

## EXAMINING THE POWERS OF THE MINISTER FOR AVIATION AND AEROSPACE IN NIGERIA TO SUSPEND COMMERCIAL AIRLINE OPERATIONS

By

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### Abstract

*The primary legislation governing civil aviation in Nigeria is the Civil Aviation Act of 2022, followed by the Nigeria Civil Aviation Regulations 2023, a subsidiary legislation. There is the debate whether the Minister of Aviation and Aerospace in Nigeria can suspend an airline from commercial operation in Nigeria on the ground of safety. This debate is heightened by the recent suspension of Dana Air and Arik Air respectively. The relevant of the debate is to determine the extent of the powers of the Honourable Minister over civil aviation, considering the technical nature of the aviation and the suspicion of that, a Minister's decision might be politically influenced. This paper is an attempt to examine the position of the law with a view to clarifying the confusion. Sections 4(3), 26, 27 and 31(7) of the Civil Aviation Act 2022 (CAA) and Part 20 of the Nigeria Civil Aviation Regulations 2023 (NCARs) in addition to the provisions of the Chicago Convention provide sufficient answer to the debate. The paper found that whereas the Honourable Minister supervises the aviation industry by the provision of government policies and frameworks, the power to suspend an airline from further operations is vested in the Nigeria Civil Aviation Authority (NCAA), which is an agency under the Federal Ministry of Aviation and Aerospace. The paper among others recommends that the independence of the NCAA should be maintained in line with ICAO standards and to immune the aviation sector from political interference.*

### 1.0 Introduction

Nigeria's Minister for aviation and aerospace recently about the 26<sup>th</sup> day of July 2024 reportedly directed the grounding of three aircrafts belonging to Arik Air Ltd (under AMCON Receivership). At first, the reason for the suspension was uncertain. Subsequent briefings by the regulators however cited compliance with a Supreme Court judgment, wherein the three aircrafts were attached by order of a mareva injunction. Similarly, the Minister for Aviation and Aerospace, Mr. Festus Keyamo, SAN had reportedly on Tuesday, 23<sup>rd</sup> of April 2024 directed the suspension of Dana Air from further operations following a minor incident involving the airline passenger aircraft boing at the Murtala Mohammed airport, Lagos.<sup>2</sup> The aircraft had skidded off the runway upon landing at the airport in what regulators considered an issue of safety concern.<sup>3</sup> By the provision of paragraph 20.1.1-2, the Dana Air incident amounted to an accident.

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<sup>2</sup> Chinedu Eze, FG Suspends Dana Air Operations, Calls for Airline's Comprehensive Audit for Safety, ThisDay Newspaper, 25<sup>th</sup> April 2024 accessible at <https://www.thisdaylive.com/index.php-2024/04/25/fg-suspends-dana-air-operations-calls-for-airlines-comprehensive-audit-for-safety/> last accessed 10<sup>th</sup> August 2024.

<sup>3</sup> James Agberebi, FG Susends Dana Air over Safety Concerns, The Guardian, 24<sup>th</sup> April 2024 available at <https://guardian.ng/news/fg-susends-dana-air-over-safety-concerns/> last accessed 10<sup>th</sup> August 2024.

Following the Minister's directive, some stakeholders in the aviation sector had expressed reservation on the legality and limitation of the powers of aviation Minister over aviation matters in Nigeria.<sup>4</sup> They argued that the Honourable Minister lack the statutory powers to suspend an airline from operation on the ground of safety in Nigeria stressing that the powers of the Minister is limited to directing compliance with aviation policies.<sup>5</sup>

In reaction to the criticisms trailing his decision to direct the suspension of Dana Air over the April 23<sup>rd</sup> incident, the Minister relying on sections 26 and 28 of the Civil Aviation Act 2022 reportedly insisted that he has the locus to direct the suspension of the airline, on the grounds of national security and safety.<sup>6</sup> He claimed that the phraseologies of national security and national safety are extensive enough to justify his directive.<sup>7</sup>

It is against this background that we have decided to examine in this article the extent of the powers of the Minister for Aviation and Aerospace in Nigeria over the aviation sector. This article shall rely on the provisions of the Civil Aviation Act 2022 and the Civil Aviation Regulations 2023, both of which are the primary legislations regulating civil aviation in Nigeria. It is however necessary to clarify that whereas the Honourable Minister confirmed his directive on the suspension of the Dana airline,<sup>8</sup> it was the Nigerian Civil Aviation Authority (NCAA) that, officially notify the airline of the suspension of its operations, pending the outcome of the investigation into the cause of the incident.

Generally, there are several reasons for the regulation of civil aviation, some of which include security, safety, economic, political and international obligations. This paper shall be limited to the power of the Honourable Minister to suspend airline operations on ground of safety only. Notwithstanding that, the reason cited by the Minister was reached on the ground of safety it suffice to add that safety concern could undermine economic factors and jeopardize compliance with international regulations.

