

TOWARDS AN EFFECTIVE LEGAL REGIME FOR DEVELOPING NIGERIA THROUGH PHILANTHROPY

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Abstract

Philanthropy is a person's, organization's, or other group's effort, based on altruistic desire, to improve the welfare of another person or group. Philanthropy can be used as a means for societal advancement. In Nigeria, as in other countries, most citizens are capable of giving – financially, materially, or otherwise. As major controllers of wealth in Nigeria, corporations are in good positions to give back to their host communities which bear the brunt of the corporate activities. By giving back, the corporations can contribute positively to the societal advancement of these communities. However, effective laws are necessary to encourage and streamline philanthropic activities in the country. This paper critically analyzes the Companies and Allied Matters Act, 2004 (CAMA) and other relevant laws to determine the effectiveness of the current legal regime on philanthropy and offer recommendations for strengthening the laws. The analysis shows that CAMA promotes shareholder value, an ideology that encourages individual freedom but which is antithetical to effective corporate social responsibility (CSR); also shareholder value detracts from philanthropic acts that are beneficial to the society. The corporations can give back through an effective CSR regime. The paper argues for the enactment of a CSR Act that will stipulate how the CSR and philanthropic activities of corporations should be carried out to make them effective, as the present situation where corporations pick and choose what they want to do, if they wish to do anything at all, is not effective. Alternatively, the paper calls for an amendment of the CAMA to make effective CSR mandatory. Finally, the paper recommends other ways in which the philanthropies of corporations, individuals, and groups can be enhanced for societal advancement.

1. Introduction

Philanthropy is the act of giving money, property, effort, or time to assist in making life better for other people. There are various ways to be philanthropic; it is not just about giving money. However, selflessness is a precursor for philanthropy and societal advancement. For Nigeria's development, it is the responsibility of all Nigerians, in collaboration with their governments, to grow their communities and Nigeria at large focusing primarily on the immediate environments. This is an aspect of *grounded law*¹ which teaches that

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¹ Chukwunonso Okafo, *Beyond the Rule of Law: Grounded Law and Personal Responsibility as the Catalysts for Effective and Efficient Crime Control in Nigeria* (Professorial Inaugural Lecture) (Nigeria: University of Nigeria Press 2017); see soft copy at: <http://www.unn.edu.ng/wp-content/uploads/2015/09/Inaugural-Lecture-by-Prof-Okafor-C.pdf>. See further: Chukwunonso Okafo (ed.), *Grounded Law: Comparative Research on State and Non-State Justice*

in order to effectively and efficiently solve a social problem, it is better to first look for a solution within the society; only if no homegrown solution is found or there is a need to complement a homegrown solution with a foreign idea would it be advisable to borrow a solution from outside the society.

To the extent that societal advancement involves all or a significant portion of a society, and some members of the population are *incapable*² of or unwilling to give what is needed to advance the group, it is worthy of note that societal advancement requires one or a few individuals to make sacrifices in the interest of the larger society. Thus, selfishness or unwillingness to give freely for the benefit of other members of a community is inconsistent with philanthropy.

Individual advancement must be distinguished from the societal advancement being addressed here. In *individual advancement*, the person's – the individual's – interest is promoted for the greater well-being of the person. On the other hand, *societal advancement* aims to enhance the larger interests of the community or group with a view to bettering the living conditions of the members. Personal growth and progression satisfy individual aspirations and feed personal characters. Societal advancement, which seeks to respond to the interests of the generality of a population, is burdened with restrictions stemming from conflicts among the varying individual interests. The various interests and preferences give rise to mistrust and fuel greed among the people.

Further, typically, the members of a country as large as Nigeria – and even smaller communities – hold conflicting views of the role of government and laws (official laws) in the quest to advance the country. While some argue that the individual, private person, or group should drive societal growth, others hold the view that the State (that is, government – local, state, and federal) is the key player in a quest to develop a society. Still others take the position that some combination of the extremes is the best option. These conflicting developmental ideas are prominently rooted in the differences between the Communist and Capitalist ideologies.

Martin Luther King, Jr. once had the following to say about the competing positions of Communism and Capitalism. In a lecture at the Southern Christian Leadership Conference in Atlanta, United States of America (USA) in 1967, he said:

Communism forgets that life is individual. Capitalism forgets that life is social, and the kingdom of brotherhood is found neither in the thesis of communism nor the antithesis of

in Multiple Societies (Nigeria and United Kingdom: Wildfire Publishing House 2012); Nonso Okafo, *Reconstructing Law and Justice in a Postcolony* (Surrey, England and Burlington, USA: Ashgate Publishing 2009).

² Lack of capacity to give philanthropically may be more difficult to justify than it appears. It seems that everyone (rich, poor, young, old, able, disabled, educated, not-so-educated, etc.) is capable of giving philanthropically. What constitutes an aptitude to give is more closely considered in sections 5 and 6 of this paper on 'Ways to Enhance Individual and Group Contributions to Philanthropy' and 'Personal Responsibility as a Way of Enhancing Philanthropy', respectively.

capitalism but in a higher synthesis. It is found in a higher synthesis that combines the truths of both.³

So, the truth is found somewhere between the two extreme points of the developmental formula continuum. In short, to develop Nigeria, various inputs based on the divergent views are needed.

To achieve optimum societal advancement, it is necessary to recognize that individual advancement leads to and energizes societal advancement; societal advancement needs broad-based coordination to capture the generality of the citizens. At the same time, however, societal advancement creates the conducive environment and facilitates the individual growths of the citizens. The ability of a country such as Nigeria to reconcile and manage the conflicting interests and ideologies is probably the greatest asset for advancing the society. Herein lies the importance of law as an instrument for identifying and clarifying the expectations of society on this matter. The law is capable of providing the desired standard for all persons and groups to be involved (either as benefactors or beneficiaries) of philanthropic efforts.

