Central Bank of Ghana: A Timorous Soul or a Bold Spirit

By:

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The argument about the novelty of the action does not appeal to me in the least…on one side there were timorous souls who were fearful of allowing a new course of action. On the other side there were the bold spirits who were ready to allow it if justice so required.

Lord Denning in Candler v. Crane, Christmas and Co [1951]2KB164, 178.

Introduction

A father had two sons whom he loved dearly. As such, their welfare was paramount to him; thus, he mandated himself to supervise their day to day activities. The children at a point in their lives wanted to marry, and sought their father’s consent. The father took into consideration the financial and emotional state of the two children and advised the older one to marry but to ensure a constant flow of income since he was a contractual employee. He also cautioned the younger son who was unemployed to find a job and be financially stable before getting married. He explained to them how financial difficulties could ruin their marriages.

Both the older and younger sons eventually got married despite their father's advice and caution respectively. A year later, the older son's contract was terminated with his employers and the younger son's financial difficulties worsened. They both appealed to their father for money for upkeep which also ran out. The sons, who lived in their father's apartment, were ejected for failure to pay their utility bills.

Now, the wives who are in a very deplorable state are accusing their father-in-law of failing to inform them about his sons' financial standing before they got entangled with them in marriage.

This story epitomizes the current situation in the Ghanaian financial sector, notably, the banks, non-bank financial institutions and specialized deposit-taking institutions. The father represents the central bank who is responsible for regulating and supervising the business of banking and deposit-taking. The two sons represent both banks and non-bank deposit-taking institutions and specialized deposit-taking institutions. The wives are the customers of the now-defunct banks and non-bank deposit-taking institutions. Now, the crux of the problem boils down to the question whether, in regulating banks, non-bank financial institutions and specialized deposit-taking institutions, the Bank of Ghana (BoG) acted timorously or boldly.

Background to the financial sector clean-up

An Asset Quality Review exercise by the central bank of Ghana between 2015 and 2016 identified certain challenges which included insufficient capital, licensing irregularities, liquidity problems, and weak corporate governance structure among financial institutions in Ghana.[1] Insufficient capital, licensing irregularities and liquidity problems are discussed below as the basis for the financial sector clean-up.

The Ghanaian Parliament, in its quest to reform the financial system, established the Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930), which came into force in September 2016. The Act consolidates all laws relating to deposit-taking by regulating all institutions in the business of deposit-taking. Key indicators and pointers in the Act and issues of paramountcy in this write-up are licensing requirements, minimum capital requirements and liquidity.[2]

Following the implementation of Act 930, on 11th September 2017, the Bank of Ghana (BoG) introduced a new capital requirement for banks and specialized deposit-taking institutions. Universal banks were to increase their minimum stated capital from GHS 120 million Ghanaian cedis (GHȻ) - ($23.2 million) to GHS 400 million Ghanaian cedis (GHȻ) - ($77.5 million) by the end of 2018.[3] The implementation of the new capital was to commence in July 2018; and by January -1 2019, all relevant institutions were to comply with the directive. Other financial institutions such as savings and loans and microfinance also had to increase their stated minimum capital to 15 million Ghanaian cedis (GHȻ)- ($3.1 million).[4]

The new capital directive was issued in line with one of the main pillars of Basel II[5] which is on minimum capital requirement. The Bank of Ghana's quest to have a good capital adequacy ratio[6] in order to protect depositors of the various financial institutions introduced the new capital requirement.

The capital requirement directive was published in consonance with section 92(1) of Act 930 and section 4-(d) of the Bank of Ghana Act 2002 (Act 612).[7]

Non-compliance with the new minimum capital requirement at the stipulated deadline led to the revocation of licenses of banks and other specialised deposit-taking institutions. However, others ceased operations of their own volition due to insolvency and illiquidity.[8]

Also, some financial institutions; Heritage Bank and Premium Bank, also had their licenses revoked as a result of breach of the licensing requirement. This happened due to the lack of requisite license to operate rendering their operations void ab initio.

The number of savings and loans, micro-credit and finance institutions whose licenses were revoked was overwhelming. Three hundred and forty-seven (347) out of a total of 566 had their licenses revoked for either one or all of the above stated reasons.[9] The revocation of the licenses led to a very significant decrease of financial institutions operating in the country. Thirty-four (34) universal banks which were operating prior to the clean-up exercise in Ghana shrunk to 23. Eleven (11) banks were affected by the clean-up exercise, which represented a 32% decrease in universal bank operators.[10]

Customers of these financial institutions are accusing the Bank of Ghana of being a timorous soul who was negligent in ensuring that the financial institutions operated with requisite license and required minimum capital. On the other hand, some academics and financial experts are of the view that the revocation of the licenses proves that the Bank of Ghana is a bold spirit and father who will not spare the rod to spoil his child, thus taking measures to safeguard the economy as a whole.

