,000 (USD 41, 064.75). He had looked for money everywhere but could not get, so he approached my client, who is in the black market to lend him money. The terms my client offered to him was N10,000,000 for the interest of N3,000,000 within two months, that is N1,500,000 interest per month. At first, he refused, then he went back, he had gone round; he had gone to the regular banks, showed them his contract award letter, they refused because he did not meet the collateral requirement. The only option he had was borrowing from a black marketer like my client. At the end of the day he spent more than the N10,000,000 he originally estimated as project cost, so the NGN 5,000,000 gain he had anticipated did not materialise. It cost him NGN 13,000,000, so he was now left with just NGN 2,000,000. He could pay back the principal loan, but my client will not have that, so we are in court for the interest which he cannot afford. However, an agreement is an agreement.[786]

The courts are, however, inclined to enforce same on the grounds mentioned before. Moneylenders often go to extreme lengths to recover their loans including employing the services of 'rogue [police] officers', thugs, and designing sham contracts:

> Here in the black market, lenders will lend to a borrower whether or not they can afford the loan. In fact, they try to commit the borrower to a sum they are unlikely to repay especially where the borrower plans to use a landed property as collateral. They will be looking to strip the borrower of the property ownership for themselves.[787]

It is crucial to offer some background. Most borrowers who patronise moneylenders do so because of their inability to meet formal requirements.[788] One respondent whose house was valued at NGN 8 500 000 (USD 23 270) had his application for a loan of NGN 200 000 (USD 547) refused by the bank because his interest in the property was

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[786]Legal Practitioner 1 (n 716).

[787]Legal Practitioner 2 (n 747); Consumer Borrower 7 (n 704).

[788]Regulator 3 (n 614).

equitable. He had no legal title documents for the land upon which the house was built: 'why should I have to spend between NGN300 000 [USD 834.24] to NGN600 000 [USD 1668.47] to secure land [ie process title documents] when everyone knows it belongs to me and nobody is going to disturb me?'[789]

One reason many lenders operate without a licence is largely to avoid prudential regulation:

> They would rather do it from the black market because as soon as you are registered, you cannot intimidate somebody who had borrowed money from you with the police.[790]

Some unlicensed lenders do not mind the risk. While they sometimes may not get their money back, they know they could make up for whatever losses they incur from other transactions.[791] The official position of the police is that they interfere with civil contracts only when there is a criminal element to the complaint. The police attribute the perception of impropriety to 'a few bad eggs': 'where a customer obtained a loan by giving false information, a fake address, or by issuing a dud cheque, we have to come in because one of the primary duties of the Nigeria Police Force is the prevention of crime'.[792] This position is, however, not supported by law. In the recent Supreme Court of Nigeria case involving *Mr. Gabriel Jim-Jaja v Commissioner of Police Rivers State & Ors*,[793] the Appellant had taken a loan on the security of a title document which was allegedly forged, prompting his arrest and detention by the police who coerced him into giving a separate undertaking to repay the loan by other means. Upon failing to honour his subsequent pledge, the Appellant was re-arrested by the police hence the fundamental rights enforcement claim that gave rise to this appeal. Despite the alleged wrongdoing of the Appellant, the Supreme Court held that the police had abused its

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[789]Consumer Borrower 4 (n 704).

[790] Legal Practitioner 1 (n 716).

[791] ibid.

[792] Interview with Consumer Borrower 8, Inspector, The Special Anti-Robbery Squad (SARS) Unit, Nigeria Police Force Headquarters (Abuja, Nigeria, 2018).

[793] (2012) LPELR-20621(SC).

official powers and consequently awarded damages in favour of the Appellant for breach of fundamental rights.

It is instructive to note that it is not very difficult to invent a 'criminal element' to purely civil transactions in order to open a corridor for the use of forceful methods:

> What we do basically is we just do a petition against them stating that the person deceived you in collecting money for business when the person knew that there was no business [cheating]; or that you gave the person money to keep for you and the person used it for other business [criminal breach of trust]. As soon as that petition gets assigned to their department, [it] gives them the power to invite or arrest that person.[794]

As noted earlier, these antics are also deployed against borrowers in the formal market. Borrowers are blackmailed into issue post-dated cheques designed to bounce upon tender to force a violation of the Dishonoured Cheques Act which prohibits issuing a 'dud' cheque. The police will bring a charge on this premise to coerce the client into payment.[795] This practice inevitably involves an abuse of investigative and prosecutorial powers in service of lenders,[796] but also accounts for some of the delays in the judiciary.[797]

Furthermore, moneylenders often take advantage of the law and the court system to enforce otherwise illegal contracts. The law requires professional moneylenders to be licensed and sets a cap on the rate that could be charged as interest on loans.[798] There are, however, exemptions for bankers, insurers, and persons who do not have for their primary objects the business of lending money.[799] Aside the fact that these laws have

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[794] Legal Practitioner 1 (n 716).

[795] Legal Practitioner 1 (n 716); Consumer Borrower 7 (n 704).

[796] *Economic & Financial Crimes Commission v Diamond Bank Plc & Ors* (2018) LPELR-44217(SC).

[797] Legal Practitioner 2 (n 747).

[798] *Chief Chris Nwankwo v Chief Francis Arthur Nzeribe* (2003) LPELR-5452(CA).

[799] ibid.

lost any real 'bite',[800] legal practitioners have devised a common approach of making the loan agreement look like it was interest-free, so the actual interest is concealed as part of the principal sum.[801] Everyone can lend money without registration when it is interest-free:

> We don't come out to call it a loan agreement, we prepare an agreement that projects a situation where the debtor needs money, and our client is just helping that person, the interest is made part of the principal amount that the client is giving out, so that when it is ripe for him to recover his money, he can file a matter in court to get it. There was one time when we did not get that chance to do an agreement with the borrower, so we just told the borrower to do an email to our client acknowledging the receipt of NGN 1 500 000 when we advanced NGN 1 000 000.[802]

Such an agreement is hard to expose as a sham before the courts because the burden of proof is on the borrower to show that none of the exemptions in law applies to the lender,[803] and the only witnesses are usually the lender's friends and lawyers.[804] According to Legal Practitioner 2, 'If you go to the black market to borrow money with a lawyer, you might end up not getting that money, so they end up not even going with a lawyer because they need that money'.[805]

5.8.1 Formal Lenders: Same Medicine, Subtler Methods

Formal lenders employ different tactics from moneylenders. Formal lenders understand the legal, ethical and reputational costs of using illegal methods but adopt such methods where it was deemed necessary to protect the bank's interest such as to

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800 See para 2.4.1 Ch 2.

801 Legal Practitioner 1 (n 716); Legal Practitioner 2 (n 747).

802 Legal Practitioner 1 (n 716).

803 ibid.

804 ibid.

805 Legal Practitioner 2 (n 747).

prevent the customer from making the collateral unavailable upon default.[806] Formal lenders tend to devise strategies that appear to make the use of legitimate force even when it is not. When confronted with enormous pressure, or when a loan becomes toxic or non-performing, the bank increases the pressure on the account officer who introduced the client: 'The staff that manages the account usually suffers it, in most cases, they lose their job, the bank will tell you that if this loan is not recovered, you must not return to the office. It is as harsh as that'.[807]

In theory, where an account officer follows bank policies and procedures, they would not be personally liable for customer default. However, in practice, there is usually management complicity:

> In most cases, even when the management are aware there are one or two breaches in terms of their policy, they instruct the account officer to ignore in order to make sure that this guy [the marketer] gets the customer on board, but when it starts going bad, they will withdraw and leave the account officer to take the heat. That is usually the practice.[808]

As evident in the established case law, the practice, especially where it involves the police, is frowned upon by the courts as it delegitimises public institutions and the methods they deploy, such as, unlawful detention and physical beating of debtors, violate the constitution.[809] However, this has not deterred the police.[810] Almost all the borrowers reported having been 'harassed' or knowing someone who had been 'arrested', 'detained' or 'beaten up by thugs' after they asked for more time to repay their debt or other forms of restructuring.[811] In the case of formal lenders who do not

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[806]UBNh (n 637).

[807]ibid.

[808] PBc (n 613).

[809] *Okonkwo v Cooperative & Commerce Bank (Nigeria) Plc & Ors* (2003) LPELR-SC.58/1998.

[810] Legal Practitioner 2 (n 747).

[811] Consumer Borrower 4 (n 704); Consumer Borrower 6 (n 649); Consumer Borrower 7 (n 704).

enjoy the liberty of forceful recovery, the use of criminal law to recover the civil debt is also rampant.[812]

The continued use of these practices again underscores the weakness of the legal system earlier discussed in this chapter. Borrowers from co-operatives and credit unions recounted the most positive experiences of debt recovery through civil means.[813] While co-operatives organised mainly around shared workplace affiliations pre-empt default through adequate due diligence, payroll deduction of salaries, and guarantees of professional reputation and job security, default occasioned by exceptional circumstances such as delayed salary and sudden family hardship attract heavy sympathies including rescheduling of debt.[814] Credit unions, on the other hand, rely strongly on social reputation and traditional dispute resolution institutions for debt recovery.

5.9 SUMMARY

Access to consumer credit in the formal sector is encumbered by policy, institutional, and regulatory obstacles in Nigeria. The CBN which regulates commercial banks in Nigeria has demonstrated a fervent commitment to promoting financial stability in Nigeria through policy frameworks like BASEL II and AML regulations. The interviews, however, indicate that policy reforms have disproportionately impacted individual credit, and especially consumer lending to those in the middle to the bottom of the credit market pyramid. These groups of consumers find it harder to access loans from commercial banks and are more likely to subscribe to more expensive products.

Following the strengthening of prudential regulation in 2005 and 2009, formal lenders responded by further narrowing the customer base to about 5per cent of current adult population. Aggressive competition amongst banks to market credit products to this 'creditworthy' borrower base arbitrarily weeds out potentially creditworthy

[812] Legal Practitioner 3 (n 687).

[813] Consumer Borrower 4 (n 704); Consumer Borrower 6 (n 649); Consumer Borrower 7 (n 704).

[814] CFANp (n 662); Regulator 4 (n 645).

borrowers while ignoring the risk of default by the so-called eligible customer base. In other words, lenders rank the unknown risk of lower-end borrowers (information asymmetry) above the known risk (moral hazard) of wealthy borrowers, ie the predictable reluctance of rich, powerful and influential borrowers to repay loans on time: 'It is the way it is, we have to keep chasing them for repayment, but eventually they repay the capital and interests, but with poor borrowers in the informal sector, we cannot guarantee that'.[815] With respect to MFIs, the increasing foray of MFIs into the market of commercial bank lending significantly impair their capacity to deliver on their social promise to provide the poor with affordable credit for investment in education and health.[816]

Wealthy borrowers do not only benefit from information asymmetry and the weak legal system but contribute to the lack of access to credit by lower-end borrowers through their own default. This is because even if banks were inclined to device risk assessment methods that could accommodate the poor, the overall capacity of banks to lend declines because 'the more non-performing loans you have, the more difficult it becomes for you to give out more money'.[817]

The interviews also revealed that non-formal lenders provide a critical service in that they cater to most borrowers in Nigeria who do not meet the requirements of the formal lenders. For this reason, informal credit channels need to be strengthened. Precisely, commercial banks lend almost exclusively to corporate entities, and their loans- specifically, consumer loans- are tailored for an exclusive cohort of company promoters and managers, politicians and top civil servants. Semi-formal and formal lenders are thus expected to cater to the borrowing needs of the majority of individuals in the market. According to SMEDAN and the National Bureau of

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[815] ZBi (n 623).

[816] A Khazanov and others, 'The Microfinance Disappointment: An Explanation Based on Risk Aversion' (2018) CEPR Discussion Paper No. DP12659 <https://warwick.ac.uk/fac/soc/economics/staff/omoav/cepr-dp12659.pdf>accessed 9 September 2019.

[817]PBc (n 613).

Statistics, 96 per cent of individual borrowers, including MSME borrow from semi-formal and informal lenders.[818]

The reforms leading to further exclusion are products of regulatory ideas that emerged from international institutions. The ideas that consumer debt is unsuitable for developing countries, that financial institutions should not be statutorily required to lend to any particular group of consumers, that the solution to financial exclusion is to establish MFIs which in theory are more appropriate institutions to serve low-income borrowers, are to different degrees products of neoliberal economics chiefly advocated by institutions such as the World Bank, IMF, the BASEL Committee and OECD. Similarly, the assumptions that competition and information are adequate tools to protect credit consumers, and that consumer protection is necessarily incidental to financial stability appear to be borne of the same ideology and institutions.

The findings of this chapter, though inconclusive, suggest that these assumptions do not necessarily hold in the context of developing countries. Individuals from all economic backgrounds continue to borrow for consumption purposes regardless of assumptions about their capacity to save or become entrepreneurs. In the case of Nigeria, most individuals source consumer loans from informal markets. Regulation fails the group of borrowers that borrow from the black market, and by failing to promote informal channels such as cooperative societies and credit unions that offer welfare-enhancing products to borrowers. Secondly, MFIs are neither willing nor capable of serving people exclusively in the lower-rung of the market due to the size of this market and the limited resources available to MFIs. The implications of these findings for theory and policy form the subject of the next chapter.

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[818] SMEDAN and National Bureau of Statistics, 'Collaborative Survey: Selected Findings' (SMEDAN 2013) <https://www.smedan.gov.ng/images/PDF/2013-MSME-Survey-Summary-Report.pdf>accessed 16 September 2019.

CHAPTER SIX

6.0 IMPLICATIONS OF FINDINGS FOR THEORY AND POLICY

The thesis set out to understand models of consumer credit regulation at the transnational level and their impact on consumer borrowers in Nigeria. Two sets of theories undergird the study. First, access to affordable consumer credit has immense welfare benefits for consumers in Nigeria. By implication, the lack of access to consumer credit in Nigeria presents welfare challenges to many households. The second theory is that the role of regulation in expanding access to credit, and in minimising the risks associated with borrowing has gained a global acceptance but not in Nigeria. The relevant period of analysis in this thesis is post-independent Nigeria (1960 to present) and the impact of transnational credit regulation on consumer borrowers in Nigeria within this period.