This paper consists of six parts. Following this introduction, part two discusses the areas in which the law can enhance philanthropy in Nigeria, part three delves into other ways to improve the philanthropies of corporations, part four proffers ways to enhance individual and group contributions to philanthropy, and part five explains personal responsibility as a way of advancing philanthropy. Finally, part six concludes the work.

1.2 Areas in Which the Law Can Improve Philanthropy in Nigeria

There are several ways in which law does and can further enhance philanthropy in Nigeria. These include laws in place or needed to require or encourage corporations to give freely to projects that improve the lives of the citizens especially in the areas where these companies operate. Also in this category are laws either in place or needed to make it attractive for individuals to give voluntarily for the good of their communities and the larger society.

1.3 Companies and Allied Matters Act Community Development Requirements for Corporations in Nigeria

The Companies and Allied Matters Act (CAMA)⁴ is the principal Act that regulates the activities of companies in Nigeria including the corporate social responsibilities (CSR) of the corporations. By their CSR, corporations are required to carry out philanthropic acts in order to protect the interests of their shareholders and stakeholders (i.e., persons that can affect or be affected by the activities of a business,

³ 'Martin Luther King Jr. > Quotes > Quotable Quote' <<https://www.goodreads.com/quotes/706610-communism-forgets-that-life-is-individual-capitalism-forgets-that-life>> accessed November 25, 2019.

⁴ Cap. C20, *Laws of the Federation of Nigeria* (LFN), 2004 (CAMA).

such as employees, customers, suppliers, creditors, competitors, and the wider community).⁵ The directors of a company have obligations to the shareholders as well as its stakeholders. Further, a company is legally empowered to make gratuitous payments.⁶ The power to do so may derive from its memorandum of association or it may be reasonable to do so as an act incidental to carrying on the business of the company,⁷ provided that the donation or gift is not for a political purpose.⁸ Thus, a company can advance its stakeholders' interest and carry out CSR if this is contained in its memorandum of association and is neither illegal nor prohibited by the Act.⁹

However, in contemporary Nigeria, the CSR activities of corporations are mostly voluntary toward their host communities. The activities are based on *soft law* or *non-legal instruments* or they are *quasi* in nature – the activities are either without the force of law or their binding nature is weaker than that usually ascribed to *hard law*.¹⁰ Thus, CSR tend to be for public relations by the corporations to avoid criticisms, win detractors, and concurrently take advantage of 'emerging business opportunities associated with doing and being seen to be doing good'.¹¹ Many corporations believe that by engaging in these CSR activities, they will avoid negative images by showcasing social responsibility towards their stakeholders.¹² These are the contemporary CSR activities that many corporations engage in, in Nigeria. It is ineffective because instead of curbing corporate excesses, these philanthropic acts have been 'colonised' and 'converted' to a secondary use by corporations, as an 'efficiency enhancing devise' for the accumulation of more profits.¹³ Thus, faced with a legitimacy crisis,¹⁴ modern corporations have devised ways of responding to societal pressures and neutralizing such pressures through contemporary CSR.

On the other hand, *effective CSR* (unlike *contemporary CSR*) will more positively impact society and fulfill the responsibilities of corporations to be accountable to those who are affected by their operations. For instance, in Nigeria's Niger-Delta, the multinational oil corporations (MNCs) typically

⁵ Corplaw Blog, 'Shareholder & Stakeholder Theories of Corporate Governance' <http://www.corplaw.ie/blog/bid/317212/Shareholder-Stakeholder-Theories-Of-Corporate-Governance>> accessed November 26, 2019.

⁶ CAMA, sections 38 (2), 39 (3).

⁷ *Ibid*, section 39 (1).

⁸ *Ibid*, section 38 (2).

⁹ Oluchukwu Precious Obioma, 'Companies and Allied Matters Act 2004, Corporate Social Responsibility and the Realization of the Sustainable Development Goals in Nigeria' (LLM Dissertation, University of Nigeria Nsukka 2018).

¹⁰ Paddy Ireland and Renginee G. Pillay, 'Corporate Social Responsibility in a Neoliberal Age' in Peter Utting and José Carlos Marques (eds.), *Corporate Social Responsibility and Regulatory Governance: Towards Inclusive Development* (Hampshire: Palgrave Macmillan 2010) 78.

¹¹ P Newell and J G Frynas, 'Beyond CSR: Business, Poverty and Social Justice: An Introduction' [2007] (28) (4) *Third World Quarterly* 668.

¹² P Utting, 'Corporate Responsibility and the Movement of Business' [2005] (15) (3/4) *Development in Practice* 374.

¹³ Wolfgang Streeck, *Reforming Capitalism: Institutional Change in the German Political Economy* (London: Oxford University Press 2009) 250.

