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The Legal Framework for Regulating Not-For-Profit Organizations in Nigeria

A.Y. Abdullahi*

Abstract

Not-for-profit organisations (NFPOs) is another name for Non-Governmental Organizations (NGOs). At the core of their existence is the issue whether these organizations need to be regulated or not. To optimize this, a Bill was proposed in the 8th National Assembly meant to specifically regulate the operations of the organization. The bill was never passed into law due to vehement opposition to the bill. Whilst the Company and Allied Matters Act, 1990 made provisions for the registration of these organizations, there are other laws which one way or the other, have an impact on the existence and operation of NFPOs/NGOs. The just enacted CAMA 2020 has in a way, expanded the frontiers of legislation regulating these organizations and this has resulted in uproar especially with the sections that empowered the registrar-general of the CAC to suspend the trustee of any of these organizations and appoint interim managers. It is argued that as much as there is need to regulate these organizations, such should be done with a view to ensure that their operations are not truncated. It is advocated that the wide discretionary powers given to the registrar-general to remove/suspend trustee of these organizations may be subject to abuse, and as a society still steeped in corruption and weak institutions, there is every likelihood that injustices may reign supreme and that the exercise of such power should be vested only on an independent body such as the court.

Key Words: Not-for-profit organisations (NFPOs), Companies and Allied Matters Act, Faith based organisations,

1. Introduction

Several studies of not-for-profit/ non-governmental organizations (NFPO/NGOs)[1] in Nigeria assume that they are like elephants - easily recognizable by the beholder - making definitions superfluous.[2] This is not however suggesting that no attempts have been made by some writers in defining the concept. Whilst we will briefly discuss the conceptual issue, it suffices to say that what is actually crucial is whether these organizations need to be regulated by the Government. The view has been that these organizations need to be as free as the air. But it is advocated that as human organizations this may not be possible in that in one way or the other there are in existence laws that have impacted on the operation of these organizations. A review of these laws would show that there were some lacunae in the laws especially the CAMA 1990 (as amended)

* Dr. A. Y. Abdullahi, Lecturer, Faculty of Law, Niger Delta University, Yenogoa. ayabdul2000@yahoo.co.uk, abdullahi@ndu.edu.ng.

[1] In this work, the use of the acronym NGO, NFPO, FBO and CSO and the like should be viewed to refer to one and the same thing being the various names in which the subject matter is known across board and same have been used in this work when convenient. But Not-for-Profit is used having in view the purpose such organizations are meant to serve in the society where they operate.

[2] Comfort Davis & others "Comparing Religious and Secular NGOs in Nigeria: are Faith Based Organisation Distinctive? 2011, 27. Available online atwww.researchgate.net/publications accessed 10/11/20.

which seems to have given birth to CAMA 2020. But the immediate concern in the new Act is the sweeping powers given to the Registrar-General of the Corporate Affairs Commission (CAC) to remove/suspend trustees in any of the not for profit organizations. The work addressed some of these issues.

As for defining NFPO/NGO, Bradley states that the concept denotes "the arena in which non-state actors are in an action oriented space of eagerness between individuals, family units and the state."[3] Okafor defines the concept as "A private association which devotes significant resources to the promotion and protection of human rights, which is independent of both governmental and political groups that seek direct political power, which does not itself seek such power."[4] Welch adopts Philippe Schmitter's definition of NGOs as "intermediary organizations and arrangements that lie between the primary units of society - individuals, families, clans, ethnic groups of various kinds, village units – and the ruling collective institutions and agencies of the society.[5] Another perspective in defining NGOs emphasizes their autonomy and independence from government. Thus, Olujide defines NGOs as "basically an association with a legal status which is financially independent of government and is actively engaged in the political, social and economic transformation of society."[6]

As it is with NGOs, it would seem that the assumption by writers on Faith Based Organisations (FBOs) is that the concept is very well known and definition of it would be superfluous. This position notwithstanding, some writers attempted a definition of the concept. Salih defines the concept with respect to Islamic FBOs as "voluntary (national, regional or transnational, as well as community-based) organizations for which Islam is an important inspiration to do good, and an identity marker that distinguishes them from NGOs with similar orientations and objectives."[7] In his study of Islamic Civil Society Organizations and educational reform in Northern Nigeria, Khalid defines religious NGOs as: "...formal organizations whose identity and mission are self-consciously derived from the teaching of one or more religious or spiritual traditions, and which operates on a non- profit, independent voluntary basis to promote and realize collectively articulated ideas about the public good at the national or international level."[8]

The definition of the concept is amorphous but for the purpose of this work we may align with that definition that properly states the purpose of the not for profit organizations. And that we find with the definition of Ladele and others who view NGOs as "non-profit, voluntary organizations engaged in the philanthropic pursuit of relief and development activities with a goal of providing services either directly to rural poor or to grassroots membership

[3] Bradley, M. T. "Civil society and democratic progression in post-colonial Nigeria: the role of non-governmental organizations." (2005) Journal of Civil Society,1(1), 64.

