COMPARATIVE APPRAISAL OF NIGERIA'S COMPANIES AND ALLIED MATTERS ACT 2020 WITH SOME SELECTED JURISDICTIONS

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Abstract

Corporations are key players in the pursuit of economic development; hence the role of the law is to ensure that there is an enabling environment to promote business continuity toward economic development sustainability. In Nigeria, the principal company legislation is the Companies and Allied Matters Act (CAMA), and after subsisting for 20 years, the Nigerian legislature revised the Act in 2020. This paper adopts an analytical approach by relying on both primary and secondary data in reviewing this Act with the aim of ascertaining whether it is an innovation or a mere revision. It examines its impact on corporate governance practice in Nigeria *vis-a-vis* the need to align with international best practices in corporate law practices. The paper examines the challenges that might confront the implementation of the Act and leeway. The status and powers of the Corporate Affairs Commission (CAC) and matters arising therefrom are also discussed. The paper identifies a dearth with reference to matters on stakeholder considerations, single shareholders, powers of the CAC with respect to the suspension of trustees, and the appointment of interim manager, as well as pre-incorporation contracts. The paper concludes with recommendations that are proffered in light of what applies in other jurisdictions as well as with respect to the peculiarity of the Nigerian situation.

Keywords: Business continuity, CAMA, Corporate Governance, Economic development; Economic sustainability

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1. Introduction

According to the World Bank's Ease of Doing Business Report (WBEDBR), Nigeria was ranked 146 globally in 2019 and 131 in 2020, with marginal improvements in recent years. It has been projected that the 2020 Companies and Allied Matters Act (CAMA) is largely responsible for the advancement (PWC Nigeria, 2017). The role of the business sector in every economy cannot be over-emphasized. This is because of the magnitude of influence it (i.e. the business sector) has on economic development. The generation of money and the expansion of infrastructures are two indicators of economic development and achieving these goals is correlated with the function that enterprises play in the economy (Soliyev and Ganiev, 2021, p. 12). As of 2017, the Organization for Economic Cooperation and Development (OECD) reported that the business sector contributed 72 percent of the Gross Domestic Product (GDP) in OECD countries (Manyika *e tal* 2021). Corporations are income and revenue producers. Corporate Social Responsibility (CSR), taxation, earned salaries, and infrastructure development are just a few ways that a company's economic values are returned to the economy, and the sum of these factors drives economic development in a country (Soliyev and Ganiev, 2021, p. 12).

In this regard, the role of the law will be to create an enabling environment where businesses can easily thrive. An enabling environment is one that encourages foreign investment while also ensuring business sustainability and continuity for indigenous or domestic businesses. The presence of a business-enabling environment results in economic growth over time which ultimately culminates into much-needed economic growth and development (Anyanwu, 2014, p. 468).

The Nigerian legislators must have had knowledge of the impacts and necessity for an enabling business environment when they enacted a new CAMA in the year 2020. Accordingly, Senator Abdullahi Yahaya, who sponsored the Bill at the Senate, remarked that it was geared towards "enhancing Nigeria's business environment and making it competitive among its international colleagues… while eliminating unnecessary regulatory provisions for small companies." (Umoru, 2020) This Act brought about sterling innovations that have been the subject of applause as well as criticisms by commentators as well as the business community. In fact, the Act has been the subject of litigation, within the first year of its enactment, and many have condemned some of the innovations as needless as well as a "witch hunting" exercise.

The aim of this paper is to assess some of these innovations in the light of international standards while also addressing their application with regard to the peculiarity of the Nigerian business environment. It seeks to determine if the introductions made to the 'letters of the law' are innovations or mere revisions. Innovations in the sense that new provisions that adhere to international best practices and promote sustainability have been added to the law. A revision, on the other hand, would mean that the introductions merely restate earlier provisions without making a material contribution to the effort to promote business sustainability and Nigerian economic development.

For attaining the set aim and objectives, the paper employs a comparative approach by selecting jurisdictions that have approached some of these 'introductions' differently and which are believed to be capable of promoting corporate sustainability and economic growth and

development. The paper is divided into four parts that address the topic sequentially. At this juncture, it should be noted that a comparison is made with jurisdictions such as South Africa, the United Kingdom, and India because of socio-legal and economic affinity with Nigeria as South Africa, at present, is regarded as the fastest growing economy in Africa while the United Kingdom and India are commonwealth jurisdiction like Nigeria hence, Nigeria can learn some salient lessons from these jurisdictions.