¹⁴ Arising from mounting pressures and attacks from communities and civil societies.

perform contemporary CSR activities, rather than effective CSR. This allows the corporations to claim that they are seriously committed to performing meaningful CSR obligations. Thus, the corporations try to prove that they are socially responsible by providing scholarships, classrooms, and teachers for the local communities.¹⁵ But effective CSR is the corporate action that clearly defines the various actors in the economic process and the respective roles they are expected to play in the production and distribution of wealth.¹⁶ As a result, effective CSR will stipulate the duties and responsibilities of the corporations, as well as the rights and obligations of corporate stakeholders, including its employees, host-communities, the environment, and the state that is expected to regulate their activities.¹⁷

It is beyond doubt that MNCs in the Niger-Delta region acknowledge their social obligations to their host communities.¹⁸ They have continued to adopt CSR projects for the development of these communities. Nonetheless, there is a predominant view that reveals the flaws in the MNCs' CSR projects, which aim to provide just the moral minimum services. The CSR programmes executed by the MNCs were not intended to tackle entrenched economic, environmental, and social problems. The MNCs thus do not invent practical measures for the execution of effective CSR projects to cater to the developmental needs of the hosts.¹⁹ There is a view that the millions of naira or dollars MNCs spend on CSR projects are cosmetic attempts to preserve corporate reputation. As an example, the construction of school blocks and health clinics by MNCs is done as 'one time offers instead of as sustainable projects'.²⁰ In short, the contemporary CSR projects do not significantly impact on poverty alleviation or the socio-economic development of the Niger-Deltans; the MNCs have not expanded their projects to reach 'the poorest and most ecologically devastated communities in the region'.²¹

To encourage corporations to perform effective CSR projects and hold them legally responsible for those, there is a need for either a specific law providing as such or an amendment of the CAMA to require corporations to undertake these responsibilities. A CSR Act or an amendment of CAMA to require corporations to perform specific CSR activities will make CSR legally binding on the corporations. Such a

¹⁵ G Eweje, 'Multinational Oil Companies' CSR initiatives in Nigeria' [2007] (49) (5/6) *Management Law* 218.

¹⁶ Uchechukwu Nwoke, 'Two Complimentary Duties under Corporate Social Responsibility: Multinationals and the Moral Minimum in Nigeria's Delta Region' [2016] (58) (1) *International Journal of Law and Management* 5.

¹⁷ U Idemudia, 'Oil Extraction and Poverty Reduction in the Niger Delta: A Critical Examination of Partnership Initiatives' [2009] (90) *Journal of Business Ethics* 91.

¹⁸ U E Ite, 'Changing Times and Strategies: Shell's Contribution to Sustainable Community Development in the Niger-delta' [2007](15) (1) *Sustainable Development* 1.

¹⁹ J DesJardins, *An Introduction to Business Ethics* (2ndedn, New York: McGraw-Hill 2006).

²⁰ U E Ite, 'Multinationals and Corporate Social Responsibility in Developing Countries: A Case Study of Nigeria' [2004] (11) (1) *Corporate Social Responsibility and Environmental Management* 1.

²¹ S U Evuleocha, 'Managing Indigenous Relations: Corporate Social Responsibility in a New Age of Activism, [2005](10) (4) *Corporate Communications* 328.

law will also standardize CSR to check arbitrariness and make the activities of the corporations more relevant to the developmental needs of their hosts.

Enacting a CSR Act will ensure that identifying, defining, and regulating CSR and philanthropic acts are contained in a specific legislation. The law will mandate corporations to carry out effective CSR (as opposed to contemporary CSR) and regulate their activities to ensure compliance. External laws, such as labour laws and environmental laws, would no longer be needed to identify, define, or regulate CSR activities.

One may wonder why it is important to mandate corporations to carry out effective CSR instead of allowing them to pick and choose the philanthropic acts they may wish to perform (if they wish to perform any at all) as is the present situation. This is explained by the importance of corporations and acknowledging the enormous wealth, political and economic influence wielded by corporations in modern times. For these reasons, it is erroneous to regard their 'decision-making' capacities and powers of persuasion as those of mere private people.²² Their character and reach are perceptible from the level of effects they have not only on the progress of the national economy but also, more importantly, on their ability to enmesh themselves (either directly or indirectly through commercial partners and subsidiaries) in widespread environmental and social struggles. As argued by Voon and Addo, the huge resources available to corporations are often used to influence national governments in areas where the corporations have interests.²³

Moreover, matters like poverty, unsanitary labour conditions, and child labour (issues that have diminished significantly in the more developed world) have persisted in the less developed economies partly because of the activities of corporations.²⁴ Consequently, the contradictions of modern corporations are such that in very few territories, their activities and mere presence have often proved central to local development, while in many others, poverty perpetuation, gross violation of human rights, and environmental devastations are their legacy.²⁵

The rising power of corporations is evident in the worsening effects of corporate actions on both people and the environment. While the reality of the matter is that some activities of corporations are positive, it is also true that corporate activities in the past two decades (especially in many developing

²² I Odeleye, 'Corporate Social Responsibility and the In-House Counsel' in R. Mullerat and D. Brennan (eds), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (Hague: Kluwer Law International 2005).

²³ T Voon, 'Multinational enterprises and state sovereignty under international law' [1999] (21) (219) *Adelaide Law Review* 234; M K Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (Leiden: Brill Academic Publishers 1999).

²⁴ D C Korten, *When Corporations Rule the World* (London: Earthscan Publications 1995).

²⁵ S A Faleti, 'Challenges of Chevron's GMOU Implementation in Itsekiri Communities of Western Niger Delta' (Peace & Conflict Studies Programme, Institute of African Studies, University of Ibadan 2007) cited in U Nwoke, 'Corporations and Development: The Barriers to Effective Corporate Social Responsibility (CSR) in a Neoliberal Age' [2017] (59) (1) *International Journal of Law and Management* 1.

economies) have become more antisocial and destructive.²⁶ Based on the foregoing, it should be mandatory for corporations in Nigeria to carry out regulated philanthropic acts to ensure that they adequately give back to the stakeholders, many of whom are affected by the activities of these corporations.