[4]Okafor, O. C. Legitimizing Human Rights NGOs: Lessons from Nigeria, Trenton NJ: Africa World Press (2006), 6.

[5] Welch, C. Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations, Philadelphia: University of Pennsylvania (1995), 44.

[6]Olujide, M.G. "Participation of rural dwellers in selected Non-Governmental Organizations (NGOS) activities in South West Nigeria. (2006) Journal of Social Science, 13(2),119.

[7]Salih, M. A. M. "Islamic NGOs an Africa: The Promise and Peril of Islamic Voluntarism." Copenhagen: University of Copenhagen, Centre of African Studies, Occasional Paper, (2002),2.

[8] Khalid, S, "Public-Private Partnership in Service Provisioning: Islamic Civil Society Organizations as Agents of Educational Reform in Northern Nigeria." Paper presented at ISTR conference, (2004) available online at http://www.docstoc.com/docs/38902485/Public-Private-Partnership-in-Service- Provisioning-Islamic-Civil

organizations."[9] It need to be noted that one limitation to the definition is restricting the services of NFPO/NGO to rural poor or to grassroots membership organizations as that may not be entirely the case. There are many of these organizations that operates in our towns and cities.

1.1 Historical Evolution of Not-For-Profit Organizations in Nigeria

The phases of evolution of civil society in Nigeria are not readily agreed upon by scholars. To, Ibeanu[10] there have been three phases: (1) the old voluntary, religious organizations, trade unions and ethnic organizations established in the late colonial period and the early years after independence, (2) the rights groups that emerged in the context of military rule and (3) the post-military organizations established to address democratic consolidation and specific social problems, such as health and human trafficking.

Using a slightly different scheme, Imade[11] delineates three phases: the pre-independence national CSOs that canvassed for independence and against neo-colonialism in the early post-colonial period, the anti-military groups that emerged out of resistance to state repression and failed economic policies, and a military-inspired phase during which the government promoted voluntary groups as part of its mobilization strategy.

Finally, Salih[12] identifies four phases in post-independence Africa. He suggests that the first phase covers the 1960-70 period which marked the transformation of community-based organizations and urban associations into modern urban charitable and local voluntary development organizations. During the second phase, covering the 1970s and 1980s, Africa experienced an expansion in the numbers of NGOs, as foreign NGOs arrived in droves to provide support to African populations in the midst of conflict and famine. The third phase, of the 1980s and 1990s, witnessed the emergence of African Independent NGOs in the political struggle for democracy and resistance to globalization-inspired economic policies. The fourth phase marks efforts to consolidate NGOs and develop their capacity.

2. Overview of the Legal Framework for Regulating Not-For-Profit-Organizations (NFPOs) in Nigeria

The legal provisions relating to regulation of NFPOs in Nigeria are scattered in the body of various statutes. It is apposite to examine these laws with a view to underscore their relevance to the subject under consideration. The major source is the Companies and Allied Matters Act (CAMA) 1990 and the much enhanced 2020 enactment. They will be scrutinized in greater detail.

a. The Constitution.

The Nigerian Constitution, being the ground norm of all laws in Nigeria in Chapter 2 thereof provides for Fundamental Objectives and Directive Principles of State Policy. In so far as the

[9]Kuponiyi, F.A. and Ladele, A.A (n9 above)
[10]Ibeanu, O. "Baseline Survey of Civil Society Organizations in Nigeria, Dakar": OSIWA and CODESRIA, (2009)
[11]Imade, L. G. "Democratizing democracy in Nigeria: the role of civil society organizations in Nigeria." Journal of Sustainable Development in Africa, (2001) 3(1), Spring, accessedatwww.jsdafrica.com/.../ARC%20%20DEMOCRATIZING%20DEMOCRACY%20IN%20NIGERIA.
[12]Salih, M. A. M. "Islamic NGOs an Africa: The Promise and Peril of Islamic Voluntarism." Copenhagen: University of Copenhagen, Centre of African Studies, Occasional Paper, (2002).

provisions therein (which are not justiciable) are to be pursued by the Government and not institutions, they are in the strict sense unqualified to answer the description of NFPO for the purposes of this work. The spirit of common brotherhood espoused albeit inchoately in the Nigerian Constitution on duties of citizens found in Section 24 provides inter alia:

> It shall be the duty of every citizen to (c) respect the dignity of other citizens and the rights and legitimate interests of others and to live in unity and harmony and in the spirit of common brotherhood; (d) make positive and useful contribution to the advancement, progress and well-being of the community where he resides; (e) render assistance to appropriate and lawful agencies in the maintenance of law and order...