2. Juxtaposing Economic Development, Business Continuity, and Business Exigencies

There are several theories that surround the concept of economic development as well as its true meaning. Notwithstanding this, there is a growing consensus that economic development may be the structural transformation of an economy through the introduction of more mechanized and updated technologies for the purpose of increasing income, labor productivity, and employment, as well as the standard of living of the population (Panth, 2020). It is said to occur when individual agents can develop the capacities that allow them to actively engage and contribute to the economy (Fieldman *e tal,* 2016). This is expected to cumulate towards lowering transaction costs while also increasing social mobility (Fieldman *e tal,* 2016). Thus (Schumpeter, 2011, p. 34) has posited that entrepreneurs are the agents of change in an economy and a driving force behind economic development. This assertion is premised on the fact that entrepreneurs identify opportunity and innovate and in doing so, they contribute towards the factors that impact economic development through business ventures. Consequently, by providing jobs, engaging in foreign investment, constructing industries and plants, and participating in CSR, which consequently improves the standard of living for the populace, corporations are key influencers of economic development. However, in the absence of business continuity, economic development becomes easily impaired.

Business continuity refers to a management process that identifies risks, threats, and vulnerabilities that could impact an entity's continued operations and operations and consequently build organizational resilience and the capacity for effective response (Atkinson, 2020). Essentially, it denotes putting structures in place that minimize the risk of corporate failure and guarantee corporate profitability. The relevance of business continuity to economic development can be gleaned from the fact that if the business community is sacrosanct to economic development, then sustaining businesses is key to sustaining economic growth and development. There are several approaches that corporate entities take towards continuity and in recent times, there is a growing campaign toward recognition and institutionalization of corporate sustainability.

A series of events around the globe, particularly as it relates to environmental degradation, propelled the recognition of sustainability. Consequently, in 1987, the Brundtland Commission and the World Commission on Environment and Development (WCED) defined sustainable development as "meeting the needs of the present without compromising the ability of the future generations to meet their own needs." Corporate sustainability is aimed at examining a corporation's performance in terms of social, economic, and environmental factors for the purpose of reducing costs, managing risks, creating new products, and fostering change (Jacob-Hernandez, James-Valdez and Ochoa-Jimenez, 2021). On the other hand, business

exigencies are events that impair the business of a corporation which when not adequately managed, can negatively impact business continuity. Thus, there is a need to engender a symbiotic co-existence between these forces in order to realize economic growth and development.

3. X-Raying Innovative Provisions of CAMA 2020 as Harbinger for Economic Growth and Sustainability

This section of the paper answers the research question of whether or not the CAMA 2020 is an innovation or a mere revision. In doing this, a clinical survey of some newly introduced sections is undertaken on a subject matter basis. These provisions are selected in light of their relevance to corporate sustainability and business exigencies *vis-à-vis* the provisions of CAMA 1990.

3.1 Introduction of Single Member Companies

The Nigerian business community is estimated to contribute about 75% towards the Nigerian economic growth and of this 75%, Small and Medium sized Enterprises (SMEs) are responsible for contributing 48% of the national GDP. Statistics also records that SMEs account for 96% of businesses as well as 84% of employment in Nigeria. Aminu, Adamu and Ibrahim (Aminu, Adamu and Ibrahim, 2018, p. 236) have asserted that the SME subsector of the economy holds the key to the nation's quest for economic growth and development. This assertion, is premised on their assessment of the impact of SMEs in other jurisdictions (Aminu, Adamu and Ibrahim, 2018, p. 237). In the European Union (EU) for instance, the SMEs constitute 99.8% of all businesses as well as account for the employment of around 76 million people, which represents around 67.4% of the total employment in 2010 (Lyndon and Opinion, 2018, p. 55). Similarly, in South Africa which is a fast growing economy in Africa from which Nigeria can learn as well, SMEs account for 91% of businesses, 60% of employment and contribute 52% of the country's total GDP (PWC Nigeria, 2021). Globally, it is also estimated that SMEs contribute over 50% of the GDP in developed nations (Lyndon and Opinion, 2018, p. 54).

Realizing the economic importance of SMEs to Nigeria's economic growth and development, based on the experiences of jurisdictions like South Africa and the EU mentioned above, couple with the need for Nigeria to align with modern trends so as to improve her socio-economic fortunes, the legislators introduced single member companies via CAMA 2020.