These divergent views create the path to a discussion on neoliberalism in central banking in relation to the financial stability mandate of the BoG, juxtaposing it with the Keynesian approach to economic policy.

The financial stability mandate of BoG

The most important laws for defining the central bank's financial stability mandate are the 1992 Constitution of Ghana, the Bank of Ghana Act, 2002 (Act 612) and its Amendment Act, Act 918 and the Banking Act, 2004 (Act 673). The 1992 Constitution of Ghana establishes the BoG as the central bank, with sole authority to issue the currency of Ghana.[11] The BoG is tasked with the promotion and maintenance of the stability of the currency and with encouraging and promoting economic development.[12] The combined effect of these laws is geared towards ensuring the safety of depositors' deposits by putting in place a safe, sound and a more robust financial system through supervision and regulation.

The BoG is primarily mandated by Act 612 as amended per section 3 to maintain stability in the general level of prices. This is complemented by other roles such as ensuring an effective and efficient operation of the banking and credit system for an overall promotion and maintenance of financial stability.[13]

The Banking Act also outlines BoG's responsibilities to include but are not limited to the promotion of an effective banking system; the dealing with any unlawful or improper practices of banks and the proposal of reforms of the laws relating to the banking business.[14]

These are further expanded in the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930)[15]. They include: promoting the safety and soundness of banks and specialised deposit-taking institutions, developing appropriate consumer protection measures to ensure that the interests of the clients of the banks and the specialised deposit-taking institutions are adequately protected, and dealing with unlawful or improper practices of banks and specialised deposit-taking institutions. The BoG, per section 123-(1) of Act 930, is also empowered to revoke the license of a likely insolvent or an insolvent bank or specialised deposit-taking institution.

As a result of these mandates, President Akuffo Addo in 2018 instituted the Financial Stability Advisory Council with an oversight responsibility to ensure stability of the entire financial sector.[16] A Market Conduct Examinations Office situated within the Financial Stability Department has been created by the BoG. The office is responsible for ensuring appropriate conduct from banks and specialised deposit-taking institutions towards their customers.[17] It is aimed at ensuring safety and soundness of the financial sector by conducting on-site supervision and a fair and timely complaint-lodging procedure for customers.

Neoliberalism in the Ghanaian financial sector

The aftermath of Ghana’s independence in 1957 was the introduction of a socialist form of governance, which plunged the country into a severe economic crisis. After the socialist policies by the Nkrumah government, the Rawlings government in 1983 sought help from the International Monetary Fund (IMF) which in turn introduced the Economic Recovery Programme (ERP). Under the ERP, there were trade liberalization and deregulation of the financial system. New banks, notably private, and non-bank financial institutions began operating in Ghana.[18] This initiated the neoliberal system of a free and competitive market devoid of government interference as opposed to the dirigiste approach pre-1983.

A market-based approach to economic policy and more importantly in the banking and financial sector, limited government control. Juxtaposing this with the recent financial crisis, the government had limited control on the banks and specialized deposit-taking institutions in Ghana. This is as a result of the adoption of a free market system as initiated by the ERP and the subsequent Ghana Poverty Reduction Strategies (GPRS I and II).

The BoG as a government institution was in a conundrum with regards to its financial stability mandate as against a free and competitive financial market with customers’ independent choice of financial institution engagement. This explains why it could only caution the public on engaging with unlicensed and illiquid financial institutions before the crisis.

At the onset of the crisis, the BoG as a neoliberal central bank sought to ensure stability in the financial sector by initiating a bail-out for the failing financial institutions. Per the central bank’s monitoring and supervision, UT Bank and Capital Bank were cited for insolvency. Reports from the BoG indicates that it communicated with these banks on several occasions for them to increase their capital requirement, which they failed.

To avoid a systemic risk, the BoG pumped in 860 million Ghanaian cedis (GHȻ)-($ 178 million) and GHS 620 million Ghanaian cedis (GHȻ)-($ 128 million) to UT Bank and Capital Bank respectively. This was in performance of its function as a lender of last resort to salvage these banks. Both UT Bank and Capital Banks lost their licenses. A purchase and assumption transaction was arranged with Ghana Commercial Bank (GCB) as the new holder of those banks to secure depositors’ deposits.[19]

In addition, Royal Bank Ltd, Sovereign Bank Ltd and Unibank Ltd all sought liquidity assistance from BoG, which was granted them from 2015 to 2018. Unibank alone received a whopping GHS 3.1 billion ($ 648 million) as uncollateralised emergency liquidity. In total, an amount of GHS 7.9 billion ($ 1.6 billion) was given to some financial institutions as liquidity support.[20] The BoG also had to secure depositors’ deposits of these banks through the establishment of an entirely new commercial bank-Consolidated Bank Ghana (CBG) to operate in the stead of these failed banks.[21]

After this costly and failed bailout, the BoG as a strict and disciplinarian father had no other choice than to revoke their licenses to prevent contagion in order to protect both the customers and the financial sector as a whole.