This section of the Constitution however denotes a moral obligation because the breach of the duties set out in this part of the Constitution is not actionable unless such breach constitutes violation of another positive law.[13]Since there exists no specific provision under the constitution that is aimed at regulating matters relating to NFPO, it will therefore be safe to conclude at this juncture that matters bordering on not for profit organization are at least for now outside the direct purview of the constitution.[14] Perhaps the closest link in this respect is the right to join an association formed for lawful purpose which is enshrined in Chapter IV of the constitution. Thus the right to form, and join and NFPO is guaranteed by the constitution.

b. Legal Aid Act 2011

This Act repeals the Legal Aid Act[15] and is reenacted in line with international standards. It provides for the establishment of legal aid and access to justice fund into which financial assistance would be made available to the Legal Aid Council on behalf of the indigent citizens to prosecute their claims in accordance with the constitution, and further, to empower the existing Legal Aid Council to be responsible for the operation of the scheme for the grant of legal aid and access to justice in certain matters or proceedings to persons with inadequate resources in accordance with the provision of the Act. It is clear from the enabling Act that the essence of the establishment of the Legal Aid Scheme was not to make profit but to provide for the robust legal representation of the deprived in the society. It is safe to conclude at this juncture that the philosophy of access to justice under Legal Aid Act is driven by the need for charitable considerations.[16]

c. The Companies Income Tax Act (CITA)

It makes room for deductible donations by companies to ecclesiastical, charitable, benevolent, educational and scientific institutions established in Nigeria. By section 23(1) of the CITA (as amended) the profit of any statutory, charitable, ecclesiastical, education or other similar associations are exempted from companies' income tax obligation provided such profits are not derived from any trade or business carried on by such an organization or association. Where

[13]Akintayo, J.O. A &Adewumi, A. A. "Charity law in Nigeria-Need for a New paradigm" University of Ibadan Journal of Private and Business Law Vol. 9 2015-2016, 74.

[14] But section 40 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provide for right of assembly and there is also right of association.

[15]Cap L9, LFN 2004.

[16]Akintayo, J.O. A &Adewumi, A. A (n 56 above)

NFPO/NGO engages in any trade or business the profit derived there from will be subjected to income tax as provided for in the Act. Also, where the NFPO invests its assets in any institution, the income derived from such investment is liable to be taxed. Where the NFPO makes gain in disposal of assets, payment of Capital Gains Tax becomes payable by the NFPO. In addition to the income tax exemption granted to NFPO, section 25 of CITA provides that any company making donations to such an organization listed under the 5th schedule to CITA is entitled to the enjoyment of tax deductible donation not exceeding 10% of the total profits of that company for that year as ascertained before any deduction of such donations is made and must not be of capital nature. These restrictions will not be applicable where the donation falls under the provision of section 25A of CITA. To enjoy this tax exemption, the NFPO is expected to register and obtain a Tax Identification Number at the Federal Inland Revenue Service (FIRS) and in line with section 55 of CITA, it is mandatory for every NFPO to file its tax return every year.[17]

d. The Personal Income Tax Act (PITA)

The Personal Income Tax Act has no provision that deals with tax deductions on charitable grounds. Section 108 of PITA defines taxable person to mean "any individual or body of individuals (including a family, any corporation sole, trustee or executor) having any income which is chargeable with tax under the provisions of this Act". Section 19 of PITA provides: "There shall be exempt from tax all that income specified in the Third Schedule to this Act." Paragraph 12 of the Third Schedule of PITA exempts the income of any ecclesiastical, charitable or educational institution of a public character in so far as such income is not derived from a trade or business carried on by such institution.[18]

However, a charitable organization is liable to pay tax on income derived from a trade or business. In *Rev. Shodipe & Ors. v. Federal Board of Inland Revenue*[19] the Federal Revenue Court (now Federal High Court) held that where a charitable institution carries on a profit-making business, profits made from such business are taxable. Thus, the rents from the property (Wesley House) developed by a development company established by (the Methodist Church of Nigeria) a charitable organization were taxable.

e. Zero-Rate VAT

Goods purchased in humanitarian donor funded projects are zero rated under the Value-Added Tax Act[20] (as amended). It is important to note that only goods purchased by the NFPO are zero rated, and that services procured by it will be charged at 5% Value added Tax.[21]