Prior to the enactment of CAMA 2020, the 1990 CAMA (i.e. section 18) required that for the formation and incorporation of a company in Nigeria, the minimum number of members is two. The effect of this is that entrepreneurs who are desirous of flagging a startup would have to pitch their ideas to a potential co-founder before being eligible for incorporation (Orojo, 2008, p. 33). The consequence was that where such an entrepreneur is unable to get a co-founder or is unwilling to pitch ideas, he/she will have to settle for establishing a sole proprietorship business which has limited advantages compared to an incorporated company under Part C of the CAMA.

Sole Proprietorships (SP) which were registrable under part B of the CAMA 1990 as business names could not afford the entrepreneurs with the benefits of incorporation spelled out under section 37 thereof. Principal among the benefits is the legal recognition for business continuity as was held in *Union Bank (Nig.) Ltd. v Penny-Mart Ltd.* (1992). By the incidence of incorporation, companies are guaranteed business continuity and this ensures that the lifespan of the company is severed from those of its members while also ensuring that the economic benefits of a corporation are not hindered. In the absence of this, SPs which could have been registered as corporations are deprived of that right, with the effect left to be felt in economic growth. Similarly, SPs are protected against certain taxes which are levied against corporations, and it is needless to emphasize the impact of taxation on economic growth, particularly in a sector that is highly liquid. An appropriate tax system can lead to optimal resource allocation and increased economic growth (Beranova and Lenaka, 2012, p. 100).

Consequently, by virtue of the provision of section 18(2) CAMA 2020, a single person may now incorporate a private company in Nigeria, by complying with the provision of the law, with respect to private companies. Such companies are also not required to have two directors pursuant to section 271 of CAMA 2020 and as such the entrepreneur could be registered as both a member and the director. The capital outlay is also relatively small, which is ₦ 100,000 subject to other provisions that may be made by sector-specific regulators. Additionally, such companies do not have a legal obligation to appoint company secretaries. The import of this is that the cost of running the business becomes significantly reduced as contemplated under Section 330 (1) of CAMA 2020.

This provision indubitably improves the ease of doing business for SMEs or startups in the economy and promotes business continuity which was not available under the erstwhile CAMA 1990. However, notwithstanding its impact on business continuity, the important question is: to what extent has it adequately catered for the subject? It must be stated that Nigeria is not the first economy to deviate from the initial judicial position in *Salomon v Salomon* (1897) for the requirement of two members in incorporating a company. In fact, the reality is that Nigeria happens to be one of the last few jurisdictions to onboard the train of this anachronistic, obsolete, and rigid position of the law. With this in mind, some jurisdictions such as the United Kingdom, South Africa, and India, all have provisions that recognize the right of a single person to incorporate a company. In examining the rather progressive position of these jurisdictions, one is able to identify a gap that can be filled under Nigerian law.

Business continuity involves the process of creating systems of prevention and recovery to deal with potential threats to a company (Punla, Santos and Noleal, 2017). In other words, it is a holistic management process that identifies potential threats to an organization and the impacts to business operations that those threats, if realized, might cause and which provides a framework for building resilience (Herbone, 2010, P. 981). While business continuity has been perceived by many to be a function of the risk management and audit department of a company, it is yet contestable that laws should be designed in such a way that it guarantees it.

The 2013 Companies Act of the Republic of India recognizes, "one person" companies (precisely section 2 thereof), which have similar standing as the private companies in Nigeria, with single entities. However, notwithstanding this similarity, the Act went further in making provisions for business continuity in these companies under the provision of section 3 thereof.

By virtue of the provision of this Act, at the point of incorporating the company, the Memorandum of Association of this company must indicate the name of another person other than the founder (subscriber), who will, upon the attainment of his consent, become a member of the company, in the event of the death or incapacity of the subscriber.

Further to this, the nominated party has the right to withdraw his or her consent to being appointed, and the subscriber also has the right to change the party. This is done by giving notice to the commission and making the change within the memorandum. Such changes to the memorandum, however, are not deemed to be an alteration of the memorandum. The importance of this provision is that it guarantees business continuity by insulating the company from experiencing the legal consequences of SPs businesses. The biggest criticism of a single-member company is that although upon incorporation, it theoretically has perpetual succession; however, in reality, what it has is tantamount to what applies to SPs. This is because the personal representatives of the founder will have to formally apply to the company by presenting probate or letters of administration, before stepping into the shoes of the subscriber, for the management of the business of the company. Undoubtedly, such a pause in the company's business activity, no matter how short, is capable of and does affect its business fortunes and also dissuade its customers or clients who may link the company to the founder and who may be unwilling to proceed (in the absence of a legal obligation) with the business relationship. This Indian model of the single-member company is examined with a view to providing a safe guide for the implementation of the scheme under CAMA 2020. India is a commonwealth jurisdiction just like Nigeria and has to a reasonable extent, implemented the single-member company admirably. Nigeria stands to benefit from her experience, especially with regard to corporate sustainability and business continuity which is the underlying justification for x-raying the position there. In comparison to CAMA 1990, one can safely argue that the single-member company model is an innovative introduction under CAMA 2020 worthy of sustenance.