## **2.0 Civil Aviation Safety Regulations**

Naturally, air carriers' main objective is to make profit, but it shall not be done at the expense of the safety of passengers, hence, the operations of commercial air transportation is highly regulated. According Bariyima Kokpan,<sup>9</sup> the aviation industry is one of the most regulated commercial sectors in any country because of the complexities and transnational nature of air travels. Accordingly, suspension of commercial air travels are not done arbitrary. Regulation means the act or process of controlling by rule or restriction. It is a rule or order, having legal force issued by an administrative agency within a State. Regulation is a standard set for measuring and assessing the operations of airline.<sup>10</sup>

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<sup>4</sup> Ifeoma Okeke-Korieocha, Minister's Order for Dana's Suspension, an Interference on Safety Process – Experts, Business Day, 24<sup>th</sup> April 2024 available at <https://businessday.ng/aviation/article/ministers-order-for-danas-suspension-an-interference-on-safety-process-experts/> last accessed 12<sup>th</sup> August 2024.

<sup>5</sup> Aderonke Oni, Aviation Group Faults Suspension of Dana Air's Operation, The Cable 25<sup>th</sup> April 2024 available at <https://www.thecable.ng/aviation-group-faults-suspension-of-dana-air-s-operation/amp/> last accessed 17<sup>th</sup> August 2024.

<sup>6</sup> Olasunkanmi Akinlotan, Stakeholders, Keyamo Disagree over Dana Air Suspension, Punch Newspaper, 9<sup>th</sup> of May 2024 available at <https://punchng.com/stakeholders-keyamo-disagree-over-dana-air-suspension> last accessed 17<sup>th</sup> August 2024.

<sup>7</sup> Ibid.

<sup>8</sup> Abdulkareem Mojeed, NCAA Suspends Dana Airline Operations, Premium Times, 24<sup>th</sup> April 2024 available at <https://premiumtimesng.com/news/headlines/688826-ncaa-suspends-dana-airline-operations.html> last accessed 20<sup>th</sup> August 2024.

<sup>9</sup> B. S. Kokpan, A Critical Analysis of Air Passengers' Protection in the Nigeria Civil Aviation Authority Regulations (NCARs) 2023 available at <https://scholar.google.com/scholar?start=10&q=Bariyima+Sylvester+Kokpan> last accessed 17<sup>th</sup> August 2024.

<sup>10</sup> Calistus E. Uwakwe, *Aviation Law: Introduction to Civil Aviation in Nigeria*, Lagos (2006), p. 46.

The Convention on International Civil Aviation 1944 otherwise referred to as the Chicago Convention<sup>11</sup> laid the foundation for the regulation of civil aviation. Article 1 of the Convention provide that “the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”<sup>12</sup> Cooper<sup>13</sup> had argued that both of these articles constitute international recognition of a prior existing rule. Both assert in substance that sovereign states held territorial rights in the 'airspace above their surface territories irrespective of and prior to either of the conventions. Accordingly, each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of the Convention.<sup>14</sup>

As applicable to this article, articles 6 to 11 of the Chicago Convention expressly recognized the powers of Contracting State to determine the terms and conditions for the operation of air carriage in that State. Specifically, article 6 is to the effect that no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

Article 12 of the Chicago Convention requires that States insure that aircraft flying over their territory or carrying their nationality mark shall comply with the rules and regulations governing flight there in force. Over the high seas, the rules in force are those established under the Convention (i.e., SARPs promulgated by ICAO). Under Article 21, the registering State must report to ICAO data revealing the ownership and control of aircraft it registers. It also must make available to other contracting States, or ICAO, information concerning the registration and ownership of aircraft registered in it, on demand. Under Articles 31 and 32, the State must provide such aircraft with a certificate of airworthiness, and issue certificates of competency and licenses for pilots and flight crew on such aircraft. Under Article 30,<sup>15</sup> the State must also issue licenses for aircraft radio equipment. Pursuant to Article 33, other States, in turn, have a duty to recognize certificates of airworthiness and personnel certificates of competency and licenses as valid, but only so long as the requirements under which they are issued “are equal to or above the minimum standards which may be established” by ICAO.<sup>16</sup> According to Uwakwe,<sup>17</sup> a State’s power to regulate operations within its territory stems from the concept of sovereignty, which is a fundamental principle of international law.<sup>18</sup>

There is therefore no doubt that basic principles of International Air Law will include: (a) Territorial Sovereignty, that is, every State has, to the exclusion of all other States, the unilateral and absolute right

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<sup>11</sup> The treaty convention modernized the existing public international law of the air and recognized certain fundamental principles and procedures of International Air Law namely, 1) Territorial Sovereignty; 2) National Airspace; 3) Nationality of Aircraft; 4) Freedom of Navigation over High Seas; 5) Standards and Notification of differences; 6). See Piyush S. Phogat, *Fundamental Principles and Procedures of International Air Law Burnished Law Journal* (2020) Vol. 1 Iss. 3, pp. 2582-5534

<sup>12</sup> Article 1 of the Chicago Convention is a reincarnation of Article 1 of the Convention Relating to the Regulation of Aerial Navigation, signed at Paris 1919 which provided that: “The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory . . . ”

<sup>13</sup> John C. Cooper, *Roman Law and The Maxim Cujus Est Solum In International Air Law*, (1952) *McGILL Law Journal*, Vol 1, pp. 23-65.

<sup>14</sup> Chicago Convention, art. 4.