The thesis identified three significant changes to the global approach to consumer credit regulation. These include an elevated status for consumer borrowers in the marketplace through the strengthening of consumer protection across the globe, and emphasis on the fair treatment of the consumer in the marketplace; the collapse of governance by information; and a growing preference for *ex ante* protection. However, the thesis argued that a simple transposition of this paradigm might not improve welfare outcomes for consumer borrowers in Nigeria and laid out some evidence for this in chapter five. The qualitative study revealed a pattern of problems with high cost borrowing in Nigeria above the global average,[819] implicated prudential reforms for entrenched financialisation and class disparities in credit access, and exposed failings in the justice system leading to violations of the human rights of consumer borrowers in the country.[820]

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[819] SL Sanusi, 'Banking Reform and Its Impact on the Nigerian Economy' (University of Warwick's Economic Summit, Warwick, February 2012) <http://www.bis.org/review/r120320d.pdf> accessed 5 May 2019.

[820] The study also found links between structural economic issues, including high unemployment, high informality, low and unstable wages, weak infrastructure, and financial exclusion. Throughout the

Economic depravity and financial exclusion in Nigeria are serious concerns which demand urgent attention not least because Nigeria hosts most of the world's extremely poor,[821] a situation that poses an existential threat to the stability of Nigeria, Africa, and indeed the world. Economic migrants from Nigeria are dispersed across Africa, Europe, and across all continents. While global migration is a fact of life, the migration of a mass of unskilled workers create cultural anxieties in host countries and has triggered a wave of populism and xenophobia that endangers the lives of migrants.[822] Financial exclusion creates a permanent underclass, breeds a collapse of social capital, and damages a country's image domestically and abroad.[823] The problems of financial exclusion and economic discontent amongst the masses appear to escalate long-running law enforcement challenges. First, there is the unabating tide of terrorism, itself linked to mass illiteracy and the growing impact of climate change along the Chad Basin in north eastern Nigeria.[824] There is also a general rise in crime levels with incessant kidnappings, armed robbery, and vandalism, and a growing

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thesis, discussion of the qualitative findings is aided by other academic references and, where available, statistical data.

[821] World Poverty Clock, 'The Percentage of Nigerians Living in Extreme Poverty Could Increase by 2030' (World Poverty Clock 2018) <https://worldpoverty.io/blog/index.php?r=12> accessed 03 September 2019.

[822] The rise of the far-right party Northern League in Italy and the 'Afrophobic' attacks in South Africa are both linked to the surge of migrants to both countries respectively. See BBC News, 'South Africa's Naledi Pandor on "Afrophobia"' (BBC News, 18 September 2019) <https://www.bbc.co.uk/news/av/world-africa-49746180/south-africa-s-naledi-pandor-on-afrophobia>accessed 27 September 2019.

[823] For example, while the mainstream media widely condemned President Donald Trump's reference to African countries as 'shitholes' as racist, many ordinary citizens in Africa agreed with his sentiment, blaming African leaders for exposing them to the unsolicited insult. Again, Trump's comment was made in relation to the national conversation about immigration in the United States.

[824] United Nations Environment Programme, 'The Tale of a Disappearing Lake' (*United Nations Environment,* 28 February 2018) <https://www.unenvironment.org/news-and-stories/story/tale-disappearing-lake>accessed 25 September 2019.

political unrest.[825] Collectively, these trends suggest an impending spectre of anarchy unless government acts to address these challenges. However, while these challenges bring Nigeria to a crisis point, it also provides an opportunity-a critical juncture- for strong regulatory reforms to improve the economic wellbeing of the citizenry. Consumer credit expansion is not *the* solution to all these challenges, but its relevance for sustaining basic consumption needs and securing political stability (or postponing political instability) is now well established.[826] This chapter explores some policy alternatives capable of addressing financial exclusion and empowering the consumer class in Nigeria.

This chapter is divided into three parts. Part I examines the implications of the findings of this study vis-à-vis the ideological framework governing regulators and makes a case for consumer credit in Nigeria. Part II proposes policy alternatives to address exclusion from the credit market in Nigeria. The last part explores various transnational regulatory strategies to make consumer credit safer including the provision of non-debt income alternatives to minimise the risk of high cost borrowing and subscription to welfare reducing loan contracts. Overall, the chapter builds on the main conclusions of the theoretical debate (ie the theoretical framework of this thesis) by considering the relevance of the policy options outlined in chapter three for developing country scenarios.

6.1 THE GULF BETWEEN IDEOLOGY AND POLICY IN NIGERIA

At the beginning of this thesis, it was made clear that a discussion of neoliberal ideology, the idea that the market is: (a) the most efficient and equitable distributor of resources and rewards; (b) the best guarantor of economic growth; and (c) the most

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[825] For example, Nnamdi Kanu's secessionist 'Indigenous Peoples of Biafra' and Omoyele Sowore's 'Revolution Now' movements are two of the more prominent political groups mobilising against the Nigerian State and governments respectively.

[826] See para 3.3.2 Ch 3.

able protector of individual liberty[827] is relevant to the primary narrative of this thesis (ie analysis of specific neoliberal policies). This is to the extent that ideology and policy are inseparable and relevant to the analysis of the utility of consumer credit to low-income individuals in developing countries. The expanding role of the state in global financial markets are also as ideological as they are policy-oriented. Consumer borrowing patterns are influenced by government's fiscal and monetary policies, such that the contents of economic rights availed consumers and the enforceability of these rights have a direct bearing on consumer wellbeing. In a nutshell, ideologies govern markets and provide the prism through which regulators view or understand their mandates and responsibilities to the market, lenders and consumers.

It is apparent from the literature and interviews that neoliberal ideas have driven policymaking at the national level in Nigeria since the pivot from the early interventionist disposition of the Nigerian state in the period between 1960 and 1983. However, there appears to be a missing link between neoliberal policymaking and neoliberal *thinking* in Nigeria. To put it in another way, although financial regulations in Nigeria champion liberal outcomes, the legal tradition, at least at the constitutional level, undercuts neoliberal economic theory. Despite the policy changes in the Nigerian credit market since 1983, in theory, there has not been an ideological change on the part of the government. To the contrary, while the state-centric cum socialist policies of the Nigerian government prior to SAP in 1983 were rather spontaneous[828] and administrative, the 1979 constitution for the first time introduced concrete welfare provisions that are closer to socialism, and at best a pivot from full scale capitalism.

A new chapter two titled 'Fundamental Objectives and Directive Principles of State Policy' was introduced into the Constitution which enacted duties and responsibilities

[827]G Gall, R Hurd and A Wilkinson, 'Labour Unionism and Neo-Liberalism' in G Gall, R Hurd and A Wilkinson (eds), *The International Handbook of Labour Unions Responses to Neo-Liberalism* (Cheltenham, Edward Elgar Publishing Limited 2011) 1-12.

[828] For example, some critics point out that the *Nigerianisation* policies of the General Murtala Mohammed military regime had an aura of populism aimed to legitimise his military coup rather than a robust plan to evolve a homegrown economy. See R Uwechue, 'Makers of Modern Africa: Profiles in History' (1991) Africa Journal Limited 391.

of a new kind on the Nigerian state. Amongst other things, the new provisions require the Nigerian government to (a) '… control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen based on social justice and *equality of status and opportunity*'; (b) promote 'a planned and balanced economic development'; (c) ensure that '…the material resources of the nation are harnessed and distributed as best as possible to serve the common good', and (d) ensure that '… the economic system is not operated in such a manner as to permit the *concentration of wealth* or the means of production and exchange in the hands of few individuals or [of] a group'.[829] This ideology was preserved by subsequent amendments and remain enshrined in the existing Constitution of the Federal Republic of Nigeria 1999 (as amended).

The framers of the Constitution hoped that this would promote national integration, reduce economic inequality, and entrench good governance in the Nigerian polity:[830]

> The need for [an] ideology in the Nigerian Constitution is all the greater because of the heterogeneity of the society, the increasing gap between the rich and the poor, the growing cleavage between the social groupings, all of which combine to confuse the nation and bedevil the concerted march to orderly progress.[831]

Beyond just theory, the fundamental objectives were intended to provide a compass for policymaking. According to Professor B. O. Nwabueze who chaired the Constitution Drafting Committee, 'Spelling them [ideologies] out in the constitution invests such principles with the quality of a constitutional directive to the organs of

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[829] See Chapter II, Constitution of the Federal Republic of Nigeria (as amended) 1999, particularly, section 16 (a-d).

[830] AHM Kirk-Greene, '"A Sense of Belonging": The Nigerian Constitution of 1979 and the Promotion of National Loyalty' (1988) 26 (2) Journal of Commonwealth & Comparative Politics 158-172.

[831] Reports of the Constitution Drafting Committee (Lagos, 1976), Vol. I, v-xiv, and Vol. II, 35-36); M Uwais, 'Fundamental Objectives and Directive Principles of State Policy in Modern Constitutions: Possibilities and Prospects' in CC Nwaeze (ed), *Justice in the Judicial Process: Essays in Honour of Honourable Justice Eugene Ubaezeonu JCA* (Enugu, Fourth Dimension Publishers 2002) 166.

the state to inform and guide them'.[832] Hence, the Nigerian government is pro-regulation and pro-intervention in financial markets *in theory*. In practice, however, section 6 (6) (c) of the Constitution renders the entire provisions of chapter two non-justiciable in any court of law. The implication of this is that in theory, Nigeria embraces welfare economics and economic rights, but in practice, it is committed to free-market ideals.

Several theories have been supplied to explain this disparity between ideological intent and policy outcome. The conventional explanation is the lack of means on the part of the Nigerian state to afford these 'promises', and accordingly, to be held accountable for them.[833] In other words, chapter two of the Constitution is unrealistic. While there may be some truth to this account, it is the contention of this thesis that the misconception of neoliberalism by national regulators and the influence of some transnational rules on Nigeria's capacity to implement welfare enhancing credit policy significantly explain this gulf. Indeed, the drafters of Nigeria's Constitution had been aware of the dangers of placing the economic destinies of the citizenry entirely in the hands of the market and how that might impact negatively on the very existence and survival of the Nigerian state. Politicians recognised that while the fundamental objectives are non-justiciable legally, politically, they offer a potent negotiation tool for candidates seeking to attain or preserve political power.

The violation of economic welfare rights (eg the rights to education, healthcare, and employment) typically has a uniform corporate impact.[834] Violations of the rights of consumer borrowers to access safe products in the credit market require collective action to redress, but pursuing the common interest is more difficult than the individual. According to Olson's thesis on collective action, individuals cannot be

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[832] BO Nwabueze, *The Presidential Constitution of Nigeria* (New York, St. Martin's Press 1982) 22.

[833] M Cranston, 'Are There Any Human Rights?' (1983) 112 (4) Daedalus 1. See also I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013); FA von Hayek, *Law, Legislation and Liberty, Vol. 2: The Mirage of Social Justice* (London, Routledge and Kegan Paul 1976) 133.

[834] For example, the failure to build public schools directly impact school-aged children, the failure to build hospitals, roads impact entire communities. This is unlike political rights (eg freedom of speech, association, right to life) which are more likely to be violated individually.

relied upon to pursue the *common* interest without an overriding incentive. This is also applicable to organisations where the leadership's interests are narrower than the groups overall objectives. Consumer borrowers lack the political clout, organisation and unity of purpose to compel politicians and regulators to translate these non-justiciable rights into actual policy, whereas, organised formal lenders and transnational actors have enjoyed enormous influence on regulators for overlapping reasons.[835]

In practice, while the regulatory framework in Nigeria seems to embrace neoliberal ideology and outcomes, state actors are more driven by non-ideological tendencies such as using state apparatuses to maximise private gain, and the pursuit of *ad hoc* and politically expedient policymaking.[836] On the other hand, globalisation and sovereign borrowing have increased the influence of transnational actors whose technical teams consist of dyed-in-the-wool specialists and policy wonks committed to the neoliberal agenda.[837] The neoliberal policy pathway imposed by these actors in specific instances operates as a boon to the domestic regulatory plagues such as elite corruption; cronyism and patronage that occur in the credit market and more broadly the financial system.[838]

The substitution of the Nigerian ideology as per chapter two of the Nigerian Constitution with a transnational neoliberal ideology comes with its unique set of problems for the regulation of the Nigerian credit market. The perspective that consumer credit can serve as a form of social insurance in poor countries as in developed ones is lost to the broader focus on macroeconomic indicators regardless of the little evidence of a direct link between consumer borrowing and systemic

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[835] M Olson, *The Logic of Collective Action* (Cambridge, Harvard University Press 1961).

[836] J Campbell, 'Nigeria: Political Parties' Limitations' (*Council on Foreign Relations*, 10 February 2014) <https://www.cfr.org/blog/nigeria-political-parties-limitations> accessed 13 August 2019 Political parties are hardly distinguishable by reference to ideology, which explains why politicians cross-carpet all the time.

[837] The IMF in particular is more conservative than the World Bank in terms of policy flexibility.

[838] N Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (New York, Cornell University Press 2006) 141.

failures in Africa.[839] The conception of consumer borrowing as a luxury rather than a palliative diverges from the Nigerian reality where consumer borrowing is a necessity for most and occurs within and without the formal system. The much bigger problem with dependence on transnational ideologies and or the transplantation of regulation is that the objective could easily be misunderstood and its inherent weaknesses less apparent to regulators in developing countries especially where there are differences within and between transnational institutions,[840] and where national regulators as in the case of Nigeria do not take part in the debates preceding policy adoption and implementation.[841] For example, between the IMF's position that SAP failed because the affected countries did not go far enough in implementing policy recommendations[842] and the World Bank's *mea culpa* urging humility and more regulation,[843] the current regulatory approach in Nigeria appears to agree with the IMF's diagnosis. Such a dull state of ideological engagement amongst national regulators increases the risk of ideological gullibility[844] and policy manipulation. Credit regulators in Nigeria continue to oppose interest rate controls, behavioural economics or responsible lending obligations even though the progenitors of

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[839] SL Sanusi, 'Banking Reform and Its Impact on the Nigerian Economy' (University of Warwick's Economic Summit, Warwick, February 2012) <http://www.bis.org/review/r120320d.pdf> accessed 5 May 2019.

[840] D Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank's "Economic Growth in the 1990s: Learning from a Decade of Reform"' (2006) 44 (4) Journal of Economic Literature 973-987.

[841] GA Onagoruwa, 'Legitimacy Deficit of Soft Law Institutions in Cross-Border Bank Regulation: An African Perspective' (2014) 34 *Journal of International Banking Law and Regulation 258;* C Brummer, 'Post-American Securities Regulation' (2010) 98 California Law Review 327, 384.