3.2 Stakeholder Considerations

The powers of a company are often vested with the Board of Directors (BoDs) of the company as well as the Members in General Meeting (MGM) and the interplay with which they exercise their separate powers form the fulcrum of corporate governance. Corporate governance essentially denotes a set of processes and structures for controlling and directing an organization (Abdullah and Valentine 2009, P. 88). It had been argued by the OECD that one key element in improving microeconomic efficiency is corporate governance. This is because corporate governance exerts a strong influence on resource allocation while also improving the global industrial competitiveness of a country (Maher M and Anderson, 2020). Corporate governance practices will often distinguish between the ownership and management interests within the company. Thus, in this regard, Section 87 of the CAMA 2020, provides thus:

a company shall act through its members in general meeting or its board of directors or through officers or agents appointed by, or under authority derived, … the business of the company shall be managed by the board of directors who may exercise all such powers of the

company as are not by this Act or the articles required to be exercised by the members in general meeting.

Therefore, the BoDs are vested with the power to determine the way the affairs and business of the company will be conducted. In doing this, Section 305(3) of CAMA 2020 provides that a director shall act at all times in what he believes to be in the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skillful director would act in the circumstances and, in doing so, shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations. Subsection 4 further provides that "the matters to which a director of a company is to have regard in the performance of his functions include the interests of the company's employees in general, as well as the interests of its members."

The importance of these provisions lies in the fact that a corporation is an amalgam of diverse interests. These interests include that of the directors, the members, the employees, the creditors of the company, the host community as well as the government among others. Thus, collectively, these interests are referred to as corporate stakeholders (O'Sullivan, 2003, P. 23). In the management of the business of the company, good corporate governance practices require that those who are involved should ensure that adequate consideration is given to the corporate stakeholders, and this is the stakeholders' theory of corporate governance (Marshall, 2014, p. 13).

It must be emphasized that there are different theories of corporate governance all of which are geared towards explaining the interconnected interests within a corporation and the role of the management in determining their priority for the purpose of satisfaction. These theories range from the agency theory and expand into shareholders theory, stewardship theory, stakeholder theory, resource dependency theory, and transaction cost theory, among others.

The stakeholder theory posits that the management of the company must work to balance the competing interests within the corporation. Therefore, while the directors may be interested in profit generation, the members in dividends, the employees in salaries, the government in taxes and infrastructural development, and the host community in skill acquisition, employment opportunities, and community development. The task of those who hold the powers of the company is to ensure that all these interests are adequately balanced with none being prejudiced no matter how insignificant. The powers of the company are vested in the Board of Directors (BoDs) and the members in the general meeting under Section 87 of CAMA 2020. Hence, the obligation for stakeholder consideration rests on them.

Prior to the enactment of the CAMA 2020, the BoDs who are the ones involved in the daily management of the business of the company do not have a legal obligation to consider the interests of other stakeholders under the CAMA. The obligation to consider their interests was only covered under the different codes of corporate governance.[2] However, unlike a law,

[2] See Principles 24, 26 and 27 of the Nigerian Code of Corporate Governance 2018, Principle 10.2 0f the Code of Corporate Governance for the Telecommunications Industry 2016, Section 4 of the Code of Corporate Governance for other Financial Institutions in Nigeria 2018, section 28 of the code of corporate governance of Public Companies 2011.

these codes are only guides that set minimum standards for companies in the execution of their business activities and their non-compliance was not enforceable at law.

The emphasis on approaching corporate governance from the stakeholder approach is often supported by the argument that this will promote corporate sustainability and business continuity (Eunsup, 2014, P. 65). Corporations thrive in their capacity to be competitive, and managing a corporation in a manner that the interests of the stakeholders are considered will enhance the company's image. The approach is estimated to also improve customer and employee loyalty which will ultimately reduce business risk, cut operational costs and increase sales.

Notwithstanding the prospective benefit of this innovation, it is however arguable that this might be in the longer period, nothing other than a dead letter provision in the absence of its enforceability. The provision of section 305(9) of the CAMA 2020 provides that these duties imposed on the Directors can only be enforced by the company itself. The immediate effect of this, therefore, is that irrespective of the unwillingness of the directors to approach corporate governance from the stakeholders' perspective, the stakeholders have no right to enforce this provision against the directors.