2.1 The Companies and Allied Matters Act (CAMA) 1990[22]

This law donates to Nigerians the opportunity of registering as an NGO/NFPO in furtherance of their desire to pursue communal goals and aspirations. This interest is further enhanced by the provision of the 1999 Constitution (as amended) wherein section 40 guarantees to every person

[17]Olarinde O. M. "Taxation of Non -Profit Organizations in Nigeria" available online at www.linkedin.com last accessed on 10/12/20.
[18]Akintayo, J.O. A &Adewumi, A. A (n 56 above)
[19][1974] FRCR 35.
[20]Cap V1 LFN 2004.
[21]Olarinde O. M
[22]Cap. C20 LFN 2004

the right to assemble freely and associate with other persons and to form or belong to any association for the protection of his interest. In furtherance of this constitutional right, any community of persons who have associated together may aspire to establish a corporate body to further the interest of their group or association. This right entitles individuals to pursue incorporation of trustees under CAMA. CAMA permits the formation of the Incorporated Trustees inter alia for carrying out charitable purposes.[23] Section 590 of CAMA provides that Incorporated Trustees may be registered under the law and the body could be "a community of persons bound together by custom, religion, kingship or nationality or by literary, scientific, social, development, cultural, sporting or charitable purpose". A corporation, once incorporated may receive gifts, grants, levies, dues, subscriptions under the terms contained in its constitution. The main limitation on the use of its income is contained in section 603 (1) of CAMA which provides:

> The income and property of a body or association whose trustee or trustees are incorporated under this Act shall be applied solely towards the promotion of the objects of the body as set forth in its constitution and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to any of the members of the association.[24]

Trustees have obligations to submit to the Corporate Affairs Commission annual returns between 30th June and 31st December of each year except the year of incorporation. The returns will set out the name of the corporation, the names, addresses and occupations of the trustees and members of the council or governing body, the particulars of any land held by the corporate body during the year and of any changes which have taken place in the constitution of the association in the preceding year.[25] Apart from the provisions on Incorporated Trustees, CAMA also made provisions for the formation of companies limited by guarantee. A company limited by guarantee is usually formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects.[26] The income and property of the company are to be applied solely towards the promotion of its object.[27] A company that is limited by guarantee can only be formed after the consent of the Attorney General of the Federation must have been obtained[28].

The Corporate Affairs Commission (CAC) is limited in its exercise of the powers of oversight conferred on it by CAMA by the following inadequacies in CAMA (1990) and in its own administrative structure:

i. Most organizations need not be registered before they can be recognized in law as existing even if not as body corporate. This loophole provides organizations protection from the oversight function of CAC.
ii. CAMA (1990) does not distinguish between religious organizations and secular organizations.

[23]Akintayo, J.O. A &Adewumi, A.A,76-77.
[24] See section 603 (2) CAMA.
[25] See section 607 CAMA.
[26]see section 26 (1) CAMA.
[27] see section 26 (4) & section 26 (9) CAMA.
[28]Akintayo, J.O. A &Adewumi, A. A (n 56 above),78

iii. The CAC does not keep a general register of NGOs in Nigeria rather it keeps a register of all companies it registers (including NGOs) in Nigeria such a lack in the light of CAMA (1990) not distinguishing between secular and religious organizations limits the ability of CAC to maintain oversight of NFPOs in Nigeria.

iv. The CAC does not purge defunct organizations from its register nor maintain a list of organizations denied registration or sanctioned and so cannot adequately ensure that boards of trustee of incorporated organizations are properly constituted or that there is not conflict of interest in the activities of its members.[29]

v. CAMA (1990) lack of provision for the enforcement of the rights and duties of the members on their behalf by CAC limits CACs ability to hold board accountable to their members.

vi. CAMA (1990) provisions that internal governance of trustee incorporated organizations be governed solely by their constitutions and that third parties, including public authorities, would usually lack the locus standi to bring suits for the enforcement of rules of internal governance places internal accountability of these organizations completely outside the oversight of the CAC.

vii. CAMA (1990) does not provide special rules for the regulation of foreign NGOs in Nigeria other than that they go through registration like all other NGOs or they will be in the same position as an unregistered Nigerian NGO effectively placing them outside the oversight of CAC, a situation that is made worse by the fact that CAMA makes no special rules for the regulation of receiving of grants from foreign agencies.

viii. CAMA (1990) does not preview a situation whereby trustee organizations can engage in merger or split-up outside the provisions for their dissolution/winding up. It thus means that these organizations can avoid CAC oversight of their activities especially of their investments and properties by engaging in mergers and split ups.