[842] A Singh and others, 'Stabilisation and Reform in Latin America: A Macroeconomic Perspective of the Experience since the 1990s' (2005) IMF Occasional Paper 238 <https://www.imf.org/external/pubs/ft/op/238/index.htm>accessed 25 September 2019.

[843] World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform.* (Washington, DC., World Bank 2005).

[844] The tendency for policymakers to adopt a herd mentality in policy formulation, where they accept the fundamentals of ideological frameworks without questioning such frameworks, and where their justification for a policy choice is that 'others are doing it'.

neoliberal ideology are now sold on the merits of these regulatory tools. This trend is not indicative of regulators' commitment to free-market ideas, but more expressive of a lack of an independent ideological anchoring, and the overwhelming influence of transnational actors imposing an ideology from the outside.

6.2 THE CASE FOR CONSUMER CREDIT IN NIGERIA

6.2.1 Consumer Credit as a Form of Social Insurance

Recent history has established that the dangers of household over-indebtedness are real and consequential. And yet the economic and social values of credit for consumption smoothing are too crucial at a time welfare states are withering away, and especially in developing countries that historically have not had robust welfare states. As social insurance, consumer credit is honest, it is not a gift, it has a price, but at a fair price it is worth having.

Although criticisms of austerity in Europe are not out of place, the critiques linking access to cheap credit to the decline of the welfare state[845] are inadequate for understanding the value of credit for borrowers in developing countries. This is because the decline of the welfare state is not peculiar to developed markets with hitherto generous welfare states. Globalisation and transnational domination have negatively impacted overall spending by most countries on social welfare programmes.[846] In relative terms, however, developed countries continue to spend a higher proportion of GDP on social welfare programmes than developing countries.[847] Developed countries can cushion the impact of globalisation on the poorest members of society (who also are the biggest losers from globalisation), while the middle and upper classes in these countries can leverage credit markets and private market insurance to manage income shocks and smoothen consumption. In contrast, such income shocks in developing countries result in drastic cuts in basic consumption due

[845] See para 3.3.2 Ch 3 for the critiques of consumer credit.

[846] J Yoon, 'Globalisation and the Welfare State in Developing Countries' (2009) 11 (2) Business and Politics 1-31.

[847] A Sinha, R Kumar, and SC Dhal, 'Financial Sector Regulation and Implications For Growth' (2011) BIS Papers No 62 <https://www.bis.org/publ/bppdf/bispap62g.pdf>accessed 9 September 2019.

to higher unemployment, underemployment, low public spending on social security and the lack of access to affordable consumer credit. Consumption smoothing in developing countries is a precarious business and quite costly in welfare terms:

> …households in low-income economies take very costly measures to avoid income risk and maintain consumption in the face of income shocks, such as reducing expenditures on children's education, putting other household members into work, planting lower-risk but lower-yielding crops… [and] murdering elderly dependents.[848]

The alternative to consumption cuts, as shown in the thesis, is that consumers turn to borrowing to finance essential consumption. The decline of the welfare state in developing countries already characterised by expensive credit and low access undercuts the causal link between cheap or affordable consumer credit and the decline of the welfare state. If this were true in the case of Europe, its applicability to Nigeria is at best tenuous. In other words, it is more honest to blame globalisation, rather than access to affordable credit per se, for the decline of the welfare state.[849]

It is equally significant to point out the flaw in the theory that consumer credit is unsuitable for developing countries because that theory erroneously assumes that the market is capable of excluding or rationing out 'undeserving' borrowers (eg consumer borrowers in developing countries) using price mechanisms, without any need for regulatory intervention by the state. To the contrary, this approach only causes low-

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[848] R Chetty and A Looney, 'Consumption Smoothing and the Welfare Consequences of Social Insurance in Developing Economies' (2006) 90 (12) Journal of Public Economics 2351-2356; World Bank, 'Finance for All? Policies and Pitfalls in Expanding Access' (2009) 24 (1) The World Bank Research Observer 143.

[849] Indeed, the overarching argument for globalists is that globalisation will produce a new wave of global prosperity, one they argue would be conferred by the markets. While much of this claim is true with the exponential growth of the middle-class especially in Asia and Africa, the collateral damage from globalisation has not been adequately understood and managed as effectively. See J Lanchester, 'The Case for Universal Basic Income' (2019) 41 (14) London Review of Books 5-8; D Moyo, *Edge of Chaos* (London, Little, Brown 2018).

income consumer borrowers to pay more for credit[850] because consumer borrowing has become a common form of social insurance as the welfare state withered away in Nigeria.[851]

It is essential to consider the scope of the withering of Nigeria's welfare state briefly. Nigeria's IFI-nudged pivot from interventionist policies to free-market outcomes occurred in stages. The first stage of this process began with the degradation of public services which were free, to the introduction of fees to make those services 'more efficient'. For example, the World Bank and the World Health Organization promoted privatisation and public-private partnership initiatives as the preferred pathway to Universal Health Coverage, and hence the birth of contributory health insurance and pension schemes along with fees for public schools and hospitals.[852] This was complemented by other ad hoc social services like the establishment of the National Poverty Eradication Programme (NAPEP) which piloted cash transfer programmes to a few of the poorest Nigerians and more recently school feeding programmes.[853] The latter, conceived to cushion the impact of the pivot, have enjoyed little success because they often do not reach intended beneficiaries and cost too much administratively.[854] The initiatives were, above all, symbolic gestures for political and tribal patronage,

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[850] P Cotler and C Woodruff, 'The Impact of Short-Term Credit on Microenterprises: Evidence from the Bimbo Program in Mexico' (2008) 56 (4) Economic Development and Cultural Change 829-849; D Karlan and J Zinman, 'Expanding Credit Access: Using Randomised Supply Decisions to Estimate the Impacts' (2010) 23 (1) The Review of Financial Studies 433–464.

[851] MM Pitt and SR Khandker, 'The Impact of Group-Based Credit Programs on Poor Households in Bangladesh: Does the Gender of Participants Matter?' (1998) 105 (5) Journal of Political Economy 958–96.

[852]EJ Chuta, 'Free Education in Nigeria: Socioeconomic Implications and Emerging Issues' (1986) 30 (4) Comparative Education Review 523-531.

[853] The Partnership for Child Development, 'Nigeria Launches Africa's Largest National School Feeding Programme' (*PCP*, 25 September 2019) <http://www.schoolsandhealth.org/News/Pages/Nigerian-Vice-President-launches-National-School-Feeding-Programme.aspx>accessed 25 September 2019.

[854] World Bank, *Nigeria - Poverty in the Midst of Plenty: The Challenge of Growth with Inclusion: A World Bank Poverty Assessment* (Washington, DC, World Development Sources 1996).

and to cushion the harshness of the free market reforms rather than any sustained ideological and policy commitment to erecting structures of social protection.

All these, however, have increased the importance of consumer credit for consumption smoothing and as a critical component of what could be described as the new 'Nigerian welfare regime'. After all, the term 'welfare regime' refers to 'the entire set of institutional arrangements, policies and practices affecting welfare outcomes and stratification effects in diverse social and cultural contexts'.[855] In many advanced economies, subsidised mortgage credit and student loans are integral to the welfare state,[856] buttressing the point that equal access to affordable credit positively impact welfare outcomes and social stratification, such that it must be considered an essential component of the modern welfare state. In practice, customary credit has served this function in Nigeria.[857] Like in many developing countries, the type of welfare state operational in Nigeria is that described as 'informal security' with prominent roles played by the family and community. According to Gough, the welfare state in developing countries is a mix of various support systems: 'from the welfare state triangle of three actors, namely, state, market and family, into a square by adding community as the fourth actor because community plays a key role in providing livelihood security'.[858] As noted in chapter two, lending by family and community members in Nigeria is characterised by 'moral obligation', 'generalised reciprocity' and 'collective action'.[859]

The theoretical implication of this is that the choice between traditionally state-guaranteed social security and affordable consumer credit is fundamentally false. The

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[855] I Gough, 'Welfare Regime in Development Context: A Global and Regional Analysis' in I Gough and others (eds), *Insecurity and Welfare Regimes in Asia, Africa, and Latin America* (Cambridge, Cambridge University Press 2004) 15–48.

[856]N Hillman, 'The Coalition's Higher Education Reforms in England' (2016) 42(3) Oxford Review of Education 330-345. See also B Akers and MM Chingos, *Game of Loans: The Rhetoric and Reality of Student Debt* (Princeton University Press 2016) 4.

[857] See para 2.8 Ch 2 for an overview of customary lending in Nigeria.

[858] ibid.

[859] ibid.

existence or otherwise of the former is independent, at least partially, of the latter. Consumers in Nigeria as shown in the findings have benefited from customary consumer credit, and even consumers who borrowed from expensive formal and black-market sources did so to avoid cutting down on the consumption of essential goods and services such as keeping their children in school and having a roof over their heads. It is, therefore, the argument of this thesis, that the theoretical argument against consumer borrowing in developing markets is otiose, and on this premise to refocus the debate on policy about how far, and in what ways regulation can make consumer credit affordable to borrowers in Nigeria, or perhaps, imbue in formal lenders, the moral obligation, if not communitarian solidarity to serve low-income consumer borrowers in the country.

Nigeria, like many other developing countries, is at liberty to explore different models of welfare states and to experiment with a broad set of tools, including affordable consumer credit, capable of enhancing the consumption, and ultimately productive capacities of its citizenry. In theory, a consumer credit regime that supports easy access to affordable consumer credit in Nigeria, rather than exclude with intentionality, consumers in the middle and lower classes, would not be promoting unsustainable lending or consumption but helping to minimise it, as unsustainable borrowing from unregulated markets is, in reality, a way of life for many citizens. Regulation of this sort would help to protect vulnerable consumers from the harsh judgment of the credit market, a form of decommodification that dismantles the class-based lending discrimination/social stratification that consumer borrowers experience every day in Nigeria.

6.2.2 Consumer Credit and Institutional Efficiency

A regime of affordable consumer credit also benefits from an institutional efficiency argument. The benefits of consumer credit do not only flow to individual consumers but rather extend to institution building and development as well. One of the key findings in this study is that weak national institutions have been a boon for transnational domination in Nigeria. In theory, a regime of affordable consumer credit for all consumer groups could increase social capital, according to institutional

theory.[860] Social capital, defined as 'features of social organisation such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit'[861] is at a low ebb in Nigeria. Decades of economic growth across the African continent without commensurate growth in employment has increased poverty, widened inequality, and negatively impacted the sense of patriotism and belonging amongst citizens.[862] This, in turn, makes it more difficult to forge a cooperative platform for pursuing the common interest and advancing the common good through the government. For example, many of the consumer borrowers interviewed complained about unpaid remuneration (ie those in public employment), or that they do not trust regulators to be fair to them in resolving disputes with lenders. An average citizen aspires primarily to join the elite class but not to build a country that benefits all classes of citizens. This mindset is the bane of institution building in Nigeria and is enabled by the kind of wholesale financial exclusion that exists in the country.

Weak national institutions enable transnational institutions to chart the regulatory course for Nigeria because free trade is beholden to transboundary forces which countries only regulate to fit national objectives. As Nigerian governments lack an anchoring ideology and rallying economic objective of their own, transnational actors gain more grip on national policy. Secondly, liberal market policies weaken the possibility and prospects of institution-building efforts at the national level because it generates outcomes that compromise social capital. For example, in the absence of social security services, public sector job security became the de facto social security with over-weighted recurrent expenditure relative to capital expenditure in national and state budgets.[863] Indeed, the cost of this to the economy and the political system

[860] E Ferragina, 'The Welfare State and Social Capital in Europe: Reassessing a Complex Relationship' (2017) 58 (1) International Journal of Comparative Sociology 55-90.

[861] R Putnam, 'Bowling Alone' (1995) 6 Journal of Democracy 65–78.

[862] MB Steger, *Globalization: A Very Short Introduction* (OUP 2017).

[863] D Rodrik, 'What Drives Public Unemployment?' (2000) 4 (3) Review of Development Economics 229–43.

outweighs the cost of a well-regulated credit market that serves all categories of eligible borrowers.

In summary, one could argue for a complete welfare state that eliminates citizens' necessity or compulsion to borrow, but this is not supported by historical evidence. In Nigeria, the government has consistently failed to meet funding commitments to social services under various plans, including the Millennium Development Goals where it failed to meet the targets. The governments have advanced a mix of cogent and flimsy excuses for their failure, but in the meantime, individuals have had to organise their private social lives, including education and healthcare around their budgets. Thus, one could either argue that the right to affordable credit come before the right to state welfare or the other way around, but this thesis argues that it is a fallacy to separate affordable credit from the notion of the welfare state. However, more importantly, empowering the poor through access to affordable credit can be a means of strengthening the bargaining position of consumer borrowers in the long term to push for more generous state welfare.[864] Access to credit increases access to education, healthcare, quality of life, all necessary conditions for upward social mobility and ultimately a better platform for extracting further commitments from the government.

6.3 WHO SHOULD BORROW IN NIGERIA?

The previous section has carefully laid out the case for consumer credit in Nigeria. That was necessary in order to move the discussion from justifying the need for regulatory intervention to make consumer credit affordable, to a discussion of how to do that in policy terms. This section examines closely the categories of consumer borrowers that transnational regulation impact, and policy measures to assist each category of borrowers. Given how reliant many Nigerians are on borrowing for consumption smoothing, it is illogical for Nigerian regulators to allow financial

[864] The same argument is inverted below that the provision of Universal Basic Income could strengthen individual bargaining position in the consumer credit market. Taken together, they reinforce the consumer borrower's overall power in the economy.

institutions to arbitrarily exclude entire categories of consumers from the credit market.

From a policymaker's perspective, it is essential to consider the exclusionary factors for individual consumer borrowers in order to respond appropriately. Based on the findings, four groups of excluded consumer borrowers exist. The first group are those considered 'not creditworthy' or 'subprime' because of too little income, informal employment and information asymmetry. The second group are those to whom lending is considered unprofitable by formal financial institutions because of the costs of procuring information and enforcing the contract. The third group are those who might be victims of discrimination because of socio-economic status. The last group includes individuals who exclude themselves from the market either because of religious or philosophical reasons or because of the price. Different policy responses are required to address each of these groups. However, as there are overlaps between some of these categories (especially the first three categories), there is scope for some of the policy measures discussed below to benefit more than one category of borrowers.