This may be highly contrasted with the Keynesian economic principles. From a Keynesian viewpoint, measures put in place by the BoG may not be sustainable for overall economic growth. Instead of increasing employment, demand for goods and services and economic growth, the neoliberal government only sought to ensure stability in the financial sector. For the Keynesian central bank, a mere caution on the husbands' financial state to the wives (i.e., bank customers) would not be enough, but rather, a pro-active step for the wives to seek an alternative source of income by securing employment would have come handy. This would have protected the marriage (i.e., the financial system) from breaking down. The bank customers (i.e., the wives) could have withdrawn a substantial amount of the deposits to start a business. This would have given them an alternative source of income and created employment for their employees. The creation of employment denotes a constant flow of income which will increase aggregate demand for goods and services. This will promote circulation of money in the economy, since to the Keynesian, excessive savings denotes less money in the economy for stimulating economic growth.

The BoG as a bold spirit

Considering the roles and functions as outlined, in relation to the question on whether the BoG is a timorous soul whose negligence caused the financial sector crises? It is relevant to ascertain whether a state institution can be liable in tort or a private law. Without delving into the historical antecedent of the crown's (in recent times, the state) liabilities on tortious acts, the precepts of the state and its public bodies liability are founded on grounds that a governmental unit should be liable whenever a private party would be liable in the same circumstances.[22] For instance, if a private person will be liable for a breach of contract of sale, a governmental unit should be liable in the same vein.

This may only be true if private persons are capable of performing all the functions of a governmental unit. It is observed that a large portion of the functions of governmental units have no private counterparts. Private persons do not administer prisons, conduct international relations on behalf of the general public, enact statutes, issue administrative orders and regulations that may have the force of law and regulate economic life.[23]

These make common law liability a difficult imposition on governmental units. This presupposes that an omission to perform a task which has been entrusted to a governmental unit in the public interest is not liable for nonfeasance.[24] The principles of tort law will only suffice here if it is expressly or impliedly provided for by statute that the breach of statutory duty is subject to tort law, otherwise, administrative law remedies are resorted to.

For the purposes of the financial sector clean-up in Ghana, the revocation of licenses or a perceived delay in the revocation of licenses by the BoG of the affected financial institutions cannot be said to be a breach of a duty in the form of negligence on the part of BoG. This is because the BoG has a statutory duty to ensure a safe and sound financial system which will create wealth, economic growth and development. This statutory duty does not create a common law duty (which includes a duty of care).[25] The BoG’s failure of a statutory duty of ensuring a safe financial system by revoking the licenses and refusing to renew the licenses ‘untimely’ cannot of itself create a duty of care to do so.

To add to it, the licensing mandate of the BoG is discretionary. License is only given when BoG is satisfied with the compliance of the license requirements. In essence, a governmental unit/public official cannot be liable where there has been a discretionary power.[26] However, a discretionary power is subject to a limitation in article 296 in the 1992 Constitution of Ghana.[27]

In essence, BoG is seen as a bold spirit as it did not tolerate inappropriate market conduct from the financial institutions, despite its neoliberal approach to the market forces. To avoid systemic risk and failure, it took stringent measures which led to the revocation of licenses and the eventual collapse of a significant number of financial institutions.

Notwithstanding, social commentators and customers of the defunct financial institutions are confident that BoG reneged on its duty and only observed the anomalies when the institutions were at the brink of collapse. This has led to a court action being taken against BoG and other relevant parties by some customers of the defunct financial institutions. This is a novel case as Ghanaians are awaiting a verdict by the court to ascertain whether BoG acted negligently.

Conclusion

The ailing financial sector in Ghana necessitated an immediate pragmatic response to realign and reposition the financial sector back to its glory days. Depositors' monies are mostly squandered or bolted with by directors and managers of financial institutions in Ghana. The recent clean-up in the financial sector has awakened uproars from some Ghanaians, notable amongst them are the customers of the affected financial institutions. While some vowed to boycott the 2020 elections, others instituted a civil action in court on the grounds of negligence against the central bank. It will be intriguing to know the legal principles for adjudicating this matter in the high court, whether private law principles under tort law (on the basis of which the customers have sued BoG), or public law principles under administrative law (which seems more appropriate for a public body). With the extent of insolvency, licensing irregularities and insufficient minimum capital requirements among financial institutions, the greatest fatherly role played by BoG was not to spare the rod to spoil the child in its quest to salvage the financial sector.