<sup>15</sup> For a detail appraisal of the Chicago Convention, see Brian F. Havel & Gabriel S. Sanchez, *Do We Need a New Chicago Convention?* (2011) Vol. 11:1, Iss. 8, *Issues in Aviation Law and Policy*.

<sup>16</sup> Paul S. Dempsey, *The Chicago Convention as a Source of International Air Law* (2015).

<sup>17</sup> Uwakwe, *supra*.

<sup>18</sup> United Nations Charter, art.2(7).

to permit or deny entry into the area recognized as its territory and similar right to control all movements within such territory; (b) National Airspace, that is to say, the territory of a sovereign State is three dimensional, including within such territory the airspace above its national lands and its internal and territorial waters; Freedom of the Seas and Air indicating that navigation on the surface of the high seas and flight above such seas are free for the use of all and, (iv) Nationality of Aircraft, aircraft have the characteristic of nationality similar to that developed in maritime law applicable to ships. Thus, aircraft have normally a special relationship to a particular State which is entitled to make effective the privileges to which such aircraft may be entitled and such State is also reciprocally responsible for the international good conduct of such aircraft.

### 3.0 Why Safety?

Numerous studies have demonstrated that human factors are the primary cause of deadly air incidents and accidents involving passenger flights. Human error is defined as mistakes and flaws in the way a human component of a system performs a predetermined action or refrains from performing an activity that is forbidden or that needs to be completed within a given amount of time, with a specific degree of precision, or both. Vision error, measurement units, radio communication, language, aircraft warning system design, psychological stress, pilot selection and qualification, pilot flight qualification, fatigue, aging, human performance, flight crew coordination, modifications to the Course of Cabin course, and human factors in aircraft design are the typical categories into which such errors are divided. Based on international norms and indications, it can be argued that the Civil Aviation Organization's supervision in the sensitive area of ISI are usually followed.<sup>19</sup>

The complexity of the aviation industry requires numerous factors to be taken into consideration in the process of ensuring safety of the operation. There are several major considerations that usually have a negative impact on safety of the flight, subsequently leading to the air crash or a serious damage.<sup>20</sup> They can be divided into 3 groups: 1. Human error; 2. Aircraft malfunction or poor airplane maintenance; 3. Sabotage (acts of unlawful interference). The main objective of safety management is to ensure a systematic management approach in order to control danger in the area of aviation operations.<sup>21</sup> The model solution should consider the idiosyncrasy of the organizational structure as the responsibility for safety of the operation should be present at different levels.<sup>22</sup>

Legal regulations play an important role in keeping aviation industry free from accidents as they set certain standards, which have been worked out, based on previous occurrences and notifications. Globally, the seriousness of air safety management is exemplified by the enactment of Annex 19 to the Chicago Convention, including the State Safety Management Service and State Safety Responsibilities. In Nigeria, Part 20 of the Civil Aviation Regulations 2023 specifically deal with safety management. Part 20 of the Nigeria Civil Aviation Regulations addresses the safety management requirements and

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<sup>19</sup> M. H. MoghimiEsfandabadi, M. H. Djavarehshkian and S. Abedi, Significance of Aviation Safety, Its Evaluation, and Ways to Strengthen Security, *International Journal of Reliability, Risk and Safety: Theory and Application*, vol. 6, no. 2, pp. 37-45, 2023.

<sup>20</sup> Ibid. Also, cf, Chicago Convention, article 44(d) and Annex 19 to the Chicago Convention.

<sup>21</sup> Yeun, R., Bates, P., and Murray, P. (2014), "Aviation safety management systems", *World Review of Intermodal Transportation Research*, vol. 5, no. 2, pp. 168-196.

<sup>22</sup> Michał Lutek, Legal Aspects of Safety Management in Civil Aviation, *Pobrane z czasopisma International Journal of Synergy and Research* <http://ijsr.journals.umcs.pl>, pp. 49 to 57.

meets the standards contained in ICAO Annex 19 second edition July 2016 (Amendment 1). ICAO Annex 19 consolidates material from existing Annexes regarding State Safety Programme (SSP) and Safety Management Systems (SMSs), as well as related elements including the collection and use of safety data and State safety oversight activities.

#### **4.0 Factors to be considered in the Grounding of Airline from Operations**

Grounding an airline from operations is a significant regulatory action that can have wide-ranging implications for safety, economic stability, and public confidence in the aviation industry. Regulatory authorities are accordingly enjoined to carefully consider several factors before deciding to ground an airline. The regulators could suspend the operations of a commercial airline for any or more of the following reasons:

##### **i. Safety Concerns**

Persistent or severe maintenance issues that compromise the airworthiness of the aircraft.<sup>23</sup> The airworthiness of an aircraft encompasses the health of the aircraft, the competence, experience and health of the crew.<sup>24</sup> Similarly, a history of incidents or accidents that indicates systemic safety problems with the airline or the particular aircraft. Inadequate training or certification of pilots and crewmembers that could jeopardize safety. Certification of pilots include clearance for the particular flight based on rest hours. Justice Beard of the Manitoba Court of Queen's Bench emphasized this imperative in *R. v. Tayfel*<sup>25</sup> when he said:

“The risks of death or serious injury arising from the activity under consideration, being that of flying an aircraft, are very high when compared to other similar activities such as driving a vehicle. If, for any reason, the aircraft cannot remain aloft, it falls to the ground and, almost without fail, all on board are killed or seriously injured. It is almost unheard of for there to be any survivors of a plane crash. For this reason, the aircraft industry is very highly regulated, much more so than other transportation-related industries. Transportation by air is more restricted than other methods of transportation, and it is much more difficult to become a licensed pilot than it is to operate a car or other motor vehicle.”