The point being made is not to encourage stakeholders' actions against the company, because to do so, will be to encourage a multiplicity of suits against the company many of which could also be frivolous and vexatious. Additionally, the duties of the director are to the company itself and not to the stakeholders, this is because the contract is between the company and the directors and not with the directors and another stakeholder as contained under section 46 of CAMA 2020. However, compliance may be enforced through punitive sanctions by regulatory authorities.

In the Republic of India, where a director breaches his duties (which includes provisions on stakeholders' consideration), under the Act, such breach is punishable with a fine which shall not be less than one lakh rupees (₦500,000) but which may extend to five lakh rupees (₦ 2,000,000) pursuant to section 166 (7) of Indian Companies Act 2013. A similar provision like this will allow the Corporate Affairs Commission (CAC) in Nigeria to bring a suit against the BoDs or in the alternative, impose a fine on the board of directors where their business conduct impairs stakeholder's consideration, particularly with respect to activities that are clearly visible such as environmental degradation, nepotism among others. CAMA 2020 should have adopted this Indian position to ensure accountability and responsibility from the BoDs in its innovative quest considering the potency of the Indian position.

3.3 Pre-Incorporation Contracts

Business exigencies often require company promoters to enter into contracts and various agreements on behalf of the company, prior to the company's incorporation, and these contracts are referred to as pre-incorporation contracts. The principle of corporate legal personality as established in the case of *Salomon v Salomon* (1897) is that a company is a separate entity from its members and directors and although they may act on its behalf, their liabilities are separate. Therefore, although a recruitment process may be facilitated by the promoters, it is the company that employs them. Also, although the negotiation for the lease or

purchase of the office space may be done by the promoters, it is yet the company's property. In this regard, therefore, pre-incorporation contracts have become a necessary evil in the incorporation of a company.

The common law position as reflected in the case of *Kelner v Baxter* (1866) and the case of *Newborn v Sensolid Ltd* (1954) is that where the pre-incorporation contract was signed on behalf of the company, by the promoter, the promoter will be personally liable. Also, where the contract was signed in the name of the company yet to be incorporated, then the contract was a nullity.

The rationale behind this was that legal capacity remains a necessity for contract and in the absence of incorporation, a company lacks legal capacity. Similarly, it is impossible for a person to act as an agent of a non-existing entity; therefore, a promoter could not enter into a contract on the company's behalf prior to its incorporation. Further, to this, the company cannot ratify these contracts after incorporation, because by the principle of ratification, the principal must be in existence at the time the contract was being made, for it to be eligible to ratify the said contract. With Nigeria being a common law jurisdiction, cases decided in this line, evidenced that the common law approach created a herculean task for the promoters in floating and setting up the company as seen in the decisions in the cases of *Caligara v Giovanni Sartori & Co Ltd* (1961) and *Edokpolo v Sem-Edo Wire Industries Ltd* (1984).

Therefore, the coming into effect of CAMA in 1990 sought to ameliorate this by providing that any contract or other transaction purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation. Hence, thereupon, the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract or other transaction and had been a party thereto as contained under section 72(1) of CAMA 1990. Also, prior to ratification by the company, the person who purported to act in the name or on behalf of the company shall, in the absence of an express agreement to the contrary, be personally bound by the contract or other transaction and entitled to the benefit thereof.

This provision has been retained under section 96 of CAMA 2020, however, where the objective of a law is to improve the business climate within the country, it is argued that improvements could have been made to the Nigerian approach to pre-incorporation contracts, with particular reference to balancing the conflicting interest, novation and release, right of action, burden of liability and time frame for ratification. It is contended that simply allowing the company to ratify the contract post-incorporation does not absolve the promoters from the totality of the hardships that pre-incorporation contacts may engender, and without abrogating the fundamental principles of the law, the necessity for pre-incorporation contracts, should drive the law to create a balance for protecting the interests of the parties involved.

3.4. Balancing the Conflicting Interests

A pre-incorporation contract involves three conflicting interests. These are those of the promoter, the company, and the third party. Under Nigerian law, the liability for the failure of the contract rests heavily on the promoter, and the justification for this is that; 'because of his role in the incorporation of the company, he is in a better position than the third party to predict

the likelihood of the incorporation of the company, as well as the ratification of the pre-incorporation contract (Cassim, 2007, P. 36).