6.4 'SUBPRIME' BORROWERS

As discussed in chapter three, transnational regulation responded appropriately to subprime lending after the Global Recession by embracing responsible lending and borrowing obligations, re-introducing interest caps (eg the UK), and establishing agencies to strengthen enforcement. These measures are necessary in Nigeria to protect vulnerable consumer borrowers, rather than a wholesale exclusion of creditworthy middle-class borrowers from the formal market.

For the first and second groups, granting access to consumer credit is not the best solution as they could quickly be plunged into endless debt. Rather, some form of redistributive programme is required to cater to their financial needs adequately.[865] However, since many individuals from these groups, especially those in informal

[865] See recommendations on alternatives to borrowing below.

employment, continue to borrow from informal sources,[866] mainly from the black market and customary lending channels, the goal of policy, in addition to providing the non-debt income options recommended below, is to make the loans more affordable. One measure that seems to work well is to link cooperatives and credit unions to formal financial institutions so that consumer borrowers in the informal sector can benefit from the capacities of formal financial institutions.

The idea of building institutional linkages within the economy to serve traditionally excluded groups is not novel. In the UK, for instance, the government sought to promote such linkage between high street and retail banks, credit unions,[867] the Post Office and other organisations to facilitate the extension of financial services to deprived neighbourhoods, even though successes were limited by failures in execution and a lack of political will.[868] With the political will and adequate government funding for cooperatives and credit unions, this strategy could address some of the informational and legal infrastructure gaps in the credit market. Currently in Nigeria, this approach is being pursued with positive results in the extension of health insurance to informal sector workers via co-operatives in the National Health Insurance Scheme.

For consumer lending, several alternative approaches exist including the provision of credit guarantees to cooperatives and unions as opposed to individuals, ring-fencing a proportion of the liquidity of formal financial institutions for consumer and MSME lending, or subsidising interest rates for specific types of consumer credit (eg student loans and credit purchases of household foods capped at a defined limit). Interventions like these could offer more opportunity for consumer borrowers to choose how they spend, and to own decisions about personal resource allocation. In terms of the informational infrastructure, this approach combines the advantage of *the*

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[866] See para 2.7 Ch 2 for an overview of the dangers of borrowing from the 'black' markets. See also para 5.6 Ch 5 for the views of some respondents on the risks of informal borrowing.

[867] For example, the UK's Credit Unions Act 1979 was enacted in part to advance this goal.

[868] N Ryder and J Devenney, 'The Labour Government and Access to Affordable Credit—More Spin than Action?' (2005) 27 (3-4) Journal of Social Welfare and Family Law 395–419.

ex post reduction in moral hazard by applying informal sanctioning, with the *ex ante* screening procedures of formal lenders checkmating adverse selection.[869] It also helps to overcome the exclusionary effects of AML regulations as stringent biometric screening of individual borrowers is not central to the process. In terms of addressing legal infrastructure gaps, the approach could lead to a diffusion of the good qualities of customary markets including its system of mutual assistance, moral obligation, and collective action into the formal market system. For instance, recognition of customary titles for collateral purposes is most viable where borrowers access formal loans via cooperatives or other organised intermediaries.

6.5 MIDDLE- AND LOWER-INCOME BORROWERS

For the third group of consumer borrowers excluded from the formal market on discriminatory and arbitrary grounds, it is vital to enact legislation to tackle discrimination. As noted in chapter three, transnational regulation has focused mainly on household overindebtedness since the Global Recession such that measures to tackle predatory/subprime lending have enjoyed priority over measures to *expand* safe credit. Nevertheless, the United States present one particular model of credit regulation that could potentially improve access for the third category of consumer borrowers in Nigeria.

6.5.1 The American Model

The Community Reinvestment Act 1977 in the United States is an excellent model to replicate.[870] Like the United States, consumer borrowers in Nigeria experience discrimination along the lines of gender, ethnicity, religion, and most prominently, economic class. This legislation will address the situation where lending decisions are based on relational factors that encourage cronyism such as familial ties, friendships with board members of financial institutions, and political interests.[871] A community

[869] C Ahlin and RM Townsend, 'Using Repayment Data to Test across Models of Joint Liability Lending' (2007) 117 (517) The Economic Journal F11-F51.

[870] See para 3.5.3 Ch 3 for a discussion of the Community Reinvestment Act 1977.

[871] S Apati, *The Nigerian Banking Sector Reforms: Power and Politics (First Edition)* (Palgrave Macmillan Studies in Banking and Financial Institutions 2012).

reinvestment legislation could produce the kind of equality of outcome envisaged in the constitution.[872] Presently, the findings reveal for instance that profitability is a crucial driver of lenders' approach to credit provisioning such that given the capital and liquidity constraints, they prefer short-term lending to corporates despite the improved credit reporting infrastructure. This lending practice is also shown to be more noticeable as the banks become bigger[873] despite evidence that lending to the poor can be profitable.[874] Again, by linking formal lenders to cooperatives and informal blocks, the scale of transaction and profitability could significantly expand while the asymmetric problem could be minimised.

The Community Reinvestment Act 1977 is the type of 'access legislation' that traditional neoliberal models opposed,[875] advocating competition and improved market information as the right policy pathway to more access except for microfinance. MFIs however, do have intermediation problems which undermine their capacity to lend.[876] Given the stated reluctance of formal lenders to leverage fintech for more consumer access, this type of legislation is desirable, putting aside

[872] See section 16, Constitution of the Federal Republic of Nigeria (as amended) 1999. Equality of outcome, in this case, would mean the ability of lower-end borrowers to access low-cost finance like the elites, if they choose to, and not compelling lenders to lend to un-desirous borrowers.

[873] BA Overby, 'Community Reinvestment Act Reconsidered' (1995) 143 University of Pennsylvania Law Review 1431-1530; R Cull, A Demirgüç-Kunt, and J Morduch, 'Financial Performance and Outreach: A Global Analysis of Leading Microbanks' (2007) 117 (517) The Economic Journal F107–F133.

[874] IDC Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 Oxford Journal of Legal Studies 177; I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (Oxford, Hart 2012). See also A Rona-Tas and A Guseva, *Plastic Money: Constructing Markets for Credit Cards in Eight Post-Communist Countries* (Stanford, Stanford University Press 2014).

[875] DA Clark, 'Capability Approach' in DA Clark (ed), *The Elgar Companion to Development Studies* (Cheltenham, Edward Elgar 2006).

[876] One problem with the MFI approach is that while the poor are excluded practically from commercial banks, the rich still have privileged access to microcredit. Secondly, microcredit is not suitable for consumer purposes because it is usually expensive and scarce. The scarcity of microcredit is not unrelated to the fact that depositors have very little faith in MFIs to protect their money and often save money with commercial banks while they approach MFIs for loans.

reservations about 'access legislations', to compel the big banks to run parallel digital operations to complement microfinance institutions in rural communities.

Adopting legislation akin to the Community Reinvestment Act in Nigeria will be more than a mere access regulation. It would signal radical consumer protection for several reasons. First, it will shift the locus of consumer empowerment from judicial to legislative, given the conservative disposition of Nigerian courts, but more importantly, it will bring Nigerian regulation in conformity with a growing global trend of providing statutory protection to consumers rather than relying on judicial precedents. Secondly, it is only fair that commercial banks lend to all categories of customers since they do not discriminate in deposit accounts. Thirdly, most government-sponsored credit subsidies are administered through commercial banks; thus, to exclude poor borrowers is to subsidise the rich exclusively. Apart from its discriminatory element, it is counterintuitive in terms of the outcome it achieves. For example, the Community Reinvestment Act is credited with achieving a significant increase in lending to the poor and minorities in the United States with only about fifteen per cent of that increase attributed to subprime lending[877] and could achieve a similar outcome in Nigeria.

The objective of this legislation will be radical, but practical concerns as to its effectiveness remain. For example, against the backdrop of corruption in the Nigerian

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[877] Joint Center for Housing Studies Harvard University, 'The 25th Anniversary of the Community Reinvestment Act: Access to Capital in an Evolving Financial Services System' (Cambridge, Joint Center for Housing Studies Harvard University 2002) <https://www.jchs.harvard.edu/sites/default/files/cra02-1.pdf> accessed 30 August 2019. For more recent assessments of the Community Reinvestment Act 1977 see J Silver, 'The Purpose and Design of the Community Reinvestment Act (CRA): An Examination of the 1977 Hearings and Passage of the CRA' (2019) 74 (4) Conference of Consumer Finance Law Quarterly Report <https://ncrc.org/the-purpose-and-design-of-the-community-reinvestment-act-cra-an-examination-of-the-1977-hearings-and-passage-of-the-cra/>accessed 16 December 2019; L Ding and L Nakamura, '"Don't Know What You Got Till It's Gone" — The Effects of the Community Reinvestment Act (CRA) on Mortgage Lending in the Philadelphia Market' (2017) Federal Reserve Bank of Philadelphia Research Department Working Paper No. 17-15 <https://www.philadelphiafed.org/-/media/research-and-data/publications/working-papers/2017/wp17-15.pdf>accessed 16 December 2019.

financial system, lenders have genuine concerns about delinquent borrowers. However, as noted in chapter five,[878] elite corruption is the bane of the Nigerian financial system, not because corruption by poor consumer borrowers is harmless, but because the behaviour of the poor borrower is effectively checked by legal and extra-legal systems in place.[879] Secondly, the incentive to enact a community reinvestment legislation at the national level is not automatic but requires intense lobbying and expense of political capital by the executive.[880] This makes domestic action unlikely, such that IFI intervention could prove useful to champion such legislation amidst possible opposition from organised business lobby and other groups invested in preserving the status quo.[881]

If a community reinvestment legislation is enacted, it will not be the first time a policy of its kind experiments within Nigeria. Before the implementation of SAP in Nigeria, the CBN issued Credit Guidelines which imposed limits on interest rates, required

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[878] See para 5.7.1.

[879] A common expression amongst everyday Nigerians is that the law only catches the poor in Nigeria. Such sentiments are not farfetched. A simple illustration is the high pre-trial detention rates across many states in Nigeria given to be above 70% in, often, overcrowded prisons. See Open Society Justice Initiative, 'Fact Sheet: Improving Pretrial Justice in Nigeria' (Open Society Foundation, February 2013) <https://www.justiceinitiative.org/publications/fact-sheet-improving-pretrial-justice-nigeria>accessed 16 December 2019. See also the Network of University Legal Aid Institutions, 'NULAI Nigeria 2018 Annual Report' (*NULAI*, December 2019) <https://nulai.org/document/nulai-nigeria-2018-annual-report/>accessed 16 December 2019 which found 75% of inmates at a prison in Kuje, a satellite town in the Federal Capital Territory Abuja to be awaiting trial. Although, these studies are mentioned here to buttress the point that law enforcement seems to always have its way with the poor in Nigeria, the problem of unequal access to justice is a global issue. See Judiciary of England and Wales, 'The Lord Chief Justice's Report 2015' (*Courts and Tribunals Judiciary*, January 2019) <https://www.judiciary.uk/wp-content/uploads/2016/01/lcj_report_2015-final.pdf>accessed 16 September 2019.

[880] Ordinarily, enacting pro-poor policies should increase, not deplete a politician's political capital in a country with many poor electorates. However, the political process involves a lot of financial costs, which gives financial donors enormous influence over political office holders and ultimately policy.

[881] See para 6.10 below for a discussion of how transnational actors can help advance the interest of consumer borrowers in the Nigerian credit market.

banks to maintain a specific number of branches in rural communities and allocated minimum credit ratios to different sectors of the economy.[882]A similar policy in India that required banks to open four new branches in unserved areas before opening a second branch in a locality led to the establishment of 30,000 new branches and a significant welfare gain for consumers.[883]

6.5.2 Digital Credit

There is a compelling case for liberalising the licensing regime for digital banking to accommodate different categories of operators including TELCOs, banks and fintech start-ups. This is essential for competition purposes but also because different operators can deliver complementary services for consumers in a way that a binary regulatory approach could not. It is an opportunity to extend prudential oversight to this safer type of informal credit. First, TELCOs in Nigeria have far more comprehensive coverage and distribution of access points compared to banks and therefore better positioned to reach rural communities where formal financial services are currently unavailable.[884] Somalia and Kenya provide impressive examples of the gains of TELCO participation in the mobile money market. In Somalia, bank account penetration stands at 15 per cent, but TELCO-led mobile money account penetration

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[882] O Sofola, 'The Nigerian Law of Consumer Credit and Security' (PhD thesis, King's College, University of London 1988).

[883] R Burgess and R Pande, 'Can Rural Banks Reduce Poverty? Evidence from the Indian Social Banking Experiment' (2005) 95 (3) American Economic Review 780–95.

[884] According to the Nigeria Inter-Bank Settlement Systems PLC ('NIBSS'), a total number of 51.7 million bank account holders had been assigned biometric verification numbers by February 2017 compared to 154.1 million phone subscribers in the same period in 2017 and 93.3 million unique subscribers (Nigerian Communications Commission, 2018). It is important to note that Nigeria has a multi-SIMs culture; hence, more active connections than individual subscribers. See GSMA, 'M-Pesa Responds: Benefits and Challenges of Using Mobile Money to Reduce Poverty for Women in Kenya' (GSMA, 2012) <https://www.gsma.com/mobilefordevelopment/country/kenya/m-pesa-responds-benefits-and-challenges-of-using-mobile-money-to-reduce-poverty-for-women-in-kenya/> accessed 5 May 2019. Also, TELCO access points across the country exceed commercial bank access points.

is over 73 per cent despite the insecurity in Somalia.[885] Consumers stand to benefit from TELCO participation in difficult business terrains primarily north-eastern Nigeria where Boko Haram terrorists have forced many banks and financial institutions to close shop. Secondly, TELCOs have a more extensive customer base, and the marginal costs of extending banking services to them are lower compared to banks. Thirdly, fintech companies have demonstrated superior ability to deploy algorithms in creditworthiness assessments in a way that commercial banks in the country have not been able to achieve. As one of the biggest challenges to fintech product uptake by consumers is lack of awareness, TELCOs have the advantage in terms of advertising as all it takes is an SMS delivered to customers at no extra costs. There is a net benefit for borrowers from an all-inclusive market. The new guidelines on Payment Service Banks do not go far enough because of specific restrictions imposed to 'level the field' for all competitors. The guidelines impose the same documentation requirements for banks and fintech and systematically neutralises the efficiency gain from innovation that fintech lenders could leverage for lower product prices.[886]

6.6 SELF-EXCLUDING BORROWERS

Finally, for the last group of borrowers who exclude themselves from the credit market, there appears to be little room within the neoliberal framework to do anything for them (to do otherwise would be paternalistic).[887] However, from the evidence on the cost of borrowing in Nigeria, it would be wrong to conclude that self-exclusion is a *choice* either. The cost of borrowing is generally high even in the formal sector such

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[885] R Firestone, T Kelly, and A Rifon, 'A Game Changer—The Prospects and Pitfalls of Mobile Money in Somalia' (*World Bank Blog*, May 2017) <http://blogs.worldbank.org/nasikiliza/a-game-changer-the-prospects-and-pitfalls-of-mobile-money-in-somalia>accessed 25 September 2019.