ix. CAMA (1990) does not adequately empower CAC to keep an eye on the investments of the property or funds of trustee incorporated associations. Therefore, CAC's ability to ensure that there is no conflict of interest in the activities of the boards or management is restricted.[30]

The above noticeable shortcomings of CAMA and CAC may perhaps have influenced the introduction of the Not-For-Profit Organizations Governance Code 2016 by the Financial Reporting Council of Nigeria (FRCN) and the directive by the former Executive Secretary of the FRCN, Jim Obazee, that Non-Governmental Organizations, Civil Society Organizations and all not-for-profit organizations, including churches and mosques should comply with a corporate governance code stipulating a maximum term of 20 years for heads of such entities.

This reportedly led to the stepping aside of the General Overseer of the Redeemed Christian Church of God, Pastor Enoch Adeboye, who had spent over 20 years as the helmsman of the church. He relinquished the position of the Nigerian National Overseer but remained the General Overseer of the church worldwide. What followed were series of controversies and public outcry

[29]Olarinmoye O. O. "Accountability in faith based organisation in Nigeria" available online at trn.sagepub.com accessed 26/11/20.
[30] Ibid, 7-8.

by various interest groups within and outside the two major religions in Nigeria. The then very young administration of President Muhammadu Buhari being not prepared for the uproar the said FRCN code was causing the government, decided to suspend the implementation of the controversial Not-For-Profit Organisations Governance Code 2016 and sacked the Executive Secretary of the Financial Reporting Council of Nigeria, Jim Obazee on January 9, 2017[31].

However, the "sacrificial" sack of Mr. Obazee and suspension of the FRCN 2016 code temporarily doused the tension but did not quite abate the controversies because at about June 2016, a former speaker of Kogi State House of Assembly, a federal lawmaker, and Deputy Majority Leader of the House of Representative, late Honourable Umar Buba Jibril, then representing Lokoja/Kogi/Koton Karfe Constituency sponsored the Nigeria's NGO Bill, which is "A Bill for an Act to Provide for the Establishment of a Non-Governmental Organisation Regulatory Commission for the Supervision, Coordination and Monitoring of Non-Governmental Organisations, Civil Society Organizations, etc in Nigeria and for other related matters"[32]

The intent of late Honourable Umar's bill as contained in the lead paper in support of the Bill was the need "to regulate Civil Society Organisations (CSOs) on matters relating to their funding, foreign affiliation and national security, and … to check any likelihood of CSOs being illegally sponsored against the interest of Nigeria." Expectedly, the Bill drew wide condemnation from the civil society and religious bodies. Critics of the bill attacked it on the basis that the bill was antidemocratic, replete with vague adjectives, phrases and penalties framed around the objective of national security and national interest and that the language and tenor of the Bill leave no doubt that its primary objective is to clamp down on the Nigerian civil society by widening the state's discretionary powers to interfere with NGO operations, and to impose additional layers of obstruction to a free civic space.[33]

The NGO Bill passed the Second Reading stage in the House within a short period of time and was sent to the Committee on Civil Society and Development Partners for further legislative input. Because of the widespread criticism and protest against the NGO Bill, a public hearing was hastily scheduled by the authorities for 14 and 15 December 2017 to seek feedback from CSOs on the Bill. Despite the short notice, over 180 CSOs were in attendance with around 30 memoranda submitted and adopted. While the hearings were taking place in the National Assembly, hundreds of people demonstrated outside, against the passing of the Bill. It so happened that the bill did not see the light of the day as it died at the committee stage because of the stiff opposition it faced from the CSOs.[34]

2.2 The Companies and Allied Matters Act (CAMA) 2020

On 7th August, 2020 many Nigerians, especially the corporate enclave, were thrown into a sudden frenzy and furore. The mood was triggered by a mere stroke of the presidential pen which assented the Companies and Allied Matters Bill. In that singular act, President Muhammadu Buhari transformed the Bill into an Act of the National Assembly and simultaneously consigned

[31] Honesty Eguridu "What Is Wrong With The New Companies And Allied Matters Act (CAMA) And The Way Forward" available online at https://www.barristerNG.com accessed 26/11/20.
[32] ibid
[33] ibid
[34] ibid

the 30 years old CAMA of 1990 into the history shelve. No doubt, CAMA 2020 is imbued with laudable provisions that seek to radically alter the way and manner businesses are conducted in Nigeria.[35] On the flip side of the coin, there are significant group of persons who decried the huge arrogation of powers to the regulatory bodies within the Act which elevated the bodies to the status of demi-gods. These disgruntled groups are largely worried about the likelihood of abuse of power (as is often the case in Nigeria) by the regulatory bodies, and in some cases allegations of unconstitutionality of certain provisions of the CAMA, 2020. Most visible in this category are religious bodies which fall within the fulcrum of Incorporated Trustees or Charities. Particularly, the Church under the umbrella of Christian Association of Nigeria (CAN) was most vocal in condemning the new Act.[36] On 20th August, 2020 CAN issued a statement describing the new Act as "unacceptable and ungodly". They vehemently argued that the Church cannot be controlled by the government because of its spiritual responsibilities and obligations.