Alternatively, if it would be too difficult to pass a distinct CSR legislation, then the CAMA can be amended to specifically provide for the protection of stakeholders and the implementation of an effective CSR regime. This would necessitate changing the underlying *theory of shareholder value* as enshrined in the CAMA. Shareholder value can be defined as the value that a company generates for its shareholders, in terms of share price appreciation, dividend payments and other possible payouts.²⁷ Shareholder value is a business term implying that the ultimate measure of a company's success is the extent to which it enriches its shareholders. Reforming the theory will mean that the stakeholders, not just the shareholders, are taken into serious consideration in deciding on a corporation's objective and goal and taking steps to realize them. These will lead to effective CSR practices which will translate to societal advancement.

Evidently, although some provisions of CAMA can be construed to protect the interest of stakeholders, CAMA is predominantly shareholder value oriented. The shareholder value theory argues that tackling social responsibility matters comes at a cost to corporations. In the event that corporations are forced to internalize the costs of socially responsible practices, the costs hurt the corporations' competitive position relative to other businesses. The injurious nature of effective CSR to corporate profits is made more compelling because of the global competitive environment in which modern corporations operate. In this sense, where a business in a particular country expends corporate profits in tackling social and environmental issues, it will incur losses if a similar business in another country does not act in like manner.²⁸

A comprehensive analysis of various provisions of CAMA shows that the shareholder value ideology has become the dominant economic ideology in the Nigerian legal jurisprudence. A combined reading of sections 41(1), 63, 79, and 279 of CAMA shows that companies are viewed as private actors to be run exclusively in the interests of shareholders. Section 41 (1) of CAMA provides:

Subject to the provisions of this Act, the memorandum and articles, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered from time to time in so far as they relate to the company, members, or officers as such.

²⁶ Nwoke *ibid.*

²⁷ 'Definition of Shareholder Value' *Financial Times* <<http://lexicon.ft.com/Term?term=shareholder-value>> accessed November 21, 2017.

²⁸ A B Carroll and A K Buchholtz, *Business and Society: Ethics and Stakeholder Management* (5th edn, Melbourne: Thomson South-Western 2003).

By the provisions of this section, the constitution of the corporation (the Memorandum and Articles of Association) is a contract involving the corporation, its shareholders, and management on the one hand, and between the shareholders and its officers, on the other hand. Accordingly, a corporation has no contractual obligation to other stakeholders. This means that the interests of other stakeholders who may be affected by the operations of the corporation are not protected. For instance, a corporation can terminate the employment of its employee at will and for no reason, after giving due notice which is one month by statute and usually three months by contract.²⁹

Furthermore, section 63 of CAMA states:

- (1) 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 from, the members in general meeting or the board of directors.
- (2) Subject to the provisions of this Decree, the respective powers of the members in general meeting and the board of directors shall be determined by the company's articles.
- (3) Except as otherwise provided in the company's articles, 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 Decree or the articles required to be exercised by the members in general meeting.
- (4) Unless the articles shall otherwise provide, the board of directors, when acting within the powers conferred upon them by this Decree or the articles, shall be bound to obey the directions or instructions of the members in general meeting: Provided that the directors acted in good faith and with due diligence.
- (5) Notwithstanding the provisions of subsection (3) of this section, the members in general meeting may -
 - (a) act in any matter if the members of the board of directors are disqualified or are unable to act because of a deadlock on the board or otherwise;
 - (b) institute legal proceedings in the name and on behalf of the company, if the board of directors refuses or neglects to do so;
 - (c) ratify or confirm any action taken by the board of directors; or
 - (d) make recommendations to the board of directors regarding action to be taken by the board.
- (6) no alteration of the articles shall invalidate any prior act of the board of directors which would have been valid if that alteration had not been made.

²⁹ K M Amaeshi, et al., 'Corporate Social Responsibility (CSR) in Nigeria: Western Mimicry or Indigenous Practices?' [2006] (39) (4) *ICCSR Research Paper Series*.

In addition, section 79 of the Act stipulates that only shareholders are members of the corporation and their interests alone matter. And, according to section 279 (3):

A director shall act at all times in what he believes to be 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.

When the foregoing sections of CAMA are read together, the implication is that shareholders, in principle, are the owners of the corporation and it is their primary responsibility to maximize the value of their investments. These shareholders delegate their authority to corporate directors who they have appointed to act on their behalf,³⁰ and who are mandated to pursue the actualization of shareholder profits with utmost vigour.³¹

The relevant Nigerian case law agrees with the preceding position. The courts have decided in favour of the supremacy of shareholders. In *Yalaju-Amaye v. AREC Ltd*,³² the plaintiff/appellant (who was a shareholder as well as a Director and Managing Director of the defendant corporation) was removed by other directors of the corporation on the ground that he had resigned his appointment as the Managing Director (MD). The other directors also took the position that since he orally resigned as the MD, he simultaneously lost his position as a shareholder of the corporation. The plaintiff MD filed a suit, asking the court to determine whether he was validly removed as the MD of the corporation and whether as a result of his purported removal as the MD, he had surrendered his share interests in the corporation. He further asked the court to determine whether he could institute action in respect of the wrongs done to him in his capacity as a shareholder.