[886] K Saigal, 'Regulators, Give Mobile Money in Nigeria a Boost' (*Euromoney*, January 2019) <https://www.euromoney.com/article/b1cmtgtzyrglb9/regulators-give-mobile-money-in-nigeria-a-boost?copyrightInfo=true>accessed 25 September 2019.

[887] World Bank, 'Finance for All? Policies and Pitfalls in Expanding Access' (2009) 24 (1) The World Bank Research Observer 29.

that the rationale response by many consumers is to cut consumption. Consumers may be cutting down on the education of their children or health insurance or some other necessities in order to avoid borrowing. Hence, policymakers must be attuned to the negative costs of self-exclusion such as rising illiteracy levels and a general decline in living standards. Some of the more appealing measures include boosting social provision for public education and healthcare, targeted credit guarantee schemes and interest rate controls.[888]

Secondly, self-exclusion may be suggestive of adverse selection. From the findings, it appears that contrary to Stiglitz and Weiss,[889] market information has not done much to curtail adverse selection and the moral hazard effect in Nigeria. This perhaps is down to non-price barriers such as the earlier point made that formal lending in Nigeria is not a purely commercial process, and financial profit is not necessarily the only motive behind transactions. It, therefore, is necessary for regulators to ensure that the cost of borrowing does not encourage a repeat of the adverse selection and moral hazard of the sort witnessed in the banking crisis of 2009.[890]

6.7 HOW TO PROTECT CONSUMER BORROWERS

6.7.1 From Consumer Access [As an End] to Consumer Welfare in Nigeria

The thesis found that Nigeria's consumer protection regime is *ex post*, adversarial and based on common law doctrines. Reliance on judicial precedents and the CBN's subsidiary legislation have produced a fragile consumer protection regime for two reasons. CBN officials in Nigeria continue to view information as the main consumer protection tool. This is not only inadequate, but the attitude of regulators that treats informal markets as if they were outside the domain of their authority is harmful to many consumer borrowers that use that market. At present, not much information

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[888] A Sinha, R Kumar, and SC Dhal, 'Financial Sector Regulation and Implications For Growth' (2011) BIS Papers No 62 <https://www.bis.org/publ/bppdf/bispap62g.pdf>accessed 9 September 2019.

[889] JE Stiglitz and A Weiss, 'Credit Rationing in Markets with Imperfect Information' (1981) 71 (3) The American Economic Review 393-410.

[890] S Apati, *The Nigerian Banking Sector Reforms: Power and Politics (First Edition)* (Palgrave Macmillan Studies in Banking and Financial Institutions 2012) 104-115.

about lenders in informal markets are collected for credit reporting purposes, and this needs to change. The enactment of the Credit Reporting Act and the Secured Transactions in Movable Assets Act both of 2017 is a good first step that, overtime, lead to better and reliable data mining and application by regulators and formal lenders. However, regulators are yet to countenance the emerging body of evidence in behavioural economics in support of stronger regulation of credit products. With conservative jurists on the bench, Nigerian courts similarly take a very liberal approach to consumer protection.[891]

Although the base of regulation is shifting from administrative and judicial towards legislation, many of the new Acts of parliament are focused on improving the informational infrastructure of the credit market. Legislative protection of borrower rights in the areas of data protection, disclosure of key terms, anti-discrimination in lending, and *ex ante* dispute resolution frameworks are still lacking. Protective tools such as responsible lending obligations and BE-inspired policy prescriptions inevitably depend on the enactment of new legislation given the difficulty of overturning several decades of judicial precedent and strong opposition from the credit industry, especially formal lenders.[892]

For the legislative arms of government at all levels in Nigeria to act, there is a need for a strong pushback against industry lobby. The extent of entrenched interests and revolving doors between financial institutions, political actors, regulators, and the judiciary and the relative illiteracy, financial weakness, and weak organisational capacity of consumer groups make it even more difficult. Paradoxically, consumer borrowers in Nigeria more than anywhere else stand to benefit from *ex ante* measures like financial literacy, caps on the rate of interest, and a fair low-cost dispute resolution framework. For example, given the tendency of commercial banks to design loan contracts mindful of the desperate circumstances of customers, if not with the intention to exploit consumer desperation, Prudential Guidelines must require banks to disclose key terms such as fees, interest rate, and total loan cost on the mandatory

[891] See para 5.7 Ch 5 for the general approach of Nigerian courts to interpretation of contracts.

[892] ibid.

'minimum information on credit print-out' which lenders must provide for the borrower before the loan contract is executed.[893] This is necessary to bring Nigerian regulation up-to-date with rules around the form, format, use of plain language, and key fact statements which have gained traction internationally since the Global Recession.

Even though some respondents complained that most loan contracts are, in effect, adhesion contracts and thus voidable[894] in principle, such claims are hard to establish in practice. In the latter case, 'non-negotiability' is an essential requirement to prove the adhesion contract. While most borrowers in practice are required to complete standard 'take it or leave it' loan application forms by commercial banks, the CBN Prudential Guidelines make clear that loan terms including interests are negotiable and banks also state that officially which makes a claim hard to prove. This regulatory approach ignores the compelling evidence from behavioural science that complexity of contractual information significantly increases welfare costs for borrowers, and that consumers are more likely to accede to harmful contracts when they are poor and desperate because poverty and desperation strain people's rationality.[895]

6.7.2 Freedom of Contract and Social Legislation: The Doctrine of *Force Majeure*

The thesis has established that the problem of product complexity and the attendant consumer risks, touch on human rights, and thus too important to be left to case law.[896] The thesis also examined responsible lending and behavioural economics as a prominent feature of the emerging transnational regulatory paradigm.

Although the case law in Nigeria has been traditionally more attuned to commercial, rather than social imperatives, One common law doctrine that illustrates this point is the remedy of force majeure. Besides the fact that it is an *ex post* remedy, the doctrine

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[893] CBN, Prudential Guidelines for Deposit Money Banks in Nigeria (2010), paragraph 3.8.

[894] *Sonnar (Nigeria) Ltd & Anor v Partenreedri MS Nordwind Owners of The Ship MV Nordwind & Anor* (1987) LPELR-3494(SC).

[895] S Mullainathan and E Shafir, *Scarcity: Why Having Little Means So Much* (New York, Time Books 2013).

[896] See paras. 4.3 and 4.5.3 Ch 4 respectively.

has often proven ill-adaptable for modern circumstances in which a consumer is unable to fulfil contractual obligations for no fault of their own. In order to establish *force majeure* under the common law:

> …there must be an event which significantly changes the nature of the contractual rights of the parties that it would be unjust to expect the parties to perform those rights such as (1) Where the subject matter of the contract has been destroyed or is no longer available. (2) Death or incapacity of a party to a contract. (3) The contract has become illegal to perform as a result of new legislation. (4) A contract can be frustrated [on] the outbreak of war. (5) Where the commercial purpose of the contract has failed.[897]

Force Majeure, where successful, amounts to the frustration of performance of the contract. However, the doctrine of frustration has been restricted by the courts to situations where the supervening event destroys a fundamental assumption, and where *force majeure* clauses are drafted into the contract.[898] In practice, it is highly improbable that lenders would allow for *force majeure* clauses to be drafted into the loan agreement in the context of the weak bargaining position of the borrower before loan disbursement in Nigeria. One solution to this is to remove the second condition through legislative intervention or evolve a robust set of new rules to address such circumstances. The second solution has been favoured in some Nordic countries with the evolution of a doctrine appropriately named *social force majeure*. Unlike the traditional stringent conditions for the invocation of *force majeure* under the common law, the concept of *social force majeure* hinges on the ground that there has been a special occurrence which has a causal link to the consumer's repayment difficulties, provided that the consumer did not foresee or trigger the occurrence through their own fault.[899] The character of the special occurrence envisaged under this doctrine

[897] Per Obaseki-Adejumo, JCA (p 29, paras. A-E) in *Globe Spinning Mills Nigeria Plc v Reliance Textile Industries Limited* (2017) LPELR-41433 (CA).

[898] *Diamond Bank Ltd v Ugochukwu* (2007) LPELR-8093(CA).

[899] T Wilhelmsson, '"Social Force Majeure" — A New Concept in Nordic Consumer Law' (1990) 13 (1) Journal of Consumer Policy 1–14. See para 4.4 for the growing power of lenders in the digital age.

includes, but is not limited to, ill health, negative turn in employment or family problems eg divorce or death of family member.[900]

There are several arguments for enacting a *social force majeure* legislation in Nigeria. The paradigm shift in global consumer credit regulation towards *ex ante* and stronger consumer protection has not been matched by doctrinal common law principles. Thus, a *social force majeure* doctrine will permit courts to factor special occurrences in a consumer's life into its reasoning of a case, and where justified, to allow for a consumer right to withdraw from a burdensome contract. The rationale for *social force majeure* is very similar to the much more established equitable ground of inequality of bargaining power, but in this case a consumer would be entitled to mitigate or avoid certain liabilities particularly where they are dealing with a large enterprise. According to Wilhelmsson, it makes sense to have 'some tie between power and responsibilities', especially because large financial institutions can mitigate their losses by dispersing risk to a larger pool of consumers in a way an individual consumer borrower cannot afford to do.[901]

A social force majeure legislation is also desirable in that it not only helps to foster a doctrinal shift in judicial philosophy, but can spur a critical pivot towards *ex ante* regulation where the legislation expressly require the Consumer Protection Council of Nigeria, the CBN and other relevant regulatory agencies to work with lenders to incorporate social force majeure terms in loan contracts. In some of the Nordic countries, the doctrine has been applied to hire-purchase and consumer credit, interest on delayed payments, and delayed payment of insurance premiums.[902] In Nigeria, the application of this doctrine to the Sheriff and Civil Process Act will produce a more robust regime of individual bankruptcy protection, and possibly counter the trend of asset seizures and disconnection of distressed borrowers from public utilities like electricity and water.

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[900] ibid.

[901] Wilhelmsson (n 902) 1-14. See para 4.4 for the growing power of lenders in the digital age.

[902] ibid.

6.8 NON-DEBT INCOME SOURCES

Although this thesis is primarily a commentary on the regulation of consumer credit, however, as the dangers of credit democratisation, financialisation and social displacement resulting from overindebtedness came to the fore post-Recession, emphasis on non-debt income sources became a core element of the current global approach to consumer credit regulation. It makes sense, therefore, to consider alternative forms of financial empowerment. Some policy alternatives have been selected below for consideration by policymakers in Nigeria for their novelty, growing popularity and effectiveness in promoting financial inclusion and economic empowerment in the respective locales where they have been tried.

6.8.1 Universal Basic Income

In its most basic sense, Universal Basic Income (UBI) is 'a guaranteed regular cash payment for every citizen, unconditionally and for life'.[903] UBI has come under significant criticisms because it proposes unconditional payments not based on work done. Two of the common criticisms of UBI are that it is a disincentive to work, and that, in any case, it is unaffordable. Advocates of UBI make the case that pay-outs would be designed to be just 'enough to provide psychological and practical security, and enough to prevent destitution, but not enough to be a disincentive to work'.[904] In other words, no one can lead a comfortable life based on UBI alone. In response to the claim that it is unaffordable, several proposals have been put forward in different jurisdictions including Milton Friedman's Negative Income Tax (NIT),[905] succeeded by the Earned Income Tax Credit of 1975 which distributes fixed amounts to a fixed number of families annually in the United States. There have also been proposals to pay for UBI by closing tax loopholes for the very rich,[906] supplanting existing state

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[903] A Lowrey, *Give People Money* (WH Allen 2018) 272.

[904] J Lanchester, 'The Case for Universal Basic Income' (2019) 41 (14) London Review of Books 5-8.

[905] Under the NIT, the government sets a benchmark income above which you pay taxes and below which the government tops up your income until you hit the benchmark. See Lanchester (n 907) 5-8.

[906] C Hughes, *Fair Shot: Rethinking Inequality and How We Earn* (Bloomsbury, 2018) 224.

welfare programmes with UBI, and incremental implementation starting with a relatively low amount.[907]

Several pilots and experiments on UBI have been carried out, and many are ongoing in very diverse places including Canada, Iran, Finland, United States, Brazil, Indonesia, Namibia, Honduras, Liberia, Mexico and Kenya[908] with very positive results. Early trials in the tiny Canadian town of Dauphin found that while poverty 'disappeared', only adolescents and new mothers worked fewer hours. Similarly, a UBI experiment in the impoverished Otjivero-Omitara region of Namibia produced an increase in entrepreneurship, increased households' buying power, reduced household debt, and increased saving.[909] Preliminary findings in Kenya also indicate that UBI improves the psychological, social, and economic well-being of recipients with improved consumption and assets ownership. It also impacts positively on key macroeconomic indices such as availability of goods and services, village infrastructure, political participation, and crime rates.[910]

The latest findings in Kenya are particularly interesting because Kenya's demographic and level of economic development are comparable to that of Nigeria. But more importantly, UBI is potentially relevant to address harmful borrowing in the informal

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[907] PV Parijs and Y Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy* (Cambridge, Harvard University Press 2017) 400. For a full reading on UBI literature, see D Graeber, *Bullshit Jobs: The Rise of Pointless Work, and What We Can Do About It* (Simon & Schuster 2019); G Standing, *Basic Income: And How We Can Make It Happen* (Pelican 2017) 400; P Barnes, *With Liberty and Dividends for All: How to Save Our Middle Class When Jobs Don't Pay Enough* (Berrett-Koehler 2015) 192; N Srnicek and A Williams, *Inventing the Future: Post-capitalism and a World Without Work* (Verso Books 2015); N Munk, *The Idealist: Jeffrey Sachs and the Quest to End Poverty* (Anchor Books 2014) 272.