The commercial aviation industry increasingly accepts that pilots, being human will make errors, and the challenge is then to establish error management and to build error-tolerant systems. Most accidents involve human errors (some by "front line" operators such as pilots and some latent and buried in the systems, often by management).<sup>26</sup> Amster added, “aviation is a unique undertaking that presents a multitude of risks and the potential for catastrophic consequences when problems arise during flight... the ultimate responsibility, however, for the safety of every flight lies with the pilot in command (PIC).<sup>27</sup>

<sup>23</sup> Part 5 of the NCARS 2023 deal with Airworthiness.

<sup>24</sup> Chicago Convention, art. 32.

<sup>25</sup> *R. v. Tayfel*, [2007] 221 Man. R.2d 135, 2007 MBQB 265 (Can.).

<sup>26</sup> Marvyn E. Bennun et al., *Flying Safely, the Prosecution of Pilots, and the ICAO Chicago Convention: Some Comparative Perspectives*, 74 *J. AIR L. & COM.* 737 (2009) <https://scholar.smu.edu/jalc/vol74/iss3/8>.

<sup>27</sup> Douglas H. Amster, *The Legal Consequences of Undisclosed Medical Conditions on Aircraft Operator Liability* (2012) *Journal of Air Law and Commerce*, vol. 77 p. 221.



In the case of Dana Air under reference, the reason for the suspension was safety following alleged repeated safety concerns.

### **ii. Regulatory Compliance**

Non-compliance with regulatory requirements set by aviation authorities, such as the Nigerian Civil Aviation Authority (NCAA), Nigerian Airspace Management Agency (NAMA) or the International Civil Aviation Organization (ICAO). Adverse findings from safety inspections and audits that reveal significant operational deficiencies. Expired or invalid operating licenses, aircraft certifications, or crew qualifications are some of the issues that could justify suspension of air operation.<sup>28</sup>

### **iii. Security Issues**

Failure to implement and maintain adequate security measures to protect against threats such as terrorism and hijacking. Instances of security breaches or lapses that could endanger passengers, crew, and aircraft. Part 17 of the Nigeria's Civil Aviation Regulations 2023 provides regulations on aviation security programmes, measures, processes, procedures and practices aimed at safeguarding civil aviation against acts of unlawful interference. In addition, Part 17 incorporates the Standards and Recommended Practices (SARPs) as contained in Annex 17 (Amendment 18) and Annex 9 (Amendment 29) to the Chicago Convention.

By the provision of Paragraph 17.3.1.1 of the NCARs 2023, NCAA is designated as the appropriate authority for aviation security within Nigeria. The Authority is responsible for the development, and maintenance of the Nigeria's national civil aviation security programme. Similarly, by sections 42 and 43 of the CAA 2022, and paragraph 17.3.2.1 of the NCARs 2023 that the NCAA is responsible for establishing and monitoring the implementation of, a written national civil aviation security programme designed to safeguard civil aviation operations against acts of unlawful interference, which takes into account the safety of passengers, crew, ground personnel and the general public including regularity and efficiency of flights. It is believe that the NCAA can only discharge this responsibility effectively if it collaborate with other security agencies.

### **iv. Financial Stability**

Evidence of financial instability or insolvency that could affect the airline's ability to maintain safe and reliable operations. For instance, Arik Air, a Nigeria based airline has been technically out of business due to financial crisis bedeviling its operations.<sup>29</sup> Failure to pay airport fees, navigation charges, or other mandatory dues, such as parking fees that can affect operational sustainability.

### **v. Operational Competence**

Inefficiencies or failures in operational control and management that affect flight safety and reliability. In the case of the Dana incident, it was alleged that the aircraft veered off the runway, not due to any adverse weather condition or airport challenge. Inadequate infrastructure and facilities that fail to support safe operations, including maintenance facilities and ground support equipment.

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<sup>28</sup> Ifeoma Okeke, NCAA Revokes Pilot's Licence over Expired Medical Certificate, Business Day, 2<sup>nd</sup> June 2019.

<sup>29</sup> Tomi Olawepo, The Cable, Arik was 'technically insolvent' before AMCON intervention, 18<sup>th</sup> July 2023 accessible at <https://www.thecable.ng/arik-was-technically-insolvent-before-amcon-intervention/amp/> last accessed 19<sup>th</sup> June 2024.

#### **vi. Legal and Regulatory Obligations**

Violations of aviation laws, labor laws, environmental regulations, or other legal obligations that affect the airline's legitimacy and operation. Non-compliance with international aviation agreements and standards, leading to potential conflicts with foreign aviation authorities.