However, there has to be a balance in the appropriation of liabilities, this is because it is inequitable for a company to enjoy the benefits of a pre-incorporation contract, while also refusing to ratify it, which is precisely the event that took place in the case of *Kelner v Baxter*. Under the New Zealand Companies Act No. 105 of 1993, section 182(5) expressly provides that prior to the ratification of a pre-incorporation contract, a company cannot enforce or take any benefits from such a contract. With a provision like this, the promoters will have no difficulty in offsetting the liability they may have incurred with respect to the contract. This is contrary to the Nigerian position that provides that the promoters will take the benefits and the liabilities, in which case, the company is not deterred from obtaining benefits from such a contract.

Again, in a similar vein, under section 21 of South Africa's Companies Act, a company is expected to decide as to ratification within a period of 3 months and where it fails to make a decision within the stated time frame, it will be deemed to have ratified it and be entitled to benefit from and be liable under the contract. Hence, it is to communicate either an approval (whether in whole or in part or subject to some conditions) or its refusal within the stated time frame. The benefit attributable to this is that it precludes the company from enjoying the long-term benefits associated with the pre-incorporation unratified by it. It also helps the third party to ascertain the party liable within the contract, and who an action for enforcement can be brought against.

The laws in South Africa (i.e. section 21(5) of the South African Companies Act 2008) and New Zealand (i.e. Section 184(1) of the New Zealand Companies Act 1993) further ensure the security of the interests of the promoter, by giving the promoter a right of action against the company for any benefit the company may have acquired from the contract in the event of a rejection by the company. The rationale behind a pre-incorporation contract is that such contracts are incidental and necessary for the benefit of the company, and where this is the argument, the promoter should not be burdened unfairly with an act done in pursuit of the company's overall objective.

Again, in the incorporation of a company, there is often more than one promoter of the company. In Nigeria, the law is silent as to who bears the liability for the failure of a company to effect ratification. It will be harsh to impose the liability exclusively on the signatory to the contract, who may simply be one of the promoters who had negotiated the contract or an agent of the promoter as was held in *Bay v Illawarra Stationery Supplies Pty Ltd* (1986).

Under the South African Law (i.e. Section 21(2) of the South African Companies Act 2008) liability under the pre-incorporation contract is imposed on all promoters jointly and severally. Hence, there is an even distribution of the liability. The provision of section 96 of the Companies and Allied Matters Act can be expanded to clarify this ambiguity and consideration may be given to the South African Law on the liability of the promoter, provided that the contract falls within the scope of the promotion, and such a person was a promoter at the time the contract was executed.

3.5 Novation and Release

Novation is a principle under the law of contract and business law that permits a party under contract to replace an obligation with another obligation, add a new obligation, or replace a party to an agreement with a new party. The laws in South Africa, Australia, and New Zealand recognize the power of a company to do this, particularly, by substituting the contract between it and the third party in substantially the same terms as the pre-incorporation contract. Where this is the case, in these countries, the Promoter will be discharged of his liabilities under the pre-incorporation contract, which is an equitable provision.

Again, allowing the parties to exclude, the promoter's liabilities if they so wish is essential to the principle of freedom of contract and will promote a flexible corporate law system. Under the Australian Corporations Act particularly section 132(1) thereof, a party to the pre-incorporation contract may release the promoter from all or part of his or her liabilities under the pre-incorporation contract, as provided for under the Act, by signing a release. This provision may also be implemented in Nigeria, allowing a third party to limit the promoter's liability for the company's failure to ratify the contract, as it may promote the ease of doing business in the Country.

3.6 Suspension of Trustees and the Appointment of Interim Managers

Non-profit organizations contribute significantly towards economic development in any country. This is a fact supported by evidence of their contribution towards providing essential services which positively impact the lives of citizens, such as building schools, hospitals, orphanages, and religious centers (Rehman, Marwan, and Din, 2020, p. 4100).

The CAMA 2020 regulates not just businesses but also non-business entities. Hence, the Act is divided into three parts, which cover the regulation of companies on the one part, sole proprietorships and partnerships on another part, and incorporated trustees on the other part. Incorporated trustees (IT) are organizations with charitable objectives; therefore, they are often incorporated for purposes other than to make profits. It is an association of persons, coming together for any religious, educational, literary, scientific, societal, development, cultural, sporting, or charitable purpose as contained under section 823(1) of CAMA 2020.

However, in difference to a corporation, the corporate status in an incorporated trustee is not vested in the organization itself, but in the trustees. Therefore, the power to sue and be sued, as well as the acquisition of properties, is vested in the trustees and not the organization itself per section 823(2) of CAMA 2020.