The Supreme Court of Nigeria used the opportunity of the case to recap the general position of contemporary Nigerian law in the area of shareholding, and the relationship between the shareholders of a corporation and other interests. The Court held (among other things) that the Memorandum and Articles of Association of a corporation bind the corporation and its directors and constitute a contract between them alone. In this context, there is the relationship of master and servant between the MD and the shareholders in a general meeting (that is the corporation) and since the plaintiff becomes an employee by virtue of his becoming a MD, there is a contract of service between him and the corporation. Accordingly, the shareholders have the power to alter the corporation's Articles of Association to remove him, even if this results in a breach of contract with the director. However, the Court further held, the contract of service does not extend to the plaintiff/appellant in his capacity as a shareholder. As an owner of shares, he is a

³⁰ *Longe v. First Bank of Nigeria Plc* [2006] 3 NWLR (Pt 967) 228 at 270.

³¹ *Obioma* (n 9) 38.

³² [1990] NWLR (Pt 145) 22; [1990] 6 (SC) 157.

member of the corporation and his interests trump other interests, apart from that of other shareholders. His interests as a shareholder are different from his interests as a MD, and it is irrelevant that he became a shareowner as a result of shares he acquired in his capacity as a MD. In this sense, he can bring actions that are either personal to him or on wrongs which affect the corporation itself. Moreover, since shareholders are the only ones permitted by law to bring actions in respect of acts done to the corporation, the plaintiff can, through a derivative action, sue for wrongs done to the corporation.³³

Furthermore, in *Odutola Holdings Ltd. & Ors v. Ladejobi & Ors*,³⁴ the court held in line with section 63(3) of the CAMA that directors of a company are authorized to take action to protect the business of the company. The plain reading of section 63(3) is that except as otherwise provided in the company's Articles, 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 the Act or the Articles required to be exercised by the members in general meeting (per Ejiwunmi, JSC). Indeed, as previously stated, the purpose of a company is to make profit; therefore, the directors' duty is to act in a way as to maximize profit for the company and the shareholders.

However, it is worth noting that although corporations are expected to increase the profits of shareholders, lack of engagement with the community and lack of transparency about the impact of corporate activities on the society have triggered the idea of mandatory CSR. In the last decade, many countries have taken initiatives to move from voluntary CSR to mandatory CSR. For examples, France, Denmark, Norway, and South Africa have passed legislations that require corporations to disclose their environmental performances.³⁵ While the debate was initially focused on CSR reporting, three countries (Mauritius, India, and Indonesia) have gone further and imposed mandatory CSR contributions by corporations.³⁶

Mauritius is used here as a case study because it is a pioneer in introducing a CSR levy on all companies irrespective of size and industry and it is a developing African country. A cursory look at the Mauritius CSR Act shows a classic CSR Act that is geared towards societal advancement. This is in stark contrast with India and Indonesia which apply mandatory CSR selectively.³⁷ Under the Mauritius CSR

³³ *Ibid.*

³⁴ (2006) LPELR-2260 (SC); [2006] 12 NWLR (Pt 994) 321; [2006] 5 (SC) (Pt I) 83.

³⁵ I Ioannou and G Serafeim (2014) 'The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries' (Harvard Business School Research Working Paper, Harvard University Cambridge 2014) <<http://doi.org/10.2139/ssrn.1799589>> accessed November 25, 2019.

³⁶ D Ramdhony, 'The Implications of Mandatory Corporate Social Responsibility: A Literature Review Perspective' *Theoretical Economics Letters* (2018) (8) 433. <https://www.researchgate.net/publication/323123395_The_Implications_of_Mandatory_Corporate_Social_Responsibility-A_Literature_Review_Perspective> accessed November 26, 2019.

³⁷ *Ibid.*

legislation,³⁸ all profitable companies are required to contribute 2% of their preceding year profits toward CSR activities. Guidelines for spending the CSR funds were formulated by government and employer representatives and aimed at synchronizing activities both for the benefit of society and particularly, the needy.³⁹ These guidelines ensure that the resources are put to effective use; without regulation, it would be difficult to channel resources towards areas which require intervention. Mandatory CSR supports the role of the government in protecting the environment and raising the standard of living of the people.⁴⁰ The priority areas of intervention wherein the CSR programme can be implemented include dealing with health problems, educational support and training, environment and sustainable development, family protection (including gender-based violence). Other areas are fields of advocacy, capacity building and research for consideration as crosscutting throughout the priority areas of intervention, leisure and sports, peace and nation-building, road safety and security, social housing, socio-economic development as a means for poverty alleviation, and supporting people with disabilities.⁴¹

If left to carry the responsibilities alone, the government cannot meet all the expectations of its citizens. The CSR levy with guidelines for spending is the best mix between the two extremes of keeping full custody and full control of CSR funds by the government and leaving all CSR funds with all control in the hands of companies. This situation is ideal for both corporations and government.⁴² Thus, it is suggested that Nigeria will do well to emulate this by institutionalizing CSR and utilizing mandatory CSR as one of the tools for societal advancement.

The recommended CSR legislation for Nigeria, or a requisite amendment of the CAMA, should further require corporations to perform *negative injunctive duties* as well as *positive affirmative duties*. Positive affirmative duties are the obligations that corporations are required to perform for their host communities. These obligations include building hospitals, roads, schools, electrification projects, and water boreholes. Negative injunctive duties are the duties of care owed by the corporations to avoid doing harm to the ecosystem, as well as preventing and repairing social injuries that arise in the process of carrying out their businesses. Included in these are taking necessary measures to prevent and/or remedy water and air pollutions, oil spills, acid rains, gas flaring, forest fires as well as other activities that could harm the

³⁸ Finance Act 2016.

³⁹ *Ibid.*

⁴⁰ K Japhet, V K Tawiah, and M Benjamin, 'Debate on Mandatory Corporate Social Responsibility' [2015] <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592880> accessed November 25, 2019.