[908] GiveDirectly, 'Programs: Basic Income' (GiveDirectly, 2019) <https://www.givedirectly.org/ubi-study/>accessed 21 September 2019. See also U Gentilini and others, 'Exploring Universal Basic Income: A Guide to Navigating Concepts, Evidence, and Practices' (Washington, DC, World Bank 2020) <https://openknowledge.worldbank.org/handle/10986/32677>accessed 16 December 2019.

[909] See A Stern, 'Moving Towards A Universal Basic Income (*World Banks Job and Development Blog*, 4 December 2017) <*http://blogs.worldbank.org/jobs/moving-towards-universal-basic-income*> accessed 18 May 2017.

[910] GiveDirectly (n 911).

'black' market in Nigeria by minimising borrower desperation which leads to better decision making. UBI also has the potential to lift lower-end consumer borrowers into the pool of eligible borrowers for formal credit. Questions abound on whether Nigeria can afford UBI assuming it desires to adopt it, and if it has the infrastructure required to successfully implement UBI to about two hundred Nigerians many of whom lack biometric verification. Indeed, the sort of infrastructural challenges that have so far bedevilled the credit market will task policymakers immensely, but these are not insurmountable with the help of IFIs.[911]

The critique of UBI's feasibility in the context of Nigeria however is met by two responses. Amongst the various ways to fund UBI outlined above, taxation potentially, remains the most promising because it has not been efficiently harnessed in Nigeria. Doing this, perhaps, would provide enough funds for a modest UBI and a huge incentive for tax reforms not just in reviewing tax codes but to mount an invigorated tax collection drive. This could help to evolve a tax compliance culture in a country where less than 30 per cent of the sixty-five million economically active adults paid taxes in 2018, amounting to 6 per cent of GDP and less than 15 per cent recommended by the World Bank.[912] The second argument against claims that Nigeria cannot afford UBI is the blatant acts of corruption and theft of public assets by officials. For example, in 2015 alone, the erstwhile governor of the CBN Mallam Sanusi Lamido Sanusi alleged that the sum of USD20 billion in oil sale revenues due in the treasury over a 19-month period had not been accounted for by the Nigeria National Petroleum Corporation (NNPC).[913] Similarly, in the same year, the National Security Adviser was arrested for allegedly stealing USD2 billion budgeted assets. Allegations like these are

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[911] See para 6.10 below for a fuller discussion of the roles that IFIs can play to promote financial access in Nigeria.

[912] RF Junquera-Varela and B Haven, 'Getting to 15 percent: Addressing the Largest Tax Gaps' (*World Bank Blogs*, December 2018) <https://blogs.worldbank.org/governance/getting-15-percent-addressing-largest-tax-gaps>accessed 22 September 2019.

[913] SL Sanusi, 'Unanswered Questions on Nigeria's Missing Billions' *Financial Times* (London, 13 May 2015); BBC, 'Nigeria's Dasuki "Arrested Over $2bn Arms Fraud"' (*BBC News,* 1 December 2015) <https://www.bbc.co.uk/news/world-africa-34973872>accessed 22 September 2019.

all too common and undermine the credibility of UBI scepticism because it shows to the citizens what could be, with better leadership and economic management.

It is important to mention that while UBI has yet to be tried on an entire population, the limited experiments have yielded commendable results deserving of consideration in Nigeria. Nigeria currently lacks a robust welfare state, but it can consolidate the various ad hoc poverty alleviation programmes which are currently administered as tools of political patronage that do not outlive the tenure of the politician. Secondly, UBI is consistent with the provisions of the Nigerian constitution and could help to fulfil the objective of that section.[914] UBI could be made mandatory by an amendment to section 6 (6) (c) of the constitution to make chapter two of the document justiciable, but the easier process would be to enact a UBI legislation which gives citizens a right to demand it from the government.[915] If policymakers in Nigeria are serious about providing economic empowerment and financial inclusion for the people, they would not let the current economic and political crisis in the country go to waste but leverage it to produce a new intellectual framework for poverty reduction.

In summary, UBI overcomes some of the critiques of consumer credit in chapter three, that (a) consumer credit primarily hurts more than it helps low-income consumers; (b) consumer credit is a smokescreen for rolling back the welfare state, and (c) Consumer credit distorts resource allocation within the economy.[916]

6.8.2 Consumer Debt and Labour Policy

Certainly, consumer welfare would be better served by stable incomes in the form of wages, salaries and guaranteed payments from the government for the unemployed, rather than by reliance on debt in any case. Therefore, labour policies are necessary because of the risks of precarious employment. As employers of labour, the three tiers

[914] See Chapter II, Constitution of the Federal Republic of Nigeria (as amended) 1999, particularly, section 16 (a-d).

[915] BO Nwabueze, *The Presidential Constitution of Nigeria* (New York, St. Martin's Press 1982) 22.

[916] See para 3.3 Ch 3.

of government were implicated in many instances where civil servants default on loans. Several civil servants, particularly at state and local government levels, have stopped seeking loans and banks have stopped lending to them because they could not guarantee that their salaries will be paid in time.[917] Such inconsistencies and irregularities in public sector finance have not only made it harder for civil servants to access formal credit but also affects semi-formal and informal sources such as cooperative societies and credit unions where members usually access the cheapest kinds of loans available in the country. This is because such unions raise their capital through staff contributions.[918]

Nigeria operates a federal system of government with three tiers composed of the federal, state and local government.[919] The federal government (FG) enjoys exclusive powers on matters of finance such as bankruptcy and insolvency; banks, banking, bills of exchange and promissory notes; and borrowing of money within or outside Nigeria for the Federation or of any State. The FG is also vested with powers bothering on labour, including trade unions, industrial relations; conditions, safety and welfare of

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[917] Interview with ICBl, Branch Manager, ICB (Abejukolo, Kogi State, Nigeria, 2018)

[918] Interview with SCMFAo, Staff Co-operative, Ministry of Foreign Affairs (Abuja, Nigeria, 2018); Interview with CFANp, Executive Secretary, CFAN (Abuja, Nigeria, 2018). For example, Adeniyi documents the lingering problem of non-payment of workers' entitlements in Kogi State (one of the locations where the qualitative study was conducted) thus: '…according to the NLC [Nigeria Labour Congress] document, payment of salaries is based on between 25 per cent and 75 per cent and is made arbitrarily to core civil servants (CCS) and teachers. The salaries owed to local government workers are 40 per cent from January to November 2016 (11 months); 60 per cent of December 2016 to May 2017 (six months); 75 per cent of June 2017 to April 2018 (11 months) and 30 per cent of May to June 2018 (two months). In Kogi State, no gratuity has been paid to CCS, teachers and local government workers for the past 12 years (from 2007 till date). Pension owed to CCS, teachers and local government workers are 40 per cent arrears from 2017 and 35 per cent arrears for 16 months. There has been no leave bonus and no salary increment since 2014 while some local government workers are currently owed salaries for as many as 17 months…' See O Adeniyi, 'The State of the 36 States!' *ThisDay* (Abuja, 7 March 2019) <https://www.thisdaylive.com/index.php/2019/03/07/the-state-of-the-36-states/>accessed 25 September 2019.

[919] See sections 2, 3 and 7 Constitution of the Federal Republic of Nigeria (as amended) 1999.

labour; industrial disputes; prescribing a national minimum wage for the Federation or any part thereof; and industrial arbitration.[920]

As a result of the long military interregnum in the Nigerian political system (1963-79; 1983-99) and its unitarist legacy, the dynamics of power and influence are still highly centralised, thus making the FG an excellent platform to diffuse strong consumer/employee welfare ethos to the constituent parts. Under its enormous constitutional powers, the FG is the appropriate tier of government to address precarious employment. It is also the most fiscally viable by the current revenue allocation formula which grants the FG 52.68 per cent from the Federation Account compared to 26. 72 per cent to thirty-six states, and 20.60 per cent to the seven hundred and seventy-four local governments in the country.[921] One implication of this is that the FG is the guardian of the economic rights in chapter two of the constitution, and should use its leverage on the other two tiers of government to end the precarious nature of work in the country. Recently, the National Assembly raised the minimum wage (monthly salary) from NGN18,000 [USD49.86] to NGN30,000 [USD83.10][922], but several states of the federation have yet to comply with the old minimum wage passed into law in 2011.

However, with the high level of unemployment in the country,[923] the justiciability of chapter two of the constitution, more than any increase in minimum wage, is the more practical way to strengthen labour rights as well as guarantee the unemployed at intergovernmental levels. It is also the only lawful means by which state and local governments can be compelled by citizens and employees to comply as the constitution is the supreme law of the land and binding on all tiers of government. Again, this will mean the excision of section 6 (6) c of the Nigerian constitution, which makes the economic rights in chapter two non-justiciable. A country facing a crisis of

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[920] See Part I Schedule two, Constitution of the Federal Republic of Nigeria (as amended) 1999.

[921] Revenue Allocation (Federal Account, Etc) (Modification) Order (Statutory Instrument No. 9 of 2002).

[922] See section 3 National Minimum Wage Act 2019.

[923] According to the National Bureau of Statistics, youth unemployment in Nigeria is at 23 per cent.

development as Nigeria deserves radical reforms such as this. Unfortunately, all tiers of government are failing in their responsibility for improving the wellbeing of workers in the country. For example, commercial banks in the qualitative study acknowledged the role of government in consumer borrowing and default patterns but did not usually bend over when there has been such a default: 'If your employer defaults or the market turns on your business, it is not our concern'.[924] As noted earlier under on the common law remedy of frustration of contracts, Nigerian courts are firm on the position that 'mere hardship, inconvenience or another unexpected turn of events which have created difficulties though not contemplated cannot constitute frustration to release Appellant from that obligation'.[925]

6.9 RETHINKING THE ROLE OF TRANSNATIONAL INSTITUTIONS IN INITIATING POLICY SHIFT IN NIGERIA

Reflecting on the title of this thesis, and its central argument that transnational institutions have, in the past, acted in ways that compromised the welfare of consumer borrowers in Nigeria, it seems rather counterintuitive to advocate for more transnational influence over consumer credit policy in Nigeria. However, the historical influence of IFIs on domestic policy in Nigeria is the reason why they must be invited to be a force for good in regulating the Nigerian credit market. The policy disparities between the current international paradigm and domestic regulation is substantially down to the fact that regulators in Nigeria are still actively implementing the old policy manual from the same transnational actors. Nigerian regulators have overtime accepted as gospel the premise that *any* regulation to strengthen consumer rights would necessarily stifle growth. It is, therefore, an irony that the World Bank, for instance, now promotes *ex ante* consumer protection measures such as responsible lending obligations and BE while Nigerian regulators continue to firmly resist these changes. The more serious implication, however, is that it illustrates a pattern of commitment to antiquated policy in Nigeria partly owing to elite incentive to maintain

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[924] Interview with PBc, Head of Credit Operations, PB (Abuja, Nigeria, 2018); Interview with FCMBa, Head of Credit Operations, FCMB (Abuja, Nigeria, 2018).

[925] *Lewis v UBA* (2016) LPELR-40661(SC).

the status quo, administrative incompetence,[926] and a dearth of technical expertise within government agencies not only to manage complex regulation but to channel critical intelligence (data, evidence, case studies) to IFIs making rules that affect Nigerians.[927]

Traditionally, IFIs have relied on a mix of cooperation with governing elites and conditionality to force through economic agenda in developing countries. The main goals of such interventions were to manage their financial exposures to governments and financial institutions in developing countries, and to diffuse neoliberal economic ideas, thereby making it the global governing paradigm. Following the pivot of transnational institutions towards stronger regulation, the thesis will propose a third goal for transnational actors: that IFIs explore ways to influence developing countries to renounce obsolete ideas and policies that diminish consumer welfare. It is only logical that IFIs take an active role in steering away national regulators from regulatory policies or approaches that have been empirically proven to produce hurtful outcomes for consumer borrowers, where knowledge of that harm or the credence of the evidence is unknown or rejected without justification by national regulators, especially if IFIs had helped to propagate them.

This proposal is controversial in that it potentially interferes with the rights of sovereign governments to make credit policies for their own domestic markets. In fact, IFIs have always disregarded such concerns and intervened when it suited their interests. The World Bank and IMF have been widely criticised for interfering in developing countries and pursuing agendas that promote the interests of the developed world and consequently, faced much pushback to limit their influence in developing countries. There is much merit in such pushbacks including the need to respect the sovereignty of developing countries, the need to get more developing countries' representatives on the policy roundtables within IFIs, and to ensure that

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[926] eg the failure to update the country's archaic moneylenders regulation, or the absence of a robust individual insolvency legislation.

[927] KW Abbott and D Snidal, 'Hard and Soft Law in International Governance' (2000) 54 (3) International Organization 421-456.

policies at the transnational level are as applicable to the diverse circumstances of countries across the world. However, the growing intersections of consumer protection and market stability objectives offer an opportunity for IFIs to score some points for consumers in developing credit markets.

The primary guardians of consumer rights are national governments, civil society groups and individual actors under a reliable and effective system of laws. However, many governments in developing countries are illiberal democracies with a history of suppressing consumer rights, while civil society and consumer groups are too weak to influence policy effectively. This leaves a vacuum for IFIs to intervene on behalf of consumers. Drawing on Hall's social learning theory, change occurs faster when ideas, institutions and crises converge. However, these three hardly ever converge in developing economies. IFIs have an opportunity to champion the cause of consumers in developing countries by leveraging current levers of influence and enforcement capacities, only this time on the side of consumers. According to Gough:

> … developing countries today are more constrained by the global environment and face much greater intervention from supranational institutions—and thus exhibit much weaker path dependency in social policy…[928]

This conclusion reflects the situation with Nigeria. Institutional weaknesses still plague the country while ideology has yet to take deep roots in its political economy. Thus, there is an immense opportunity for policy transfer, and IFIs can still significantly affect the country's economic policy trajectory.

[928] I Gough, 'Welfare Regime in Development Context: A Global and Regional Analysis' in I Gough and others (eds), *Insecurity and Welfare Regimes in Asia, Africa, and Latin America* (Cambridge, Cambridge University Press 2004) 64.