With the coming into effect of CAMA 2020 however, section 839 CAMA, gives the Corporate Affairs Commission (CAC), the powers; under certain circumstances to suspend the trustees in an IT, and appoint interim managers during the continuance of the suspension. This innovation, however, was not well received by many sectors, particularly within religious circles. Consequently, in 2021, the Incorporated Trustees of the Christian Association of Nigeria (CAN) brought an originating summons against the Minister of Trade and Investment as well as the registrar of the Corporate Affairs Commission. CAN urged the court to declare the provision of section 839 null and void, in what has been tagged "a deliberate attack against the Christian community." However, it must be stated that the suit was dismissed by the court

for being improperly constituted. This, therefore, begs the question as to the contentions and arguments posed by the Christian community, and for the purpose of addressing some of these concerns, this provision is hereby reproduced hereunder.

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.

This power however, may only be exercised with the approval of the minister of trade and investment as provided for under Section 839(11) of CAMA 2020, and the suspension will be ordered after an application is made by way of a petition to the Federal High Court by the CAC itself or by one-fifth of the members of the organization pursuant to section 839(2) thereof. The Act defined misconduct to include;

"The employment for:

(a) The remuneration or reward of persons acting in the affairs of the association, or

(b) Other administrative purposes, of sums which are excessive in relation to the property which is or is likely to be applied or applicable for the purposes of the association."

The criticisms of the religious organizations have been premised on the supposed attempt of the government to influence or control religion in the country, consequently, in an interview, the President of the Pentecostal Fellowship of Nigeria (PFN); Ayoyinka Jegede stated that:

The government has brought in a controversial aspect of the CAMA that infringes on the religious freedom of the non-governmental organization that is serving the ordinary people of Nigeria. The Church stands against violations. We are opposed to those sections of the law that suggest that somebody can sack the trustee of a church and appoint a manager.

Their argument is often supported by the fact that Nigeria remains a secular state as argued by as guaranteed by the provision of the constitution (Agbedo, 2022). Thus, section 38 of the 1999 Constitution provides thus: "Every person shall be entitled to freedom of thought, conscience, and religion, including the freedom to change his religion or belief and freedom (either alone or in community with others and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice, and observance."

In support of the concerns, (Ayodele and Ojekunle, 2021, 50) argued that giving the CAC such discretion as contained under Section 839(1) CAMA is not advisable because power corrupts and absolute power corrupts absolutely. They demonstrated by citing the cases of *Lopez v AG Osun State* and *State v S.O Ilorin & Ors* (1983) that in the past when the government exercised its discretion in matters of state policy or public interests, their activities have not been devoid of questionability. However, notwithstanding these contentions and challenges to this provision of the law, the writers of this article submit, that business exigencies favor this provision of the law. While ITs are not business entities, it will be unwholesome to disregard the pecuniary risks associated with their operations. Trustees of an IT have fiduciary obligations to the organization and by the fundamental principles of the doctrines of equity, they are acting in the interest of other entities, who for proper and effective administration are not involved in the daily operation of the organization. Like (Agbedo, 2022) has rightly pointed out, power corrupts and absolute power corrupts absolutely and to simply commit the administration of an organization into the care of an entity without a means to check their excesses may be an ineffective practice and enthronement of tyranny.

A fundamental aspect of corporate governance is the principle of majority rights and minority protection as established in the case of *Foss v Harbottle* (1843) and statutorily recognized under Nigerian law under section 341-373 of CAMA 2020. Thus, by this principle, the law recognizes corporate democracy but also balances it by making provisions for checking the excesses of the majority and protecting the rights of the minority. In securing the protection of the minority, the law (i.e. section 366 of CAMA 2020) enables the CAC to carry out investigations into the affairs of a corporation. Further to that, petition for the winding up of the company, and yet the business community is yet to petition for the provision to be expunged pursuant to section 573 of CAMA 2020. It must be reiterated that most criticisms of this section seem to always omit the explicit provisions of subsection 2 of section 839, which provides that the power of the CAC is subject to an order of the court. Therefore, although the CAC has the power to order a suspension, such suspension can only be made after an order of the court is issued in that regard.