Section 839 (1) & (2) CAMA, 2020 is the major impugning provision often referenced by CAN, civil society organizations, clerics and individuals who share similar sentiments. The section empowers the Commission to suspend trustees of an association (like the Church) and appoint an interim manager to manage the affairs of the association for stipulated reasons. On the side of the Civil Society Groups, they are quick to align with the Church to contend that the import of the dead NGO Bill was inserted into the CAMA through the backdoor. But the question that have been asked but remained unanswered is whether our religious leaders and the civil society groups who are kicking against the Act have members of their churches and those sympathetic to their causes in the National Assembly who should watch out to protect their interest when the legislation was still at the Bill level? Was the offensive provision smuggled into the Act just before the presidential assent? That is most unlikely.[37] Why we leave the issue of whether or not the section in contention was smuggled into the CAMA 2020 as same is speculative, it is essential here that the said section is examined in details to weigh it in the legal scales with a view to determine the rightness or otherwise of the agitation. Before that is addressed it is worthy to state here that just as the old CAMA 1990, the new CAMA empowered Nigerians to form associations and incorporate same as incorporated trustee for the purposes of realising stated goals which may be educational, religious, scientific, social among others.[38]

i. *Suspension of Trustees And Appointment of Interim Managers*

What made headline in section 839 of CAMA that has enraged religious leaders and civil society groups was the power donated to the registrar of the CAC to suspend trustees and appoint interim Managers for incorporated trustees when same is deemed appropriate by the registrar. For the purpose of clarity, it is apposite to reproduce the vexed section here.

[35]Anayochukwu J. V. "Religion and State as Strange Bedfellows: Examining Agitations on the New CAMA."available online at https://www.barristerNG.com accessed 26/11/20.

[36]Similar calls were made by Sultan of Sokoto, Alhaji Muhammadu Sa'adAbubakar in his capacity as President General of the Nigeria Supreme Council for Islamic Affairs (NSCIA). See "CAMA: Sultan, CAN ask NASS to revisit law" available online at https://www.barristerNG.com accessed 26/11/20.

[37]Anayochukwu J. V. (note 77 as above)

[38]see sections823 to 848 of CAMA 2020 which governs the registrations and operations of incorporated trustee such as NFPOs and NGOs operating in Nigeria.

Section 839(1) CAMA 2020 provides that the Commission may by order suspend the trustees of an association and appoint an interim manager or managers to manage the affairs of an association where it reasonably believes that —

(a) there is or has been any misconduct or mismanagement in the administration of the association;

(b) it is necessary or desirable for the purpose of—

(i) protecting the property of the association,

(ii) securing a proper application for the property of the association towards achieving the objects of the association, the purposes of the association of that property or of the property coming to the association,

(iii) public interest; or

(c) the affairs of the association are being run fraudulently.

Subsection (2) of section 839 provided another way in which trustees are to be suspended. The Subsection provides that the trustees shall be suspended by an order of Court upon the petition of the Commission or members consisting one-fifth of the association and the petitioners shall present all reasonable evidence or such evidence as requested by the Court in respect of the petition.

One thing that is clear here is that the Court and the Commission are exercising concurrent jurisdiction on the same subject matter without any clear guidelines as to the limit of application of this power by both authorities. This is unhealthy as a collision may be inevitable. For example, in the United Kingdom where such powers are shared between the Court and the United Kingdom Charities Commission there are clear provisions on restriction on the exercise of the power by the UK Charities Commission. Section 70 of the UK Charities Act of 2011 (as amended) provides thus:

1. The Commission does not have jurisdiction under section 69 to try or determine— (a) the title at law or in equity to any property as between— (i) a charity or trustee for a charity, and (ii) a person holding or claiming the property or an interest in it adversely to the charity, or (b) any question as to the existence or extent of any charge or trust.
2. Subject to the following subsections, the Commission must not exercise its jurisdiction under section 69 as respects any charity except— (a) on the application of the charity, (b) on an order of the court under section 69(3), or (c) on the application of the Attorney General.