⁴¹ 'Guide on Corporate Social Responsibility' Mauritius Revenue Authority [August 2019] <<https://www.mra.mu/download/CSRGuide.pdf>> accessed November 24, 2019.

⁴² Ramdhony (n 36) 436.

society.⁴³ Simply put, positive affirmative duty is an obligation to do something good, while negative injunctive duty is the requirement to refrain from harming the ecosystem.⁴⁴

The negative impacts of the oil companies' oil spillage, gas flaring, water pollution, and environmental degradation on the Niger-Delta and the exploitation of customers by telecommunications companies in Nigeria are evident. The oil companies and other multinational companies tend to give more attention to the affirmative duties in their CSR without addressing the negative injunctive duties which have greater implications.⁴⁵ The negative injunctive duties are fundamental because they make up the 'moral minimum' that every corporation is expected to observe.⁴⁶ No amount of classroom, road, or hospital construction will adequately compensate for the health injuries caused by oil pollution, acid rain, and gas flaring. In the same way, no amount of cash can compensate for the loss of a community's source of livelihood.⁴⁷

Thus, the positive affirmative duties and their negative injunctive counterparts should be required side-by-side in order for the CSR activities of corporations to be effective. By fulfilling their duty of care not to damage the environment, the corporations will create value. The value is then enhanced through the performance of affirmative duties.⁴⁸ Relying too heavily on the affirmative duties to the detriment of the negative injunctive duties makes corporations' CSR activities mere public relation stunts.⁴⁹ If the corporations put more emphasis on living up to their negative injunctive duties, the corporations would invariably spark a process to develop and transform their host communities.⁵⁰ This will definitely lead to increased societal development in Nigeria.

⁴³ Uchechukwu Nwoke, 'Two Complimentary Duties under Corporate Social Responsibility: Multinationals and the Moral Minimum in Nigeria's Delta Region' [2016] (58) (1) *International Journal of Law and Management* 13.

⁴⁴ G J Simon, W C Powers, and P J Gunnemann, 'The Responsibilities of Corporations and Their Owners' in TL Beauchamp and NE Bowie (eds.), *Ethical Theory and Business* (Prentice-Hall: Englewood Cliffs, NJ 1972).

⁴⁵ Marianne Ojo, *Analyzing the Relationship Between Corporate Social Responsibility and Foreign Direct Investment* (USA: Business Science Reference 2016) 232.

⁴⁶ Simon, Powers, and Gunnemann (n 44).

⁴⁷ U Idemudia and U E Ite, 'Demystifying the Niger Delta Conflict: Towards an Integrated Explanation' [2006] (33) (108) *Review of African Political Economy* 56; U Idemudia and U E Ite, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' [2006] (13) (4) *Corporate Social Responsibility and Environmental Management* 194.

⁴⁸ D Ogula, 'Corporate Social Responsibility: Case Study of Community Expectations and the Administrative Systems, Niger Delta' [2012] (17) (73) *The Qualitative Report* 1.

⁴⁹ G U Ojo, 'Community Perception and Oil Companies Corporate Social Responsibility Initiative in the Niger Delta' [2012] (3) (4) *Studies in Sociology of Science* 13.

⁵⁰ U Idemudia and U E Ite, 'Corporate-Community Relations in Nigeria's Oil Industry: Challenges and Imperatives' (n 47) 202.

1.4 Corporate Governance Codes Community Development Requirements for Corporations in Nigeria

1.4.1 Nigerian Securities and Exchange Commission's Corporate Governance Code (SEC Code) 2011

This Code is limited to public companies; it provides specifically for the responsibilities of the board of directors in Part B; their relationship with shareholders and stakeholders are provided in Parts C and D respectively. Thus, the code provides specifically that:

2.2. The principal objective of the Board is to ensure that the company is properly managed. It is the responsibility of the Board to oversee the effective performance of the Management in order to protect and enhance shareholder value and to meet the company's obligations to its employees and other stakeholders.

2.3. The primary responsibility for ensuring good corporate governance in companies lies with the Board. Accordingly, the Board should ensure that the company carries on its business in accordance with its articles and memorandum of association and in conformity with the laws of the country, observing the highest ethical standards and on an environmentally sustainable basis.⁵¹

And in their relationship with other stakeholders, the following provision is relevant:

28.1. Companies should pay adequate attention to the interests of its stakeholders such as its employees, host community, the consumers and the general public. Public companies should demonstrate sensitivity to Nigeria's social and cultural diversity and should as much as possible promote strategic national interests as well as national ethos and values without compromising global aspirations where applicable.

28.3. The Board should report annually on the nature and extent of its social, ethical, safety, health and environmental policies and practices. Issues should be categorized into the following levels of reporting:

- (a) disclosure of the company's business principles and codes of practice and efforts towards implementation of same;
- (b) description of workplace accidents, fatalities and occupational and safety incidents against objectives and targets and a suitable explanation where appropriate;
- (c) disclosure of the companies policies, plans and strategy of addressing and managing the impact of HIV/AIDS, Malaria and other serious diseases on company's employees and their families;
- (d) application, in the company's operations, of options with the most benefit or least damage to the environment, particularly for companies operating in disadvantaged regions or in regions with delicate ecology in order to minimize environmental impact of the company's operations;
- (e) the nature and extent of employment equity and gender policies and practices, especially as they relate to the executive level opportunities;
- (f) information on number and diversity of staff, training initiatives, employee development and the associated financial investment;

⁵¹ Section 2 SEC Code 2011.