#### **vii. Consumer Protection**

Persistent complaints and violations related to passenger rights, such as delays, cancellations, and poor customer service. Part 19 of the Nigeria Civil Aviation Regulations (NCARs) 2023 deals with consumer protection in the Nigerian aviation sector. Failure to provide refunds or compensation to passengers as required by law.

#### **viii. Public Interest**

Actions that could severely damage public confidence in the safety and reliability of the airline. For instance, perennial cancellation of flights or uncouth treatments of passengers that is persistent and unjustified could affect public confidence. Consideration of the broader impact on national and regional connectivity, especially if the airline plays a critical role in the transportation network. For instance, health issue could among to public interest pursuant to section 27 CAA 2022.

Grounding an airline from operations is a serious measure that should be based on a comprehensive assessment of safety, regulatory compliance, financial stability, security, legal obligations, and public interest. Regulatory authorities must follow due process, ensure transparency, and carefully weigh the potential consequences to make informed and balanced decisions.

### **5.0 Nigeria and ICAO**

One of the objectives for the enactment of the CAA 2022 and the repeal of the CAA 2006 was to provide for an effective legal and institutional framework for the regulation of civil aviation in Nigeria in conformity with the standards and recommended practices set by the International Civil Aviation Organization (ICAO).<sup>30</sup> Others included establishing rules of operation and divisions of responsibility within the Nigerian civil aviation system in order to promote aviation safety and security;<sup>31</sup> ensure that Nigeria's obligations under international aviation agreements are implemented,<sup>32</sup> and consolidate the laws relating to the regulation of civil aviation in Nigeria.<sup>33</sup>

Nigeria is a member of ICAO and a Contracting State to the Convention on International Civil Aviation, 1944 (Chicago Convention). The question is what is the position of ICAO on the regulation of civil aviation by Contracting States?

By the ICAO standards, civil aviation authorities are responsible for ensuring aviation safety and protecting the public from aviation hazards. The regulators are to identify key areas of concern and draft regulations that can be implemented effectively.

The International Civil Aviation Organization (ICAO) plays a pivotal role in setting global standards for civil aviation, but it recognizes and supports the crucial involvement of national governments in the

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<sup>30</sup> CAA 2022, s.1(a).

<sup>31</sup> Ibid, s.1(b)

<sup>32</sup> Ibid, s. 1(c )

<sup>33</sup> CAA 2022, s.1(d)

implementation and enforcement of these standards. Consequently, ICAO shared some of its responsibility with national governments.

Briefly, the interplay between ICAO and the national governments in the regulation of civil aviation could be highlighted thus:

**a. Sovereignty of States** - ICAO acknowledges the sovereign rights of states to regulate civil aviation within their own territories.<sup>34</sup> The Chicago Convention, which established ICAO, emphasizes that each state has complete and exclusive sovereignty over the airspace above its territory.<sup>35</sup>

**b. Implementation of SARPs:** ICAO develops SARPs for international civil aviation, which are published in the 19 Annexes to the Chicago Convention. While ICAO sets these standards, it is the responsibility of national governments to implement them. In addition, ICAO recognize national regulations. Accordingly, States are expected to incorporate ICAO SARPs into their national regulations. This ensures a harmonized global aviation system while allowing for the consideration of local contexts.

**c. Safety Oversight** - National governments are responsible for establishing and maintaining an effective safety oversight system. This includes the creation of regulatory frameworks, certification processes, and the continuous monitoring of aviation activities. Similarly, ICAO conducts Universal Safety Oversight Audit Programme (USOAP) audits to evaluate how effectively states adhere to SARPs and fulfill their safety oversight responsibilities.

**d. Security Measures** - Governments are required to implement national aviation security programs that align with ICAO's security standards and practices, as outlined in Annex 17 (Security). Through the Universal Security Audit Programme (USAP), ICAO assesses the compliance of states with international aviation security requirements. This is accommodated in Part 20 of the NCARs 2023.

**e. Economic and Environmental Police** - While ICAO provides guidance on economic regulation, such as market access and competition, the specific policies are largely determined by national governments in accordance with their own economic goals and bilateral/multilateral agreements. In Nigeria, there is doubt regarding the equities in most bilateral and multilateral air agreements.<sup>36</sup> Furthermore, national governments are responsible for implementing ICAO's environmental standards and policies, including those related to noise, emissions, and the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). Part 18 of the NCARs deals with Air Transport Economic Regulations.

**f. Technical Assistance and Capacity Building** – One of ICAO's primary responsibilities is to provide technical assistance and capacity-building programs to help states develop their aviation regulatory frameworks and enhance their ability to comply with international standards. In this vein, ICAO

<sup>34</sup> cf, Article 2(7), United Nations Charter 1945; *Nicaragua vs. United States* (1984) ICJ Report 392.

<sup>35</sup> Art. 1, Chicago Convention

<sup>36</sup> Guardian Newspaper, Appraising Nigeria's Bilateral Air Service Agreements, May 8<sup>th</sup> 2024; DA Ismaila, The Impact of Air Service Agreement Liberalization: The Case of Nigeria, 2014; Christopher Stevens, Impacts and Challenges of Multilateral and Bilateral Trade Agreements on Africa, African Development Bank Economic Research Working Paper Series No. 79 October 2005.



conducts training sessions and workshops for government aviation authorities to improve their regulatory capabilities.