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[1] See generally, Kapotwe "How Ghana is working to improve the banking sector" 2018 *World Economic Forum* 1.

[2] Section 6, 28 and 36 of Act 930

[3] PricewaterCoopers (PwC) "Banking reforms so far: topmost issues on the minds of bank CEOs" *PwC* (2019) 138; Public Notice No. BG/GOV/SEC/2017/19 was issued as a directive for the new capital requirement.

[4] Microfinance institutions which are in Tier 2 and tier 3 categories under ACT 930 require not less than GHS 2 million as minimum paid up capital. Tier 2 and tier 3 entities comprise microfinance and moneylenders. The dollar equivalents are originally not in the directives the author has converted them to the prevailing cedi to dollar rate in 2018.

[5] Base II is the second set of international banking regulation defined by the Basel Committee on bank Supervision (BCBS). It is an extension of the regulations for minimum capital requirement as defined under Basel I. The Basel II framework operates under three pillars: capital adequacy requirement, supervisory review and market discipline.

[6] The capital adequacy ratio (CAR) is measured as a percentage of the capital of the bank, specialised deposit- taking institution or financial holding company to its assets. The minimum capital adequacy is at least ten percent (10%) for all financial institutions regulated by Act 930. A CAR less than 10% is an indication of insolvency. Coupled with fraudulent licensing, Premium bank was insolvent with a CAR of -125.2%.

[7] The Bank may issue directives to banks, specialised deposit taking institutions or financial holding companies generally or to a class or classes of banks, specialised deposit-taking institutions or financial holding companies where the Bank of Ghana is satisfied that *(a)* it is necessary to secure the proper management of a bank, specialised deposit-taking institution or financial holding company generally; *(b)* it is necessary to prevent the affairs of banks, specialised deposit-taking institutions or financial holding companies being conducted in a manner detrimental to the interest of depositors and other stakeholders or prejudicial to the interests of the banks or specialised deposit-taking institutions or financial holding companies; *(c)* it is necessary to maintain the overall stability of the financial system in the country; or *(d)* it is necessary to give full effect to the provisions of this Act.

[8] Bank of Baroda voluntarily offloaded its assets and deposits to Stanbic Bank and exited the Ghanaian financial system.

[9] Bank of Ghana *Notice of Revocation of Licences of Insolvent Savings and Loans Companies and Finance Houses, and Appointment of a Reciever (2019) 3.*

[10] These are UT bank, Capital bank, Unibank, Sovereign bank, Construction bank, Beige bank, Heritage bank, Royal bank and three mergers through mergers and acquisition to raise the minimum capital requirement: Omni bank and Sahel Sahara as OmniBSIC: First National Bank and GHL as First National bank and First Atlantic bank and Energy bank as First Atlantic Bank

[11] Article 183(1)

[12] Article 183(2) - (a) and (c)

[13] Bank of Ghana. Monetary Policy Framework 2017

[14] Section 2(1) of Act 612

[15] Act 930 consolidates all laws relating to banking and non-banking financial laws

[16] The President exercised this power in line with his article 58 mandate by the 1992 Constitution of Ghana, which vests the executive authority of Ghana in the president. This includes the issuance of a statutory instrument to establish a body.

[17] Bank of Ghana's Assessment of Banks and SDIs' Compliance with its Consumer Protection Regime, 2021.

[18] The Financial Institutions (Non-Banking) Law of 1993 provided licence to non-banking financial institutions. This was followed by the enactment of the Ghana Stock Exchange Listing Regulations and the Securities Industry Law. (Buckle)

[19] 2018 Ghana Banking Survey: Having secured the new capital; what next for banks? PricewaterhouseCoopers (PWC) 58. The purchase and assumption transaction was in line with section 123 of Act 930

[20] This calculation was done using the prevailing exchange rate of $1: GH₵4.78

[21] n17 above

[22] Du Bois " State Liability in South Africa: A Constitutional Remix" 2010 *Tulane European and Civil Law Forum* 1 13.

[23] n 22 above

[24] Stovin v Wise (1996) A.C. 923, Corringe v Calderdale Metropolitan Borough Council (2004) 1 WWLR 1057

[25] (n) 19

[26] Dalehite v United States 346 U.S. 13 (1953)

[27] Article 296 states that where in the constitution or in any other law discretionary power is vested in any person or authority - (a) that discretionary

power shall not be arbitrary, capricious or biased whether by resentment, prejudice or personal dislike and shall be in accordance with due process of law.

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