Implementing an agenda in any country requires the buy-in of national governing elites to succeed.[929] While elite opposition may not be quite consequential,[930] their support for the agenda is very consequential, especially when the agenda intersects with their interests. However, the fact that they need elites to accept their conditionality and reform proposals may undermine their willingness to intercede, but doing this, more than any admission of complicity in failed policies of the past can ameliorate the sufferings of consumers over the years. In order to genuinely help promote consumer borrowers, there are many possibilities before it. IFIs could engage pro-poor activists and policy experts from developing countries, for their knowledge and experiences, to calibrate new policy goals to suit developing country contexts. However, this is not without its challenges. Again, as IFIs seek to move beyond past mistakes, national elites are now well invested in the existing structure of the economy and may present significant resistance. Thus, they must learn to devise other means of influencing regulation. This should not be difficult as the old playbook of IFIs could still be deployed to this purpose.

In the past, IFIs used the carrot and stick to force the agenda. In many cases, they worked closely with and promoted western-educated economists that firmly subscribed to the free market doctrine. Where such leaders dragged their feet for any reasons, IFIs imposed conditionalities that borrowing countries must implement in order to access international loans and aid. This strategy is still useful in diffusing the new regulatory knowledge to regulators in developing countries. More policymakers in developing countries today are educated in western universities than at any time in the past. IFIs thus have a more robust team of policy experts in developing countries to share policies, strategies and tactics with on matters of consumer policy. For example, rather than foisting austerity on home governments, the World Bank and IMF can build consumer protection frameworks into sovereign credit assessment

[929]N Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (New York, Cornell University Press 2006).

[930]IFIs seem to always have their way in developing countries through their onerous conditionalities for external aid.

processes, project assessment and execution, and consultancy services to home governments. When assessing market risk and types of market failures, regulators must be attuned to the welfare cost of *ex post* intervention and the welfare loss flowing from consumers' bounded rationality. While this may sound unprecedented, an existential crisis requires radical solution. For example, in response to the climate crisis, central banks around the world have begun factoring climate risks into market risks while credit rating agencies have begun including climate risk into creditworthiness assessment.[931] While over-indebtedness and financial exclusion do not equate climate change, they both represent forms of existential crises for the individual and humanity respectively.

Finally, transnational institutions must get better at foreseeing and forestalling the collateral damage likely to result from their policies. Where the premise for pursuing specific policies is not feasible, and the outcomes disproportionately favour a few elite groups, it can be a recipe for consumer welfare diminishing policies. For example, the privatisation of financial institutions in Nigeria was commenced on the assumption that the relevant institution overseeing state-owned financial institutions[932] will organise transparent auctions with competitive bidding taking place. However, privatisation became an avenue for public servants to sell government assets, including government-owned banks to themselves for cheap while siphoning the proceeds of the sale to private accounts. Similarly, deregulation in the absence of well-established financial infrastructure has fuelled more loan concentration, speculation, and corrupt patronage between bank boards and regulators. Beneficiaries of this

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[931] M Carney, FV de Galhau and F Elderson, 'The Financial Sector Must be at the Heart of Tackling Climate Change' *The Guardian* (London, 17 March 2019) <https://www.theguardian.com/commentisfree/2019/apr/17/the-financial-sector-must-be-at-the-heart-of-tackling-climate-change>accessed 19 April 2019. See also Center for International Environmental Law, '(Mis)calculated Risk and Climate Change Are Rating Agencies Repeating Credit Crisis Mistakes?' (*CIEL,* June 2015) <http://www.ciel.org/wp-content/uploads/2015/06/CIEL_CRA_Brief_24Jun2015.pdf>accessed 25 September 2019.

[932] Currently the mandate of the Bureau of Public Enterprises.

outcome, described as a 'distributional coalition'[933] make it almost impossible to produce the kind of regulations that would benefit consumer borrowers in the lower economic strata.[934]

6.10 SUMMARY

Politicians and regulators in Nigeria have been under the illusion that Nigeria's commitment to capitalism is settled and that decisions about who has access to credit and on what terms should be left to the market.[935] It is an illusion because, as noted in the introduction to this thesis, capitalism or neoliberalism is not antithetical to regulation. Secondly, the constitution of Nigeria declares otherwise, and Nigerian policymakers generally do not orient policy decision on ideology but expediency.[936] Overall, drawing upon the works of Armatya Sen and Peter A Hall, this thesis concludes that regulation has a role to play in the provision of affordable consumer credit. According to Hall and Soskice, 'national political economies are what determine economic performance and social well-being, and not the reverse'.[937]

Consumer policy-making in Nigeria has been weakened by financial liberalisation in the last forty years. The governing neoliberal ideology in Nigeria has produced a policy continuum of market governance. Competition for global financial capital continues to take precedence over considerations for the quality of consumer services. For instance, the regulatory race to the bottom to climb up the World Bank's Ease of Doing Business Index is instructive. Also, as the international paradigm for consumer credit regulation became more regulatory, policymakers in Nigeria doubled down on

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[933] Top military brass, senior civil servants, urban formal sector employees and salaried workers.

[934] N Rudra, 'Welfare States in Developing Countries: Unique or Universal?' (2007) 69 (2) The Journal of Politics 378-396; World Bank, World Bank, 'Finance for All? Policies and Pitfalls in Expanding Access' (2009) 24 (1) The World Bank Research Observer 146.

[935] IB Babangida, 'Speech by Nigeria's former Head of State, General Ibrahim Babangida' (The Daily Trust Annual Dialogue, Abuja, January 2012).

[936] J Yoon, 'Globalisation and the Welfare State in Developing Countries' (2009) 11 (2) Business and Politics 1-31.

[937] P Hall and D Soskice, 'Introduction' in P Hall and D Soskice (eds), *Varieties of Capitalism* (Oxford, Oxford University Press 2001) 1–70.

discredited policies and adopted incomplete set of reforms. The reforms highlighted in chapter five have their merits but escalated the inequality of access to affordable consumer credit in the country.

This thesis was able to outline the international regulatory objectives for credit markets, identify the challenges of consumer borrowers in Nigeria, and examine how specific transnational policy measures address concerns for more affordable consumer credit in Nigeria. The thesis shows that the current regulatory approach in Nigeria is different from the transnational trend since the Global Recession. This divergence, however, occurs at the policy level rather than ideological.

Consumer borrowers in Nigeria have long been exposed to unsafe credit products and harmful lending practices on account of the policy pathway adopted in the 1980s and as such should not have to wait too long to benefit from policy correctives emerging from the same actors that imposed that pathway. Secondly, if the longer-term relationship of transnational institutions with developing countries is to have a different kind of impact on consumers in developing countries, then concrete policies must be put in place to support institution-building at the national level, and transnational institutions do have a role to play in achieving that. Nigerian regulators continue to construe neoliberalism and the role of regulation almost exclusively as market protection and extremely conservative on consumer protection. This was the position of IFIs, especially the World Bank, IMF, and the United States before the Recession. While the IMF continues to insist that the problem in developing countries is too little capitalism, the other institutions have demonstrated an ideological epiphany and have chosen a new policy pathway that is more protective of the consumer borrower. The challenge is how to get Nigerian regulators to shift policy ground, and this can only happen if they have a better understanding and appreciation of the ideological ground they 'occupy'.

6.11 SUGGESTIONS FOR FURTHER STUDY

The limitations of this thesis were acknowledged earlier in chapter one. Particularly, the small scale of the qualitative study which is not representative of the perspectives

of consumer borrowers in a substantive way. Accordingly, while the thesis has attempted to address the research question 'how beneficial is the evolving international approach to consumer credit regulation to consumers of credit products and services in Nigeria?' from a lender's perspective, several incidental questions continue to demand answers. One implication of having a small sample of consumer borrowers is that it leaves a gap for larger scale studies to capture a broader spectrum of consumer experiences. Consumer perspectives are very important from a policy standpoint because they enable policymakers to appropriately tailor regulation to improve their experiences and minimise collateral damage. A grounded understanding of consumer experiences potentially increases their visibility and influence on the policymaking process especially in Nigeria where there is a wide gap between elite interests and those of lower-end borrowers. If regulators are genuinely concerned about avoiding paternalistic regulation, such a study would be very helpful.

A second area that might be of interest to researchers is a comparative study of sub-Saharan African countries or a wider study of developing countries. Although this thesis explored other jurisdictions in other to contextualise the analysis, the central focus was on the divergent points between developed and developing countries and how regulation originated in the former impact consumer outcomes in the latter. A comparative analysis of consumer credit policies in developing countries will be invaluable in terms of assessing the effectiveness of some of the policy recommendations highlighted in chapter six of this thesis. For example, while this thesis recommends adequate government funding for cooperatives and credit unions, or at least, a linking of the two to address information asymmetry and liquidity shortages in the informal sector, it would be helpful to 'see' how schemes to promote this eg credit guarantees, ring-fenced financing of consumer loans, and subsidised interest rates administered through cooperatives and credit unions are currently being executed in any developing country and the potential challenges.

Thirdly, the thesis also found that regulators in Nigeria lack an independent ideological anchoring, and implied that this could be responsible for the

overwhelming influence of transnational actors imposing free market ideology from the outside. The thesis cited elite interest and corruption as possible underlying causes. However, the thesis does not engage with this subject in great depth or attempt to understand why the prevailing values of moral obligation, reciprocity and collective action that currently govern customary credit relations have neither permeated the culture of formal lending institutions nor impacted regulatory policy. Such a study might have implications that resonate beyond the narrow context of consumer credit policy and far into other aspects of public regulation across the developing world.

Fourthly, the thesis confirmed Olson's thesis that consumers lacked the political clout and organisational competence, in contrast to lenders, to influence regulatory change. However, the thesis does not address why this is the case in the context of Nigeria. For example, trade unions have historically enjoyed great influences on public policy across sectors ranging from education, health, transportation to the oil & gas sectors even during the era of dictatorial military governments. It is, however, unclear to what extent trade unions and consumer groups can impact financial markets, and whether they encounter the same sets of obstacles as unions in the other sectors.

Various trade unions including the Nigeria Union of Teachers, the Academic Staff Union of Universities, the Nigeria Medical Association, the Petroleum and Natural Gas Staff Association and the Nigeria Union of Petroleum and Natural Gas Workers (NUPENG) have on several occasions demonstrated a capacity to bring the Nigerian economy to a halt whenever they decide to embark on nationwide industrial actions. However, the unity of purpose and staying power to press objectives is often undercut by corruption and incompetent leadership. For instance, in a BBC documentary on the Lagos chapter of Nigeria's National Union of Road Transport Worker, it appeared that one of the biggest concerns was corruption and a tendency for union leaders to be appendages of the government.[938] With the thesis having established regulatory

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[938] See L Theroux, 'Law and Disorder in Lagos' (*BBC iPlayer*, 10 October 2010) <https://www.bbc.co.uk/iplayer/episode/b00vcwfw/louis-theroux-law-and-disorder-in-lagos> accessed 05 October 2010.

capture as one of the underlying reasons for anti-poor regulation, it is worrisome to have union leaders primarily loyal to government officials and regulators whose agenda frequently diverges from that of the average consumer of public services. A study into this area could provide a vital insight into strategies for harnessing consumer strengths behind some of the policy outcomes canvassed in this thesis eg the justiciability of economic rights enshrined in the Nigerian constitution.

Finally, most of the consumer borrowers interviewed described borrowing from formal lenders as a 'last resort'. This sentiment was widespread amongst all categories of consumer borrowers interviewed but the fact that it includes certain middle-class and creditworthy individuals (roughly 5 per cent of the adult population) who forgo the opportunity to borrow might be of interest to researchers. The qualitative study in chapter five indicated that consumer borrowers in Nigeria could be self-excluding from the formal credit markets for a variety of reasons such as wrongly assuming that their applications would be denied, high interest rates, the lack of information about products available on the market, or cultural resistance to credit-driven consumption. However, the sample of consumer borrowers, as noted above, is quite small such that it is insufficient to support a conclusive determination of which underlying reasons are more pervasive. For instance, it would be very useful to understand how many of the self-excluders turn to informal consumer loans, as this would help explain to what extent the problem of exclusion is about formal credit and formal lenders. Indeed, the research skills required to tackle this issue might be more readily available to sociologists and economic anthropologist rather than a lawyer with a limited mastery of socio-legal research methods.

In conclusion, it is hoped that the findings of this thesis would be an opening to a larger conversation about the impact of financial markets on the consumption patterns of consumers in developing countries, both in appraising the merits of consumer credit as social insurance in countries where the welfare state is weak or non-existent, and as a bridge to a more sustainable consumption financing model. For many Nigerians, consumer goods such as food, education, and healthcare remain critically underutilised such that consumers in this market would benefit from an academic

discourse that frames consumerism more as the protection of consumer interests and less as a social or economic order that promotes excessive consumption. The latter though is a more accurate portrait of consumption trends in developed economies.

APPENDICES

In compliance with the ethics approval which was sought and obtained before embarking on the field trip, a participant information sheet and an informed consent form were handed out to all respondents and the interviewer was fully satisfied that they were informed about the purpose of the research.

The interviews on average lasted about 75 minutes, were taped and subsequently transcribed for analysis. The EnVivo software was used to select themes relevant to the research question. The questionnaire administered to all lenders was structured to enable lenders to articulate how their relationships have evolved with consumers[939] and regulators[940] in response to specific policy changes. Specific questions about lender engagement with fintech,[941] and the legal system[942] were also covered in the questionnaire. The interview responses further helped to crystallise answers to the research question by indicating what policies lenders in Nigeria have found most enabling or inhibiting of their lending activities, the sources of such policies; what reforms lenders are most opposed to, and where the opposition has succeeded, to understand why.

Interview Questions

A. REGULATOR (CENTRAL BANK OF NIGERIA)

Could you please tell me about your role in this organisation?

REGULATORY PURPOSE

a. **H**ow would you define the CBN's regulatory purpose and vision for the Nigerian credit market?

[939] Loan marketing, risk assessment, the loan application process, and loan characteristics.

[940] Banks' characterisation of the quality of prudential oversight, ie liberal or strict, lenders' role in rulemaking, and consumer protection requirements/mandate.

[941] Adoption levels, relevance to competitiveness, regulatory framework, and digital credit products.