**g. Collaborative Decision-Making** - ICAO's governance structures, such as the Council and Assembly, include representatives from member states who collaborate in the development and adoption of international aviation standards and policies. ICAO also encourages regional cooperation among states to address common aviation challenges and improve regional aviation safety and efficiency.

**h. Challenges and Flexibility** - While ICAO promotes global standards, it recognizes that national governments may need to adapt these standards to fit their specific contexts and challenges. Accordingly, States are allowed to file differences if they cannot comply with specific SARPs, provided they notify ICAO. This ensures transparency and allows for flexibility in the implementation of standards.

### **6.0 Can National Governments Suspend Airline from Operations in their Jurisdictions?**

Generally, national governments through its relevant agency or persons can suspend airlines from operations within their jurisdiction based on safety, security, economic, legal, health or even political reason. This power is part of their responsibility to ensure the safety, security, and regulatory compliance with international and domestic regimes of civil aviation within their airspace. However, the question in this work still is who can so act on behalf of the national government? Is it the Honourable Minister, who is a political appointee of the President or a specialized aviation regulatory agency such as Nigeria's NCAA?

As noted above, an air operation such as in the case of Dana and Arik airlines under reference could be suspended for safety concerns, to ensure regulatory compliance, enable accident investigation, security reason, airline insolvency and non-compliance with administrative requirements, environmental rule such as noise pollution and emission and operational issues, and to avoid violation of national laws or international obligations.

In Nigeria, the authority to suspend airline operations typically falls within the purview of the Nigerian Civil Aviation Authority (NCAA), which is the regulatory body responsible for overseeing and regulating the aviation industry in the country, and not the Minister of Aviation and Aerospace.

The CAA 2022 recognises that the Federal Ministry of Aviation is responsible for the formulation of *policies and strategies* for the aviation industry. On the other hand, the NCAA is empowered under the CAA 2022 to make regulations on various issues, including aircraft registration, air navigation services, airworthiness standards, aviation safety and security, commercial air transport, personnel licensing, aerodrome and airspace standards, and the provision of allied aviation services.

It has been argued that the CAA 2022 introduced certain novel provisions, including consolidating all laws dealing with civil aviation in Nigeria; making the NCAA the sole regulator of the aviation industry and further established the NCAA as an independence body free from any other body or institution and the enlargement of the functions and powers of the NCAA in the regulation of civil aviation in Nigeria.<sup>37</sup>

<sup>37</sup> Aviation Laws and Regulations Report 2024 Nigeria., <https://iclg/practice-areas/aviation-laws-and-regulations/Nigeria> last accessed 10<sup>th</sup> of August 2024.

This is based on section 4 (3) of the CAA 2022 which provide that the Authority shall be independent in the discharge of its duties and functions under the Act and for that purpose shall not, except as provided under the Act, take directives from any person or authority.

Section 26 of the CAA 2022 clearly provides for Ministerial Powers and Directions. A close scrutiny of the said section seems to suggest that the powers of the Honourable Minister relates to protecting the image of Nigeria, exercising advisory powers, providing enabling environment for civil aviation to thrive, including requiring compliance with international obligations. This is further reiterated by the provisions of section 27 dealing with ‘emergency powers of the Minister for the protection of public health’ and section 28 on ‘power of the Minister to make orders in emergency’.<sup>38</sup>Put succinctly, the Minister act like an intermediary between the government and the actual regulators of the civil aviation industry by providing and communicating the general policies and framework of government for the sector.

To be sure, this paper shall now briefly examine relevant provisions of the CAA 2022 first on the powers of the Honourable Minister for Aviation and Aerospace and the NCAA *vis a vis* suspension of air operations.

### **7.0 Specific Powers of the Honourable Minister**

Section 26 (1) of the CAA 2022, which the Honourable Minister for Aviation and Aerospace also relied upon in, is rebuttal provides that the Minister for Aviation and Aerospace in Nigeria may after consultation with the Authority, give such directions consistent with the provisions of this Act to the Authority on matters of policy in —

(a) the interests of national security ; (b) connection with any matter appearing to him to affect the relations of Nigeria with a country or territory outside Nigeria ; (c) order to discharge or facilitate the discharge of an obligation binding on Nigeria by virtue of its being a member of an international organization or a party to an international or regional agreement ; (d) order to obtain or facilitate the attainment of any other object of which is in his opinion appropriate in view of the fact that Nigeria is a member of an international organization or a party to an international or regional agreement ; or (e) order to enable Nigeria become a member of an international organization or a party to an international or regional agreement.

What is clear from the provision of section 26(1) of the CAA 2022 is that (1) the decision of the Minister shall be made after consultation with the NCAA, (2) The direction or directive shall be directed to the NCAA, (3) The direction must be consistent with the provisions of the CAA 2022, and (4) the direction must relate to matters of policy. Furthermore, the Minister can formulate and publish government policy on aviation<sup>39</sup> in addition to issuing other directives in the interest of peace, tranquility and the public, especially when the country is likely to be at war.