- (g) disclosure on the conditions and opportunities created for physically challenged persons or disadvantaged individuals;
- (h) the nature and extent of the company's social investment policy; and
- (i) disclosure on the company's policies on corruption and related issues and the extent of the compliance with the policies and the company's code of ethics.⁵²

1.4.2 Nigerian Code of Corporate Governance 2018

The Nigerian Code of Corporate Governance covers all public companies, private companies that are holding companies of public companies, concessioned and/or privatized companies as well as regulated private companies whose files return to any other regulatory authority other than the Federal Inland Revenue Service and the Corporate Affairs Commission.⁵³ A major point about this Code is the active involvement of stakeholders in the formulation of the code as well as the consideration of the peculiarities of the local business terrain in relation with global best practices.⁵⁴

Notwithstanding this Code and although the Nigerian Corporate Governance Code provides for stakeholder interests, where the Code is inconsistent with the CAMA, the CAMA will prevail; therefore the Code is ineffective if the CAMA is not amended. Consequently, the CAMA should be amended to reflect the changes in the Code. Furthermore, the amended CAMA should provide for companies to make provisions for corporate social responsibility agenda or drive social and environmental improvements.⁵⁵

1.5 Other Ways to Improve the Philanthropies of Corporations

The foregoing sections of this paper have recommended legal requirements that should be placed on corporations to give to causes aimed at the development of their host communities. Beyond those legal requirements, it is noteworthy that philanthropy is fundamentally predicated on appealing to the consciences of the citizens, including corporations. The challenge is to educate and convince them that it is in their interest – as well as the interests of the beneficiaries – to give as the benefactors are able. In doing this, the community, local, state, or federal authority may resort to incentivizing the citizens to part with a portion of what they have for what they can gain.

Offers of tax breaks to companies and businesses to get them to give to philanthropy have the prospect of increasing the gifts made available for societal development. Thus, a company that gives X amount of Naira to a recognized philanthropy may be rewarded with a specified percentage reduction in

⁵² Section 28 SEC Code 2011.

⁵³ Ibraheem Alawode, 'Financial Reporting Council Unveils Nigerian Code of Corporate Governance 2018 Draft' <<https://www.premiumtimesng.com/business/272322-financial-reporting-council-unveils-nigerian-code-of-corporate-governance-2018-draft.html>> accessed November 26, 2019.

⁵⁴ Babajide Komolafe, 'FRC moves to develop new National Code of Corporate Governance' <https://www.vanguardngr.com/2018/01/frc-moves-develop-new-national-code-corporate-governance/>> accessed November 26, 2019.

⁵⁵ Obioma (n 9) 110.

the taxes due from it to the government. It seems that many companies will seek to take advantage of this offer since they will be making positive contributions to the development of their host communities while lowering their taxes.

Another way to boost philanthropy is to identify companies and businesses that give to worthy causes and give them preferential treatment in the awards of contracts. The governments have a pivotal role to play on this, by offering to award government contracts first to companies and businesses that give to developmental causes. Making this a criterion for the award of government contracts will incentivize many that seek government contracts to contribute to philanthropic ventures.

Governments can further enhance philanthropy by dedicatedly procuring goods and services primarily from businesses that give to societal development endeavours. Again, there is little doubt that this will motivate businesses to give to worthy developmental causes.

1.6 Ways to Enhance Individual and Group Contributions to Philanthropy

In addition to corporate, business, and other group contributions to societal development through philanthropy, individual citizens are in positions to contribute substantially. As mentioned earlier in this paper, there are a number of ways to be philanthropic; it is not just about giving money. Even a poor person can be philanthropic by giving property, effort, or time to make the lives of other people better. Consequently, volunteerism is a viable means of contributing to societal development. Volunteered time or effort can be rewarded with tax break or credits for school. In the situation, both the society and the volunteer gain significantly. Moreover, volunteerism is a potent way to inculcate and strengthen social responsibility and patriotism in the citizens. This should apply to both old and young citizens as well as to rich and poor persons and groups.

Many of the more developed countries recognize the importance of giving what one is able to, to improve the lives of others in their societies. In those countries, many people that do not have the ability to give money or other property do volunteer services in public and private establishments. For example in the USA, it is common to observe secondary school students seriously pursuing volunteer opportunities and volunteering at hospitals, schools, homes for the disabled and old people, etc. The value of this life-shaping experience on a young person is immense. Moreover, the students are rewarded with credits towards their graduation and even university education, and the volunteer services may be favourably considered for employment.

Beyond their contributions to the betterment of the lives of other citizens and the credits they earn, the volunteers imbibe invaluable morals toward nation-building. Without a doubt, these tenets are greatly needed in our dysfunctional country, Nigeria. Laws to encourage the citizens to engage in these activities are most welcome.

Generally, philanthropy in Nigeria needs increased citizen participation. The citizens can do more even in the midst of the current difficult economic situation. As already shown in this paper, even a poor person has the capacity to give to a public cause. However, it is observed that *poverty of the mind*, rather than *poverty of material things*, is the major obstacle to philanthropy in our society.⁵⁶ *Poverty of the mind* refers to the mentality that fails to recognize that the individual and the other citizens deserve better living conditions and that everything possible needs to be done to achieve such conditions. *Poverty of the mind* causes the citizens to hold on to the prevalent undesirable conditions even where they negatively impact the business interests of the citizens. Thus, a businessman who has the money and material means to pave the entrance to, and environs of, his place of business refuses or fails to do so because ‘it is the responsibility of the government’. But this mindset ignores the fact that paving the area around the business will attract more customers and improve the fortunes of the business; paving the area is also a way of contributing to the betterment of the lives of other citizens that will use the space. Refusing or failing to appreciate the positive impact of such contribution to the quality of lives and instead insisting on the government as the answer to all the deplorable environmental conditions is rooted in the *poverty of the mind*. We all need to recognize and rise above this.