[942] Default and debt recovery (rate of default, mode of recovery, and cost of recovery).

b. Research on financial regulation across jurisdictions indicate a specific difficulty in terms of achieving a balance between market access and consumer protection. How have you approached this problem?
c. I would like to ask a few questions about credit culture and philosophy. There is a popular view held by classical economists that consumer credit is not necessarily helpful to the economy but rather that policy should focus on expanding producer credit or credit for production. What is the CBN's position on this?
d. I am not sure if this question is for you or an economic anthropologist, but I will ask you anyways with this privilege. Has the CBN ever undertaken a systematic study of the credit culture of Nigerians? Are most Nigerians credit embracing or averse?
e. The statistics suggest that close to 90% of adult working-class Nigerians lack access to credit. What are the issues responsible for this?
f. How do you fix the interest rate? How much role does demand and supply play. I ask this because many people I know think it is crazy to borrow from commercial banks at current interest rates. Do you have data on the current shape of the demand curve? Do you think the rate is responsive to the demand curve?
g. What in your view would it take to drive the interest rate to a single digit?

BANKING SUPERVISION

a. About 9 years ago, Nigeria witnessed a banking crisis. The CBN's response was widely commended for bringing stability to the system with Basel III implementation, dissolution of management boards and the purchase of toxic assets by AMCON, amongst other reforms. Some emerging markets central bankers have opined that BASEL III undermines the drive for financial inclusion. Do you share this view?
b. When you look at what happened in Nigeria back in 2009, the CBN published batches of defaulting debtors. A handful of borrowers were responsible for the crisis. I want to know how regulators and banks address the problem of

adverse selection with the prohibitively high interest rate. How do banks tell risky borrowers from dodgy ones?

c. The reforms in a way restricted access to finance for lower end borrowers as opposed to corporate borrowers even though the latter were responsible for the crisis. Would you say this is an unintended consequence of policy or the design of the response?
d. Do you think that lenders under your supervision ration credit? What is your attitude to this?

THE INFORMAL SECTOR

a. As you know, Nigeria has a huge informal sector compared to other emerging economies like Brazil for example. According to data from SMEDAN and the NBS, over 90% of Nigerian businesses are MSMEs. Could you distinguish between consumer credit and credit for MSMEs?

INFORMATION ASYMMETRY

a. Info asymmetry is a recurrent subject when we discuss the credit market. Recently, the Credit Reporting Act was passed. A collateral registry has also been established to facilitate borrowing for borrowers with movable assets. In terms of practicalities, how have they fared in the light of the booming informal credit market?
b. Do you have a blacklist of loan sharks in the country?
c. Corruption remains problematic for many advanced, but more so, developing economies. Do you guarantee the integrity of credit scores and registers in the country? For example, is it possible for a big man to bribe their names off credit registers, perhaps not completely but earlier than the prescribed duration under the law?
d. Does the CBN have a threshold for what should be considered harmful credit product?

INSOLVENCY PROCEEDINGS

a. Since the GFC, we have seen adjustments with corporate insolvency. Depending on which side you fall, do you think regulators have been very generous to loan defaulters across the world or stricter? Perhaps you could speak in terms of advanced and emerging economies.
b. In Nigeria, AMCON assumed responsibility for a vast amount of toxic loans on bank balance sheets. Many analysts would say that the bailout was a regulatory statement that avoiding systemic risk outweighs moral hazard concerns. Do you think the CBN could approach personal insolvency in a similar manner?
c. If big companies are bailed out but not individuals and MSMEs, isn't there the moral hazard of TBTF. Borrowers could pick up the message that to get government aid we must borrow big and default. What do you think?
d. The Bank of England in a recent report warned that household debt posed greater systemic risk than corporate debt based on the higher risk and the very nature of the latter. Is the CBN determined to stifle access to this type of credit?
e. The IMF in 2017 identified Nigerian households as under-borrowed. I believe this include civil servants and other demographics with stable income. Do you think Nigerians need to be encouraged to borrow more to maintain a living standard e.g. encouraging banks to introduce more credit cards?

MICROFINANCE BANKS AND INSTITUTIONS

a. Could you please give an assessment of MFIs in Nigeria as agents of financial inclusion?
b. When you use the phrase 'financial inclusion' how do you define it?
c. Do MFIs submit credit data to Credit Bureaux?
d. What is the effective interest rate offered at MFIs?
e. What cheaper alternatives exist for lower end borrowers in the credit market?
f. Fintech is gaining prominence as a key player in the credit market both as a part of licensed banks and autonomously. Is regulation keeping up with Fintech innovation?

MONETARY v FISCAL POLICY

a. A group of critical scholars have argued that financial inclusion as currently understood is, to put it bluntly, a scam. That loans to poor people especially where interest rate caps are disallowed can only harm borrowers. Thus, many have advocated fiscal policy to focus on job creation and to boost social welfare rather than rely on personal loans as a means out of poverty. Suggestions range from conventional social security benefits to bold advocacy for Universal Basic Income. What do you think? Can Nigeria afford a welfare state?
b. If you are an advocate for the free market, and believe that private individuals are more ardent than the government in managing resources, what do you think is the cost of governments' domestic borrowing to financial inclusion? Perhaps you may want to speak to the Nigerian experience.

CONSUMER PROTECTION

a. How does the CBN approach consumer protection?
b. The Crowther Report in the UK took a liberal approach to consumer protection in the early 1970s preferring to treat consumers as rationale adults. Do you think this stance is tenable in Nigeria?
c. Behavioural economics is growing in influence in policy circles. Has the CBN commissioned a study of the economic behaviour of the Nigerian consumer? In short, is the Nigerian financial or credit consumer the rational agent presented in economics textbooks?
d. Does the CBN employ BE insights in consumer protection policy?
e. Is the interest rate indicative of total loan cost?
f. What measures are in place to promote consumer literacy?
g. Do you think caps on interest rates are helpful to credit users ultimately?
h. Many jurisdictions, including international frameworks like the G20, EU, BCBS, OECD etc. have adopted/advocated responsible lending and borrowing

obligations. What are the pros and cons of this approach? Will Nigeria follow this path?

i. What unique risks does fintech present to consumers and the markets more generally?
j. Are Nigerian consumers vulnerable to same risks as those in advanced or other emerging economies or peculiar?
k. Finally, how much external (executive, international) pressures does the CBN put up with in regulatory policy formulation and implementation?

B. REGULATOR (SMALL AND MEDIUM ENTERPRISES DEVELOPMENT AGENCY OF NIGERIA)

a. Could you please tell me what you do in this organisation?
b. In your joint report with the National Bureau of Statistics, it says that access to finance is a major drawback to floating SMEs in Nigeria. Could you please explain some of the key challenges to access that you have encountered while serving as linkage between MSMEs and lenders?
c. In terms of partnering with lenders, I understand that you work with the Bank of Industry to get them to lend to MSMEs. What do you think can be done to get commercial banks to begin to lend at affordable costs to this category of borrowers? Also, private sector financiers more generally?
d. I would like to ask you about the scope of your agency's role as a facilitator. Do you mainly point MSMEs to financing bodies, or do you consider it your mandate to make inputs to fiscal policy?
e. Statistics from the World Bank's Ease of Doing Business index tend to suggest that MSMEs have high failure rates in most countries. Similarly, SMEDAN's report points out that the number one source of funds for MSMEs in Nigeria is savings and family before loans. When you consider the federal government's cash transfer policy, do you think SMEDAN's role can accommodate advocacy for more social welfare to boost individual savings?

f. Nigeria has a huge informal sector. A lot of credit operators exist in the informal sector, and some exists in the semi-formal sector eg co-operatives. Do you see any intermediation gaps within the informal economy for your agency?
g. SMSE owners especially in developing countries rank among some of the most vulnerable borrowers in credit markets. Their business risk can be very high, and a lot of them are not fully informed about the terms of loan contracts. Have you ever had to deal with borrower's complaints about loans you helped them acquire?
h. What other agencies do you liaise with to accomplish your goals as an agency?
i. Could you please tell me some of the landmark policy initiatives floated by your agency? What implementation challenges are you concerned about now?
j. How popular is the service you render?
k. Do you have legal obligations towards your clients?

C. FORMAL SECTOR LENDERS

BACKGROUND QUESTION

a. Could you please tell me about your job description?
b. What is your business model i.e. credit operations?
c. How diverse are your credit products?

ABOUT YOUR RELATIONSHIP WITH CUSTOMERS

a. How does your organisation assess creditworthiness?
b. Is your customer risk assessment pooled or personalised? (in other words, do you operate a flat rate of interest for all categories of borrowers?)
c. How transparent is the Nigerian credit market with the licensing of credit bureaux?
d. What limitations currently exist about access and use of credit reporting data?

e. Do you (i.e. your organisation) ration credit? Do you ever disapprove applications from otherwise qualified applicants?
f. Do you offer subprime loans? If not, why?
g. I have spoken to several people who say they could never apply for loans at current interest rates, what do you think the demand curve currently looks like? and do you think the current interest rates are responsive to the demand curve?
h. If the current rates can be explained by high demand, what is the profile of these pool of applicants?
i. Is your interest rate fully indicative of the total loan cost? What other charges are typically associated with your loan offers?
j. How do you educate subscribers about loan cost?
k. When you analyse uptake at current interest rates (up to 25% in some cases), do you have a system of telling risky borrowers (unstable income, unemployed etc.) apart from dubious ones (i.e. those who do not plan to repay *ab initio*)?

   HINT: This question is designed to elicit information about how lenders manage to avoid adverse selection. In 2009, the banking crisis appeared to have been caused by dubious, rather than risky or subprime borrowers according to the former Governor of the Central Bank of Nigeria, Mallam Sanusi Lamido Sanusi.

ABOUT YOUR RELATIONSHIP WITH REGULATORS

a. **I**n what ways have regulation contributed to any restrictions in lending?
b. Do you consider your organisation a partner in rule making or would you say the regulatory framework takes the form of command and control?
c. In what ways do you think regulators could further help you to expand access to credit?
d. Have you encountered a situation where your organisation was unable to roll out an innovative credit product that would benefit 'smart' consumers because of regulatory or administrative prohibitions? What was the reason for such prohibition?

e. How many regulatory organisations are you accountable to for your credit operations?

ABOUT FINTECH

a. FinTechs (e.g. Paylater, Social Lender, Chams Mobile Ltd etc.) are increasingly taking on lending activities. How involved is your organisation with FinTech?
b. More generally, do you consider FinTech companies as partners or competitors in the lending business? Specifically, is FinTech a threat to your traditional approach to lending?
c. Do you have a strategy towards the informal market?

ABOUT YOUR APPROACH TO DEBT RECOVERY

a. What are your biggest challenges?
b. As a lender, do you consider the present insolvency regime an obstacle to debt collection? (e.g. do you need a court order to enforce a collateral? How easy or difficult is the court process?)
c. Do you consider law enforcement helpful in debt collection?
d. Is there a cap on the percentage of a defaulting borrower's personal belongings you are authorised under the law to seize?

D. SEMI-FORMAL LENDERS (COOPERATIVE SOCIETIES AND CREDIT UNIONS)

BACKGROUND QUESTIONS

a. Please could you tell me about your position in your organisation?
b. What does your organisation do?

REGULATORY FRAMEWORK

a. Could you please tell me about the rules and regulations that guide your co-operative?
b. Who makes the ultimate decision about loan grants?

LOAN TERMS

a. What kind of loans do you typically grant?

b. What is the average duration of your loans?
c. Who are the people you lend to?
d. How do you assess creditworthiness?
e. Do you ask applicants about the purpose (s) of the loan?
f. Do you charge interests? If you do, what is the effective interest rate?
g. What other costs are associated with your loans?
h. How are your loans repaid?
i. Have you ever had difficulties recovering your money back?
j. How do you approach defaulting debtors?
k. How do you inform borrowers about the terms of your loans?
l. Your borrowers being civil servants are obviously educated. But how financially literate are they?
m. Do you market your loan to members? Do you have competition?
n. Do you ration credit to members?
o. Who would you rather not lend to?

LIQUIDITY

a. How do you generate or pool your capital?
b. What is the maximum amount you have ever lent?

PROCESS

a. How long does it take to process your loans?
b. How much paperwork does an applicant have to complete?

CONSUMER PROTECTION

a. How do you respond to borrower complaints?
b. How often do you get reported to your regulator?
c. In what ways does regulation restrict your operations e.g. how much you lend etc.
d. Have you ever had to sue or be sued by a client?
e. Do you offer financial literacy programmes to your members?

E. OFFICIAL OF THE BUDGET OFFICE AND NATIONAL PLANNING (MINISTRY OF FINANCE)

BACKGROUND QUESTIONS

a. Please could you tell me about your organisation and your role within it?

FINANCIAL INCLUSION

a. A group of critical scholars have argued that financial inclusion as currently understood is, to put it bluntly, a scam. That loans to poor people especially where interest rates are too high can only harm borrowers. Thus, many have advocated fiscal policy to focus on job creation and to boost social welfare rather than rely on personal loans as a means out of poverty. Suggestions range from conventional social security benefits to bold advocacy for Universal Basic Income. What do you think? Can Nigeria afford a welfare state?
b. It is often said in Nigeria that the FG's domestic borrowing undermines access to affordable credit by private borrowers. If you are an advocate for the free market, and believe that private individuals are more ardent than the government in managing resources, what do you think is the cost of governments' domestic borrowing to financial inclusion? Perhaps you may want to speak to the Nigerian experience.
c. Do you think that the government is currently getting a fair rate of interest from domestic lenders?
d. The federal government have floated several welfare programmes to assist the poor. I can think of NAPEP, and then the previous administration had YouWin and SURE-P. This government has floated a conditional cash transfer policy. Various state governments also have their versions of such programmes. These initiatives are mostly ad hoc and small scale. Why is it difficult to harmonise a unified government programme to uplift the poor?

FISCAL POLICY

a. What is the fiscal policy agenda to support financial inclusion?
b. There is a perception that developing countries cannot afford a welfare state. But some countries like say India and Namibia do operate different scales of social security. What infrastructure do you think Nigeria must put up to facilitate the mainstreaming of social security?

c. I have spoken to several banks – commercial and microfinance institutions. They speak glowingly about the Federal Government's support for agriculture through intervention funds for agricultural credit facilities. Why can't this be our national credit policy for the entire sectors of the economy? For example, extending this to student loans, tech start-ups, private medical start-ups, etc.

d. Is there an existing framework to facilitate interagency co-operation/partnership on your priorities as an MDA and those of the CBN, the NBS, SMEDAN, and DMO etc. in terms of facilitating easy access to affordable credit?

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