However, the Minister in charge of aviation can issue directive directly to aircrafts or airline operators in time of war, whether actual or imminent, or where a proclamation of emergency under the Constitution is in force in the Federal Republic of Nigeria or any part of it. The condition for the validity

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<sup>38</sup> See CAA 2022, ss. 27-28.

<sup>39</sup> CAA 2022, s.30.

of such directive include that the Minister is of the opinion that in the interest of public safety or tranquility to do so. Such decision in this circumstance shall be published in the federal gazette and must be exercised in the public interest. Accordingly, the Minister can direct that any aircraft or class of aircraft, or any aerodrome, aircraft factory, flying school or club, or place where aircraft is manufactured, repaired or kept, together with any machinery, plant, material or thing used for the operation, manufacture, repair or maintenance of aircraft shall be delivered, either forth with or within a specified time, to such authority and in such manner as he may specify in the order, to be at the disposal of the Federal Government of Nigeria for the public service.<sup>40</sup> The Minister can also direct that any airline operator having its principal place of business in Nigeria, or an aerodrome operator or a provider of air traffic and meteorological services, and the employees of such airline operator, aerodrome operator or provider of air traffic and meteorological services, shall carryout flights, and other duties connected with operation of flights, in the public interest in the manner specified in the order.<sup>41</sup>

One interesting though controversial provision in the CAA 2022 is section 29 designating aviation as an essential services and empowering the Honourable Minister to make regulations prohibiting such workers in the aviation sector from taking part in industrial action. It provide that all services which facilitate and maintain the smooth, orderly and safe takeoff, flight and landing of aircraft, embarkation and the disembarkation and evacuation of passengers and cargo respectively in all aerodromes in Nigeria are hereby designated as essential services under the provisions of section 11 (1) of the Constitution of the Federal Republic of Nigeria, 1999. The Minister may by regulations prohibit all or such class or classes of workers, officers and other employees or persons whether corporate or natural, engaged in the provision of the services specified in subsection (1) from taking part in a strike<sup>42</sup> or other industrial action.<sup>43</sup>

In addition, the Minister may make order and issue directive in respect of aircraft in distress, establishment of aerodromes, land acquisition and management around the airport among others.<sup>44</sup>

### **8.0 Some Specific Powers of the NCAA**

Part VII of the CAA 2022 provide for the Powers of the NCAA to control and regulate civil aviation. By section 31(1), the powers conferred on and the functions of the Authority in the Act are vested in the Director-General who may exercise them directly or by delegation.

The NCAA is responsible for making provision for regulating air navigation;<sup>45</sup> and generally for ensuring aviation safety and security, the efficiency and regularity of air navigation and the safety of

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<sup>40</sup> CAA 2022, s.28(1)d.

<sup>41</sup> Ibid, s.28(1)d, (2-4).

<sup>42</sup> S.29(3) define “strike” as the cessation of work by a body of persons employed, acting in combination or a concerted refusal or a refusal under a common understanding of persons employed to continue to work for an employer in consequence of a dispute, done as a means of compelling their employer, or the Government of the Federation of Nigeria or any part of it, or to aid any other worker in compelling his employer or any person or body of persons employed, to accept or not to accept terms of employment and physical conditions of work or any government economic policy or pricing of any essential product, and in this definition— (a) “cessation of work” includes working at less than usual speed or with less than usual efficiency without reasonable operational justification ; and (b) “refusal to continue to work” includes a refusal to work at usual speed or with usual efficiency.

<sup>43</sup> CAA 2022, s. 29 (1)(2). There is no doubt that this provision when tested in court could be declared unconstitutional because of its expropriating mandate.

<sup>44</sup> See generally, CAA 2022, ss. 56, 57, 109 and 110.

<sup>45</sup> Ibid, s.31(1) c.

aircraft, persons and property carried in aircraft and for preventing aircraft from endangering persons and property.<sup>46</sup>

(4) The regulations, rules, orders and directives made or given by the NCAA shall provide for the imposition of penalties for non-compliance, including the suspension or revocation of certificates, licences, validations and authorizations, and in the case of any particular offence such fine as may be prescribed by regulations made by the Authority and or imprisonment for a term not less than six months, and, subject to Chapter IV of the Constitution of the Federal Republic of Nigeria, 1999, which relates to fundamental rights, for the taking of such steps including the interception of aircraft as may be prescribed as respects aircraft flying over areas of Nigeria over which flying is prohibited by the regulations.<sup>47</sup>

Section 31(7) appears to be most pivotal to our discussion in this paper. It provides that where the NCAA is of the opinion that an emergency requiring immediate action exists with respect to safety and security in civil aviation, it shall have the power, *either upon complaint or on the Authority's initiative without complaint, at once, if the Authority so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report,* to make such orders, rules, or regulations or issue such directives as may be essential in the interest of safety and security in civil aviation to meet such emergency.

The issue of Dana Air overshooting the runway deals with safety concern. Safety concerns is an issue of emergency requiring immediate action to avoid loss of lives and properties. The case of Arik Air as reported has to do with airline insolvency and compliance with legal process.