In the United Kingdom, ITs are referred to as charities and their regulation is subject to the powers of the Charities Commission, by virtue of the Charities Act. Section 46 of the Act, gives the commission, the power to carry out an investigation into a charity. Where after its investigation, it finds that there has been any misconduct or mismanagement in the administration of the charity or it has become necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of any property coming to the charity then the commission may:

a. Order the suspension of either the trustee, officer, agent, or employee of the charity, pending consideration being given to such person's removal, and appoint such additional charity trustees it considers necessary.

b. Order that any person vested with the title to the charity's property should not part with such property without the commission's approval;

c. Order that any debtor of the charity should not make any payment to the charity in the discharge of its debts without the approval of the commission.

d. By order restrict the nature of the transactions which the charity may engage in or limit the amount which may be made in the administration of the charity without the approval of the commission;

e. Appoint an interim manager to act as receiver and manager in respect of the properties and affairs of the charity.

Consequently, the position in Nigeria is *impair material* with what is obtainable in the UK which counters the arguments of religious sectors as to the law being an intentional attack by the government against the Christian faith. The sustainability of a course, objective, or venture is often determined by the governance structure and the management prowess. Consequently, where the affairs of the administration are being fraudulently operated and wholly mismanaged, then it is highly probable that the business may not be sustainable in the long term. Trustees of IT hold significant powers within their reach and have equity dictates, they should be accountable. NGOs operate through voluntary donations, given in pursuit of a course and it will be highly detrimental to public safety and order if it becomes a channel for economic crimes. Notwithstanding the rationale and justifications posed in support of this provision, the writers of this article are, however, not oblivious to the apparent inadequacies of the law.

In the first instance, every IT is formed in pursuit of a course or objective and it is this objective that unifies the members together, while the removal of a trustee may be justifiable for the purpose of guaranteeing sustainability, we submit that the appointment of a trustee or interim manager, who has no understanding of the objective of the organization or who, although is familiar with it, does not subscribe to it, is equally detrimental to the sustainability of the organization.

Secondly, we submit that suspension does not inure in perpetuity, therefore, our contention is in the loophole that evades this law. Where the CAC exercises its power of suspension, the law has to make adequate provision for the duration of time within which the suspension should continue. Similarly, during the continuance of the suspension, the law ought to make provision for whether the allegation made against the suspended trustee would be tried to ascertain its truthfulness and to arrive at a decision on whether the trustee should be removed or reinstated.

Lastly, there has to be a proper process that invigorates the findings of the CAC as a ground for the removal of the trustee. The law provides that the trustee will be removed where the CAC "believes" that the trustee has acted in a certain manner as provided under the law, however, an action so fundamental to the operation of the organization should not be premised simply on a belief but should be informed by factual evidence. In similitude to what is obtainable in the UK, the CAC should be required to carry out an investigation before carrying out an investigation, and their powers to investigate should be informed by real and tangible events and evidence.

4. Conclusion and Recommendations

Evidence and theories affirm that the business community will continue to matter in matters of economic development, and as a matter of fact, economic development may be

unattainable in the absence of the influence of the business community. The law remains a driver for change and in the relentless pursuit of economic development law remains instrumental. Consequently, the task of law will be to secure and create an enabling environment where corporations can function productively and sustainably for the purpose of attaining economic development.

The Nigerian legislators are not oblivious to this fact and consequently, they have remodeled the principal law i.e. CAMA in the corporate sector for the purpose of mobilizing the much-needed change and attaining the much-needed development. However, from the lens of scrutiny, the introduction to the law appears to be more of a revision than an innovation. Consequently, the law requires more restructuring in the quest for attaining its set objectives, therefore, it is recommended that:

1. For the purpose of business continuity, the provision on single member companies should make provision for succession planning, by nominating at the time of incorporation the personal representative of a shareholder, for the purpose of preventing pauses in corporate administration, which might impact negatively on the business of the company;
2. To invigorate the effect of stakeholders' considerations as provided for under the law, the directors should be subject to pecuniary sanctions for non-adherence to the dictates of the law in that regard as well as for their breach of duties;
3. The provision of the law on pre-incorporation contracts has become obsolete and should be reformed for the purpose of balancing the competing interests involved in the execution of the pre-incorporation contract, as well as novation and release, as discussed in the body of this work;
4. With respect to the powers of the CAC to suspend a trustee in an IT and appoint interim managers, the law should be amended for the purpose of requiring that the decisions of the CAC to exercise these powers on the grounds provided for under the law, should be subject to conducting an investigation into the affairs of the company. Also, the law should provide for the qualifications of the interim manager, and chief among this should be a requirement that the manager demonstrates clear belief in the objects of IT.
5. Lastly, the law should make provision for the duration of time, in which the suspension of a trustee will inure so that CAC does not engage in and create the undesirable phenomenon of permanent suspension of trustee (s).

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