1.7 Personal Responsibility as a Way of Enhancing Philanthropy

Philanthropy evokes personal responsibility.⁵⁷ A person who gives freely for a public cause does so primarily because he has concluded that it is the right thing to do; he also believes that he should play a role to ensure that it is done. The law might have encouraged him to give, but it is his giving spirit – which caused him to feel responsible for alleviating the conditions of less privileged citizens – that led him to consider and choose to do *the right thing* by giving. ‘Where the law fails, personal responsibility is the foundation of society.’⁵⁸ So, with personal responsibility a person holds himself to account in a situation such as that in which other citizens need his help. With or without (effective) law, philanthropy is predicated on personal responsibility.

While identifying twelve reflections on personal responsibility, Brunkhorst wrote in part:

- 1) Personal responsibility begins from the inside and moves outward, we must begin by taking responsibility for our thoughts, choices, and reactions. Then we can be responsible for the circumstances we create in our world.
- 2) Every choice can benefit humanity or harm it. Even avoiding choices is a choice and each choice has consequences.

⁵⁶ Chukwunonso Okafo, ‘How the Law Can Enhance Philanthropy as a Means for Societal Advancement’, Paper delivered at the 1st Ephraim C. Eluchie Memorial Lectures on *Grassroots Development*, Owerri, Imo State, Nigeria, October 10, 2018.

⁵⁷ Chukwunonso Okafo, *Beyond the Rule of Law: Grounded Law and Personal Responsibility as the Catalysts for Effective and Efficient Crime Control in Nigeria* (n 1).

⁵⁸ *Ibid*, 10.

- 3) When you think something or someone else is responsible for your problems and their solutions, that exact thought is the first problem to solve.
- 4) A great philosophy of responsibility: When things are working, I am responsible ... and when they need fixing, I am responsible.⁵⁹

In philanthropy, personal responsibility and self-control reinforce each other. Both lead to a choice by the individual to do or refrain from doing something that will benefit other people – giving. In contemporary Nigeria, the absence of sufficient *personal responsibility*, *self-control*, and *rational choice* seems to be at the root of many social problems. Without a doubt, the governments at the local, state, and federal levels owe the primary duty to guide, regulate, and advance the society. In a US court decision on the relative rights and responsibilities of the governments and the citizens, Justice Frankfurter stated as follows: the US Constitution (after which the Nigerian Constitution 1999 is modeled) has left the performance of many government businesses to depend on the fidelity of Executive and Legislative actions *and ultimately the vigilance of the people in exercising their rights*. Thus, as important is the role of the private citizen to ensure that the government does its duty.⁶⁰

Where, however, it is impossible for the government to perform a particular duty and the citizen can do so, he is obligated to fill the need. Regrettably, often the citizens' desire for change (development) is not matched by the necessary efforts. In his consideration of many Nigerians' penchant for wanting positive change in the society but avoiding personal responsibility therefor, Alabi observes as follows:

... for any meaningful change to happen, the individual psyche must be "retuned". Unfortunately, what we want as Nigerians is a change of government and not a change of individuals. The question is who are the people who make up the government? These are individuals and they are Nigerians. If we change the government and bring in new set of Nigerians, we shall still be shouting change in a few months down the line. It is the psyche of the ordinary Nigerians that need change, and not the political grandstanding our leaders are engaged in now. An ordinary Nigerian believes the government is a gateway to wealth, so getting into government is a means of having a comfortable life for himself and his family. Without a change of this mentality, there is no "change" coming to Nigeria. Change does not come in a vacuum, it has to be effected. And no society can be changed without changing the individual. The Nigerian has to change himself before the society can change. And this is the mistake these agents of change are making. Change cannot be achieved overnight. It has to be a steady process.⁶¹

Therefore, the government, corporations, smaller businesses, other groups, as well as individual citizens have critical roles to play to develop Nigeria.

⁵⁹ Steve Brunkhorst, '12 Reflections on Personal Responsibility' <http://www.boxingscene.com/motivation/29761.php>> accessed November 26, 2019.

⁶⁰ *South v. Peters* 339 US 276 (1950).

⁶¹ Babajide Alabi, 'Nigeria Will Change, When There is Individual Rebirth' *Vanguard* (Lagos, 4 January 2015) <http://www.vanguardngr.com/2015/01/nigeria-will-change-individual-rebirth/#sthash.3G8RpkY.dpuf>> accessed November 26, 2019.

1.8 Conclusion

Nigeria's development requires government action together with corporate and selfless private individual contributions of money, work, and time. The private efforts are at least as important as those of the local, state, and federal governments. Beyond the government and its official role, grassroots efforts for development depend on the citizens identifying with, accepting, and voluntarily participating in developmental causes the citizens have accepted as theirs. The fact that the citizens are convinced that a particular developmental effort is worthy of their participation makes it easy for the people to support it. However, for the government efforts, as well as corporate and other private philanthropic contributions for development, an effective set of laws can be an important instrument for clarifying, standardizing, and regulating the various contributions to ensure coordinated advancement.

In the final analysis, the law's power to enhance philanthropy is undeniable. The law can require or encourage corporations, groups, and individuals to give to identified causes for societal development. In return, those that give accordingly will be recognized and rewarded for their contributions. Beyond the law, however, whether or not a person gives depends to a great extent on whether he accepts that he has a duty to do so, and further, whether he believes that a cause to be given to is important.