For effective regulation, the power of the NCAA under section 31(7) can be exercised *suo motu* where immediate action is required. Accordingly, it is immaterial for the airline to argue fair hearing, provided *such* order was issued in the interest of safety and security. Presumably, this was situation in the case of Dana Air suspension as there was no reported case of petition or hearing. Furthermore, from the perspective of tortious liability, passengers on the Dana Air apparently suffered some psychological loss due to the aircraft skidding the runway. It was thus a case of *res ipsa loquitur* since there was no dispute as to the incidence or the natural impact of the incident on passengers.

Furthermore, section 32 (1) of the CAA 2022 is to the effect that NCAA may at any time vary, suspend, revoke and cancel, a licence, permit, certificate or any other authorization where it considers it appropriate to do so, whether or not such an application with respect to the licence, permit, certificate or authorization has been made under subsection (3).<sup>48</sup>

### **9.0 Is Anything Wrong with the Honourable Minister Directly Suspending Airlines Operations for Safety Reason?**

The Honourable Minister in charge of aviation and aerospace is usually a political appointee of an elected President of the Federal Republic of Nigeria. The loyalty of such appointee is usually to his appointor. Over the years, ICAO is determined to drive the independence of the aviation sector from

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<sup>46</sup> CAA 2022, s.31(1)d.

<sup>47</sup> s.31(4).

<sup>48</sup> See s.32(1)4.

the vicissitudes of politics and politicians while respecting the sovereignty of States. This is imperative because a viable, sustainable and efficient aviation sector must be protected from the uncertainty and hazards of politics.

The politicization of the civil aviation industry can lead to various legal issues that can affect the regulation, operation, and overall integrity of the sector. These issues can arise from undue political influence, conflicts of interest, and the manipulation of regulatory frameworks for political gain.

Some of the likely legal issues associated with the politicization of the civil aviation industry include:

**a. Regulatory Independence and Integrity:** Political interference can undermine the independence of aviation regulatory bodies like the Nigerian Civil Aviation Authority (NCAA). When political considerations influence regulatory decisions, it can compromise safety and operational standards. Beside, politicians or government officials with vested interests in certain airlines can lead to biased regulatory actions, favoring some operators over others, which violates principles of fair competition and integrity.

**b. Transparency and Accountability:** Political interference can lead to opaque decision-making processes, where decisions are made without proper justification or public scrutiny. This can result in loss of public trust and confidence in the regulatory system. Furthermore, when political considerations override technical and safety concerns, holding officials accountable for regulatory failures becomes challenging. This can lead to a culture of impunity and reduced motivation for adhering to regulations.

**c. Safety and Security Risks:** Political pressure to favor certain airlines or expedite approvals can lead to compromised safety standards. This poses significant risks to passengers, crew, and the public. Politicization can also affect the implementation of security measures, leading to inconsistent application of security protocols and increased vulnerability to security threats.

**d. Economic and Operational Efficiency:** Political favoritism can distort market dynamics by providing unfair advantages to certain airlines. This can stifle competition, lead to monopolistic practices, and ultimately harm consumers through higher prices and reduced service quality. Political interference can result in inefficient allocation of resources, such as airport slots, air traffic routes, and funding for infrastructure projects, which can hinder the overall efficiency of the aviation industry.

**e. Legal and Contractual Disputes:** Politicization of the aviation sector can lead to breaches of contracts with private operators, investors, or international partners, resulting in legal disputes and potential financial liabilities for the government. Political decisions that contravene international aviation obligations and standards can lead to disputes with other countries and international bodies, potentially resulting in sanctions or loss of privileges.

**f. Impact on Investment and Development:** Political interference can erode investor confidence, leading to reduced investments in the aviation sector. Investors seek stable and predictable regulatory environments, and politicization undermines this stability.



## 10.0 Conclusion

Everyone is in business to make profit. Balancing profit making, air passengers' concerns, and civil aviation regulations is a complex but essential aspect of managing the aviation industry. Each of these factors plays a crucial role in the sustainability and success of airlines, as well as in maintaining a safe and efficient aviation environment. There is no conflict between the right of airline operators to maximize profit and the requirement to comply with air transport safety regulations. Compliance with safety regulation would save airlines from incurring liability from accident.

Airlines need to prioritize safety and regulatory compliance while also focusing on delivering high quality, customer-centric services. By leveraging innovation and maintaining a commitment to continuous improvement, airlines can achieve profitability while meeting the expectations of passengers and regulatory bodies.

In Nigeria, while the NCAA is the main authority responsible for regulating and suspending airline operations, the Federal Minister of Aviation can have a significant role, especially in policy direction and in situations requiring immediate government intervention. The suspension process generally involves collaboration between the NCAA and the Minister, within the framework of the Civil Aviation Act and other relevant regulations. While the NCAA can suspend an airline operation without the input of the Honourable Minister, the latter has no direct role in the suspension of flight operation except in situations where the country is at war. This is because safety matters is considered one of the technical issues for which the NCAA is vested with exclusive jurisdiction to act, even though in practice, the decision of the NCAA could be indirectly influenced by the Honourable Minister.<sup>49</sup>

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<sup>49</sup> CAA 2022, s. 4(3). The original intention of ICAO however is that such influence should not exist.