A provision such as above would in no small measure reduce area of conflict between the CAC and the Court and would help guide the general public and litigant as to what and where to challenge wrong exercise of discretion of the CAC. This is unlike what obtains under the UK

Charities Act (as amended) where the Commission is not allowed to suspend a trustee or an officer of a charity for more than 12 months.[39]

Besides, the duration on which the suspension order of the Charities Commission is to last is limited to 12 months while that of the CAC has no time duration. This is dangerous. It would mean that the suspension order by the CAC, may be indefinite, either shorter or longer than 12 months than may be imposed by the Court. There is clear absence of the power of the CAC to make order under Part F of the Act as there was no specific provision vesting such power on the CAC to be exercised specifically when occasion warrants. The UK Charities Act also differs in this regard.[40]

Moreover, the power to suspend trustees vested on the CAC was done without provision of enough safeguard in the Act to prevent arbitrary exercise of such powers. This gives room for a lot of concern and agitation. Though it may be argued that the exercise of the power by the CAC is subject to that of the Minister, the basis on which the Minister may approve or reject such exercise of power is clearly absent in the Act. In the UK, the power to suspend a trustee is also vested on the Charities Commission[41] but there was an amendment of the Act by the UK Charities (Protection and Social Investment) Act 2016, which brought in the provision of section 76A. That section provides for range of conduct to be taken into consideration by the Commission before a trustee is suspended from office. Such conduct includes the following:

(a) that a particular person has been responsible for the misconduct or mismanagement,

(b) that a particular person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or

(c) that a particular person's conduct contributed to it or facilitated it.[42]

In addition to the above the Commission is also required to take into account the following matters in deciding whether or how to exercise the power. Those matters are:

(a) the conduct of that person in relation to any other charity;

(b) any other conduct of that person that appears to the Commission to be damaging or likely to be damaging to public trust and confidence in charities generally or particular charities or classes of charity.[43]

The above provision under the UK laws regulating charities leaves no one in doubt that before the UK Charities Commission can exercise the power to suspend a trustee or an officer of a charity, a lot of weighing and balancing need to be done with a view to knowing if doing so will be beneficial or detrimental to the public trust and confidence on a particular charity or to the whole charities operating in the UK. This circumspection is required to ensure that the whole reputation of a particular charity or the entire charities is not rubbished. This is good, in that for a

[39] see section 76 (4) of UK Charities Act, 2011 (as amended).
[40]See section 69 of the UK Charities Act, 2011 (as amended).
[41]See section 76 of the UK Charities Act, 2011 (as amended)
[42]see section 76A (2)UK Charities (Protection and Social Investment) Act 2016.
[43] See section 76A (3) UK Charities (Protection and Social Investment) Act 2016.

particular charity or charities to thrive in modern times a lot of trust and integrity is required. If the impression is deliberately created that a particular trustee was suspended because of fraudulent practices, wrong signal may have been sent to the donor's quarter and that may stifle charities of appropriate funds, especially from foreign donors.

The provision contained in section 839 (1) have led to some misgivings as to the purport of the law. It has been contended that a comparative reading and scrutiny of Subsections 839(1) and 839(2) will disclose that while the court requires evidence, following a petition to suspend trustees, the Corporate Affairs Commission (CAC) simply require the belief, desire and some other interests disguised as public interest, to suspend trustees. In other words, the Registrar General of CAC does not need any evidence to suspend trustees of an organization, once he believes that the trustees have committed fraud or illegalities or that it is in the public interest that they should be suspended, the law permits him to do as he wishes!

The absolute and overriding discretion given to the CAC and the supervising Minister under the new Act can be interpreted to mean that the powers of the CAC overrides that of the courts. The belief and desires of the Registrar General and the Minister becomes superior to the judicial powers of the court under subsection 2. Therefore, one will be right to draw the conclusion that aggrieved members of an association do not need to go to court with a petition to suspend trustees. All they need to do is to lobby or appeal to the belief and desires of the Registrar General of the Corporate Affairs Commission or the supervising Minister.[44]

Another troubling part of section 839 is subsection 7 which provides that after an enquiry into the affairs of the association, if the commission is satisfied as to the matters in subsection (1) may suspend and remove any trustee. This provision as most provisions of section 839, is too subjective and open to abuse by the operators of the C A C. It is apt that statutory provisions that have provisos and clauses such as "reasonably believes", "deem it necessary or desirable" and "public interest" can be manipulated to suit the narrow interest of self-serving political office holders and corrupt public servants. No clear distinction exists in the law to determine at what time subsections 1 and 7 of section 839 can be invoked. A lot seem to have been left to the discretion of the Commission. It is submitted that the discretion so granted cannot by any stretch of imagination be tagged unfettered discretion as Tobi[45], JSC (of blessed memory) once opined, an unfettered discretion is a misnomer. According to him the moment a judge is called upon to exercise discretionary power, in accordance with the enabling law or rule of court, it is not correct to say that he has an unfettered discretion in the matter, otherwise the exercise would be incapable of being set aside on appeal. It is submitted that where there is clear abuse of discretion by CAC under this section, that is acting outside the bounds of reasonableness such can be challenged in court successfully.

Furthermore, section 839 (1) and (7) are penal provisions in a statute and the attitude of courts to the interpretation of such statutes is that they adopt the principle of strict construction encapsulated in the legal maxim: *fortisssime contra preferentes*- sympathetically in favour of the citizens, whose rights are tinkered with, and strictly against the law maker or the acquiring

[44]Anayochukwu J. V. (note 77 as above)
[45] see Ideozu&Ors. v. Chief Ochoma&Ors. (2006) All FWLR (pt. 308) 1183 at 1207-8 SC

authority.[46] The guiding parameters for determining the applicability of expropriatary laws, in a given case, was propounded in *Nwosu v. Imo State Environmental Sanitation Authority*[47]

Where it was lucidly stated by Nnaemeka-Agu, JSC that:

> If there should be any doubt, gap, duplicity or ambiguity as to the meaning of the words used in the enactment, it should be resolved in favour of the person who would be liable to the penalty or deprivation of his right…. If there is reasonable construction which will avoid the penalty in any particular case, the court will adopt that construction…. If there is any doubt as to whether the person to be penalised or to suffer a loss of the right comes fairly and squarely within the plain words of the enactment, he should have the benefit of that doubt…. If after the above approach and application of the above principles the person to be affected comes squarely and fairly within and is affected by the words of the statute, the court has no alternative than to apply it.[48]

Similarly, in *Nigerian Navy v. Lambart*,[49] Tabai, JSC, penned:

> It is settled law that penal statutes are to be construed strictly to the benefit of the accused person and that where there is a reasonable construction that avoids the penalty in any particular case, the court must adopt that construction…. And if there are two possible constructions the court must adopt the more lenient one.[50]

Though the provision of section 839(1) may have been inserted in the CAMA with certain goals in mind it would seem that its operation was not properly weighed by the legislature against the background of the kind of heterogeneous society of ours where the policy of government is mainly viewed by the citizens from the twin lenses of ethnicity and religion. A country that is perceived to be deeply entrenched in corruption and weak institutions cannot operate in an environment where so much discretion is granted to a public servant whose motives for acting may not be understood order than in the realm of prejudice to the individual or society affected by such a decision.

3. Conclusion

The enactment of CAMA 2020 have been hailed in some quarters as a step in the right direction, especially in the area of promotion of ease of doing business in Nigeria, it however has some aspect which was not clearly thought out before they were included in the law by the law makers. The aspect of vesting power on the Registrar-General of the Commission to suspend trustees of incorporated trustees and appoint interim managers is one of such troubling area of the law which is subject to abuse. It may be argued that same power is exercisable by the UK Commission on Charities, that may be true but it is argued that enough safeguards are provided

[46]Ogbuinya, O. F. Guidelines to interpretation of Nigerian Statutes,Snaap Press Nigeria Ltd (2019),145.
[47] (1990)2NWLR (Pt. 135) 688 at 723, per Nnaemeka-Agu, JSC.
[48] See alsoKotoye v. Saraki (1994) 7-8 SCNJ 524. See also N.I.W.A. v. G.C. I.T.F. (2008)7 NWLR (Pt. 1085) 109 for section 12 of the Industrial Training Funds Act; F.B.I. R. v. I. D. S. Ltd (2009) 8 NWLR (Pt.1144) 615 for sections 12(1), 15(1) and 31 of the Value-Added Tax (VAT) Act, No.12 of 1993.
[49] (2007)18 NWLR (Pt.1066) 300 at 317. See also, Wilson v. A. G. Bendel State (1985) 1 NWLR (Pt.4) 572.
[50] See Ogbuinya O. F. (n 87 above), 150.

in the UK Act to protect against such abuse. We have shown that the UK society is far ahead with regard to strong and independent institutions and low in the scale of corruption unlike the position in Nigeria. And that it would be preposterous to follow hook line and sinker, laws in such clime and plant them here without taken into consideration our socio-political milieu. It is, therefore, recommended that an amendment is required that will vest the exercise of such power solely on an independent body such as the court in order not to hamstrung the growth and development of not-for-profit organizations in Nigeria.